IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'C' BENCH, NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE MS. SUSHMA CHOWLA, VICE PRESIDENT
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 5555/DEL/2014 [A.Y 20**05-06**]
ITA No. 6162/DEL/2013 [A.Y 2006-07]
ITA No. 835/DEL/2014 [A.Y 20***08-09***]

HCL Comnet Systems and Services Ltd 806, Sidharth, 96 Nehru Place Delhi	Vs.	The Dy. C.I.T Circle – 12(1) New New Delhi

PAN: AAACH 3130 M

ITA No. 5924/DEL/2014 [A.Y 20***05-06***]
ITA No. 6181/DEL/201***3*** [A.Y 2006-07]
ITA No. 922/DEL/2014 [A.Y 20**08-09**]

The Dy. C.I.T Circle – 12(1) New Delhi	Vs.	HCL Comnet Systems and Services Ltd 806, Sidharth, 96 Nehru Place New Delhi PAN: AAACH 3130 M
(Applicant)		(Respondent)

Assessee By : Shri Ajay Vohra, Sr. Adv
Shri Aditya Vohra, Adv
Shri Arpit Goyal, CA

Department By : Shri Satpal Gulati, Sr. DR

Date of Hearing : 18.06.2020
Date of Pronouncement : 25.06.2020

ORDER

PER BENCH:

ITA No. 5555/DEL/2014 and ITA No. 5924/DEL/2014 are cross appeals by the assessee and Revenue pertaining to assessment year 2005-06. ITA No. 6162/DEL/2013 and ITA No. 6181/DEL/2013 are cross appeals by the assessee and Revenue pertaining to assessment year 2006-07. ITA No. 835/DEL/2014 and ITA No. 922/DEL/2014 are cross appeals by the assessee and Revenue pertaining to assessment year 2008-09. Since all these appeals pertain to same assessee involving common issues and were heard together, we are disposing them off by this common order for the sake of convenience and brevity.

ITA No. 5555/DEL/2014 [Assessee's appeal A.Y 2005-06]

2. Ground No. 1 relates to the disallowance made u/s 14A of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] being 10% of dividend income earned during the financial year.

3. Facts on record show that during the year under consideration, the assessee earned dividend income of Rs. 6,12,626/-. However, no disallowance was made by the assessee u/s 14A of the Act in respect of earning this exempt income. The Assessing Officer was of the firm

belief that some expenses need to be disallowed for earning this exempt income. The Assessing Officer was of the opinion that for earning dividend income, there are various administrative expenses involved, like taking the decision of investment, expenses relates to purchase/sale of the investment, like the DMAT fee, collection expenses, telephone expenses etc and other administrative expenses as well as personnel cost.

4. The Assessing Officer accordingly, disallowed by estimating 25% of the dividend income and made addition of Rs. 1,53,157/-.

5. When the matter was agitated before the ld. CIT(A), the ld. CIT(A) was of the opinion that 10% of the dividend earned to be reasonable amount that must have been incurred for earning the said exempt income and, accordingly, restricted the disallowance to Rs. 61,263/-.

6. Before us, the ld. counsel for the assessee vehemently stated that no expenditure was incurred by the assessee on earning dividend income. It is the say of the ld. counsel for the assessee that when the assessee contends before the Assessing Officer that he did not incur

any expenditure for earning exempt income, the Assessing Officer is duty bound to prove the explanation of the assessee incorrect with respect to examination of the books of the assessee.

7. Strong reliance was placed on the decision of the co-ordinate bench in the case of Honda Siel Power Products Ltd ITA No. 988/DEL/2016. The ld. counsel for the assessee submitted that the working before the lower authorities wherein the expenses relating to Finance Department were proportionate between the exempt income and total income and expenses attributable towards exempt income comes to Rs. 5,924/-. Therefore, at the most, disallowance should be restricted to Rs. 5,924/-.

8. Per contra, the ld. DR strongly supported the findings of the lower authorities.

9. We have given thoughtful consideration to the orders of the authorities below. It is not in dispute that Rule 8D of the Rules is not applicable for the year under consideration. However, some reasonable expenditure needs to be allowed for earning exempt income. The ld. CIT(A) has restricted the disallowance to 10% of the

dividend income. In our considered opinion, restriction by the ld. CIT(A) seems to be reasonable and, therefore, no interference is called for. Ground No. 1 is accordingly, dismissed.

10. Ground Nos. 2, 3 and 4 relate to adjustment of foreign currency expenditure and tele-communication charges for working out the deduction u/s 10A of the Act.

11. The main contention of the appellant is that the ld. CIT(A) erred in exceeding his jurisdiction u/s 251(1) of the Act in restoring the matter back to the file of the Assessing Officer.

12. During the course of scrutiny assessment proceedings. The Assessing Officer was of the opinion that certain expenditure has to be excluded from the export turnover for the purpose of deduction u/s 10A of the Act. Accordingly, the assessee was directed to give details of telecommunication charges attributable to the delivery of computer software outside India and also details of expenditure incurred in foreign exchange in providing the technical services outside India.

13. Details were furnished by the assessee. After perusing the

details, the Assessing Officer asked the assessee to explain as to why the tele-communication expenses pertaining to the delivery of the computer software not be excluded from the export turnover for the purpose of computation of deduction u/s 10A of the Act. The assessee was also asked to explain as to why the expenses incurred in foreign currency for the purposes of providing the technical services outside India not be excluded from the export turnover for the purpose of calculation of deduction u/s 10A of the Act.

14. In its reply, the assessee contended that such expenditure could only be excluded from the export turnover only when these are included in the export turnover in the first place. It was pointed out that since the aforesaid expenditure had not been included in the export income and also since no specific reimbursement was claimed in respect of these expenses, the same were not forming part of the export turnover, and accordingly, such expenditure should not be excluded from its export turnover for calculation of deduction u/s 10A of the Act.

15. Reply of the assessee did not find any favour with the Assessing Officer who proceeded by re-computing the deduction u/s 10A of the Act and recomputed the same at Rs. 11,06,24,673/- instead of Rs. 11,62,25,520/- as claimed by the assessee and accordingly, Rs. 56,00,847/- was added to the gross total income as declared by the assessee.

16. The assessee carried the matter before the ld. CIT(A) and it was vehemently argued that if the aforesaid expenses were excluded from the export turnover, the Assessing Officer ought to have also excluded the same from the total turnover.

17. However, the ld. CIT(A) found that in A.Y 2007-08, the then ld. CIT(A) directed the Assessing Officer to ascertain claim of the assessee. Following the order of his peer in 2007-08, the ld. CIT(A) remanded the matter back to the file of the Assessing Officer.

18. Before us, the ld. counsel for the assessee vehemently stated that the ld. CIT(A) has no power in setting aside the matter to the file of the Assessing Officer. It is the say of the ld. counsel for the assessee that the ld. CIT(A) further erred in holding that if the expenditure was excluded from export turnover, the same should be excluded from total turnover. The ld. counsel for the assessee drew our attention to the decision of the co-ordinate bench in assessee's own case for A.Y 2007-08.

19. Per contra, the ld. DR strongly supported the findings of the lower authorities.

20. We have given thoughtful consideration to the orders of the authorities below. We find that a similar issue was considered by the Tribunal in assessee's own case in ITA No. 4546/DEL/2013 for A.Y 2007-08. In that year also, the ld. CIT(A) has set aside the assessment to the file of the Assessing Officer. The relevant findings of the co-ordinate bench read as under:

"8. We have considered the submissions of both the parties and carefully gone through the material available on the record. It is noticed HCL Comnet Systems & Services Ltd. that the issue under consideration is squarely covered vide order dated 19.12.2011 of the ITAT 'B' Bench, Bangalore in ITA Nos. 975 & 979/Bang/2011 for the assessment year 2002-03 in the case of Intel Technology India Pvt. Ltd. Vs DCIT, LTU, Bangalore, wherein one of us (Accountant Member) is the author. In the said case the relevant findings have been given in paras 21 and 22 which read as under:

21. We have considered the submissions of both the parties and carefully gone through the material available on record. It is noticed that an identical issue has been decided in favour of the assessee by the Special Bench of ITAT Chennai in the case of ITO v. Sak Soft Ltd. 313 ITR (AT) 353 (Chennai)(SB) wherein it has been held as under:

"To say that in the absence of any definition of "total turnover" for the purpose of section 10B, there is no authority to exclude anything from the expression as understood in general parlance would be wrong, as there has to be an element of turnover in the receipt if it has to be included in the total turnover. That element is missing in the case of freight, telecom charges or insurance attributable to the delivery of the goods outside India and expenses incurred in foreign exchange in connection with the providing of technical services outside India. These receipts can only be received by the assessee as reimbursement of such expenses incurred by him. Mere reimbursement of expenses cannot have an element of turnover. It is only in recognition of this

position that in the definition of "export turnover" in section 10B, the aforesaid two items have been directed to be excluded. Secondly, the definition of export turnover contemplates that the amount received by the assessee in convertible foreign exchange should represent "consideration" in HCL Comnet Systems & Services Ltd. respect of the export. Any reimbursement of the two items of expenses mentioned in the definition can under no circumstances be considered to represent "consideration" for the export of the computer software or articles or things. Thus, the expression "total turnover" which is not defined in section 10B should also be interpreted in the same manner. Thus, the two items of expenses referred to in the definition of "export turnover" cannot form part of the total turnover since the receipts by way of recovery of such expenses cannot be said to represent consideration for the goods exported since total turnover is nothing but the aggregate of the domestic turnover and the export turnover. In the formula prescribed by section 10B(4) the figure of export turnover has to be the same both in the numerator and in the denominator of the formula. It follows that the total turnover cannot include the two items of expenses recovered by the assessee and referred to in the definition of "export turnover"."

22. The aforesaid decision had been considered and affirmed by the Hon'ble jurisdictional High Court in the case of Tata Elxsi Ltd. & Ors. 2011-TIOL-684-HC-KAR-II wherein it has been held that for the purpose of computation of deduction u/s. 10A of the Act, if any expenditure is excluded from the export turnover, the same has to be excluded from the total turnover also. A similar view has

also been taken by the Hon'ble Bombay High Court in the case of Gem Plus Jewellery India Ltd. 2010-TIOL-456-HC-MUM-IT. We, therefore, by considering the totality of the facts as discussed hereinabove, are of the view that the ld. CIT(Appeals) was not justified in confirming the action of the Assessing Officer. We therefore set aside the impugned order on this issue and the Assessing Officer is directed to exclude the telecommunication charges from the export turnover as well as total turnover while working out the deduction u/s. 10A.

9. It is also noticed that in assessee's own case also for the assessment year 2004-05 in ITA No. 3199/Del/2007 vide order dated 23.01.2009, ITAT Delhi Bench 'C' New Delhi vide paras 8 and 9 has held as under:

"8. With regard to the revenue's ground of appeal, he submitted that the issue is squarely covered by a number of decisions of the ITAT. He relied upon the order of the ITAT in the case of Binary Sematics (supra) and the order of the ITAT in the case of ACIT Vs Infoses Technologies reported in 172 Taxman 134. Similarly, he pointed out that an identical issue has been considered by the ITAT, Hyderabad Bench in the case of Patni Telecommunication (P) Ltd. Vs ITO reported in (2008) 22 SOT 26 (Hyd.). Learned DR was unable to controvert the contentions of the learned counsel for the assessee.

9. On due consideration of the facts and circumstances of the case, we find that this issue has been considered in detail by the ITAT in the above orders and it has been held that if such

expenses are to be excluded from the export turnover then they are to be excluded from the total turnover also. Respectfully following the orders of the ITAT, we do not find any merit in the ground raised by the revenue. Learned CIT(Appeals) has rightly directed the Assessing Officer to exclude such expenses from the total turnover also while computing the deductions under sec. 10A of the Act."

10. So respectfully following the aforesaid referred to orders, we set aside the impugned order of the ld. CIT(A) on this issue and the AO is directed to reduce the expenses incurred in foreign currency and telecommunication from the export turnover as well the total turnover while working out the deduction u/s 10A of the Act.

21. Finding parity on the facts with the facts of the appeal in hand, we direct accordingly. Ground Nos. 2 to 4 are allowed.

22. In the result, the appeal filed by the assessee is partly allowed.

ITA No. 5924/DEL/2014 [Revenue's appeal for A.Y 2005-06]

23. Ground No. 1 relates to deletion of addition of Rs. 91,894/- made by the Assessing Officer by invoking the provisions of section 14A of the Act r.w.r 8D of the I.T. Rules.

24. This disallowance u/s 14A of the Act has been considered by us elaborately in assessee's appeal [supra] vide Ground No. 1 of that appeal. For our detailed discussion given therein, Ground No. 1 is accordingly, dismissed.

25. Ground Nos. 2 and 3 relate to the deletion of addition of Rs. 14,45,72,425/- on account of licence fee paid to DOT.

26. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has claimed deduction of Rs. 16,06,36,027/- as revenue share of license fees paid to DOT and debited in the profit and loss account. The assessee was asked to explain as to why the expenses incurred on license fee

should not be treated as capital expenditure as per the provisions of section 35ABB of the Act.

27. In its reply, the assessee contended that as per the terms of the license agreement with the Department of Tele-communication, in terms of migration to the revenue sharing scheme under the National Telecom Policy, 1999, effective from 1.8.1999, the assessee company was paying license fee at specified percentage of the gross revenue derived by the assessee.

28. The assessee pointed out that under the new revenue sharing regime, effective from 1.8.1999, the license fees was a direct function of the revenue and that the license fee was correctly claimed as revenue expenditure.

29. The contention of the assessee did not find any favour with the Assessing Officer who was of the opinion that the license fee debited in the profit and loss account is to be amortized over the

remaining period of license and since the assessee has claimed Rs. 16,06,36,027/-, the Assessing Officer was of the opinion that 1/10th of the payment is to be allowed u/s 35ABB of the Act for expenses incurred during the year under consideration and accordingly, disallowed excess amount of Rs. 14,45,72,425/-

30. The assessee carried the matter before the ld. CIT(A) and reiterated its contentions as taken before the Assessing Officer.

31. The ld. CIT(A) found that in A.Y 2007-08, his peer has deleted the additions made by the Assessing Officer and following the same, the ld. CIT(A) deleted the addition.

32. Before us, the ld. DR strongly supporting the findings of the Assessing Officer reiterated that the expenditure is of capital in nature and there is no error in the findings of the Assessing Officer.

33. The ld. counsel for the assessee drew our attention to the decision of the co-ordinate bench.

34. We have given thoughtful consideration to the orders of the authorities below. We find force in the contention of the ld. counsel for the assessee. An identical issue was considered by the co-ordinate bench in assessee's own case in ITA Nos. 4546/DEL/2013 and 5106/DEL/2013. The relevant findings of the co-ordinate bench read as under:

> *"30. We have considered the submissions of both the parties and carefully gone through the material available on the record. It is noticed that the issue under consideration is squarely covered by the judgment of the Hon'ble Jurisdictional High Court in the case of CIT Vs Bharti Hexacom Ltd. 221 Taxman 323 (Del) (supra), wherein it has been held as under:*
>
> *"The licence fee was imposed and payable under the Indian Telegraph Act and other statutory provisions and was/is mandatory. Failure to pay the same would/will result in discontinuance or stoppage of business operations.*
>
> *Under 1999 policy, the amount payable speaks of sharing of gross revenue earned by the service provider from the customers. 1994 agreement as noticed did have a provision for sharing but with minimum payment stipulation. In case of non-payment of licence fee, the licence could be revoked and licencee was not permitted to carry on and continue cellular telephone service.*
>
> *Thus, the licence fee payable was/is equally with the objective and purpose to maintain and operate cellular telephone services. It was*

also an operating expense and non-payment can lead to cancellation as one of the consequences. Endurement requires current expenses and is subject to payment on revenue share. It will not be correct to hold or propound that entire payment during the term of licence, is deferred capital payment. This was/is not the intent under the 1994 agreement or 1999 policy. The intent is to also share the .gross earning to maintain and operate the licence.

The licence fee as such is similar to both prospecting fee, acquisition of right to lease as well as leases which enabled removal of sand/tendu leaves, etc. as nothing has to be won over, or extracted. Part payment was towards an initial investment which an assessee had to make to establish the business. It was a precondition to setting up of business. It has element and includes payment made to acquire the 'asset' i.e. the right to establish cellular telephone service. But the licence permits and allows the assessee to maintain, operate and continue business activities. Payment of licence fee has certain ingredients and is like lease rent which is payable from time to time to be able to use the licence.

The licence acquired was initially for 10 years and the term was extended under the 1999 policy to 20 years but this itself does not justify treating the licence fee paid on revenue sharing basis under the 1999 policy as a capital expense made to acquire an asset.

The payment of yearly licence fee on revenue sharing basis was for carrying on business as cellular telephone operator and, thus it was a normal business expense.

Read in this manner, the licence granted by the Government/authority to the assessee would be a capital asset, yet at the same time, the assessee has to make payment on yearly basis on the gross revenue to continue, to be able to operate and run the business, it would also be revenue in nature.

Failure to make stipulated revenue sharing payment on yearly basis would result in forfeiting the. right to operate and in turn deny the assessee, right to do business with the aid of the capital asset. Non-payment will prevent and bar an assessee from providing services.

In aforesaid circumstances, it would be appropriate and proper to apportion the licence fee as partly revenue and partly capital.

The next obvious question is, on what basis apportionment should be done and what could be the proportion of apportionment between capital and revenue expenditure. In this regard it would be appropriate and proper to divide the licence fee into two periods i.e. before and after 31-7-1999. The licence fee paid or payable for the period up to.31-7-1999 i.e. the date set out in the 1999 policy should be treated as capital and the balance amount payable on or after the said date should be treated as revenue.

The aforesaid apportionment is necessary because licence fee was payable for establishment, maintenance and operation of cellular telephone service. Establishment and set up took place in the initial years and thereafter the payments made were/ are for operation or maintaining the cellular telephone service. Initial outlay and

payment, therefore, is capital in nature, whereas the outlays and payments made subsequently are to operate and maintain the service. 1999 policy in the form of letter dated 22-7- 1999 also refers to one time entry fee which is chargeable and had to be calculated as lic7ence fee dues payable up to 31-7-1999 and licence fee was thereafter payable on percentage share of gross revenue.

The new licences issued to others also stipulated one time entry fee and then licence fee payment on sharing basis. In view of the new 1999 policy, the earlier policy which restricted competition, underwent a change and licencees forgo their right to operate in the regime of limited number of operators.

Another reason why licence fee payable for the period on or before 31- 7 -1999 should be treated as capital and the amount payable thereafter as revenue, is justified and appropriate in view of section 3SABB. The provision provides that licence fee of capital nature shall be amortized by dividing the amount by number of remainder years of licences.

Thus, the capitalized amount of licence fee is to be apportioned as a deduction in the unexpired period of the licence. The provision will have ballooning effect with amortized amount substantially increasing in the later years and in the last year the entire licence fee along with the brought forward amortized amount would be allowed as deduction.

After a particular point of time, deduction allowable under section 35ABB would be more than the actual payment by the assessee as

licence fee for the said year. This would normally happen after the mid- term of the licence period.

Section 35ABB, therefore, ensures that the capital payment is duly allowed as a deduction over the term and once the expenditure is allowed, it would be revenue or tax neutral provided the tax rates remain the same during this period."

31. The Hon'ble Jurisdictional High Court concluded as under:

(i) The expenditure incurred towards licence fee is partly revenue and partly capital. Licence fee payable up to 31- 7-1999 should be treated as capital expenditure and licence fee on revenue sharing basis after 1-8-1999 should be treated as revenue expenditure.

(ii) Capital expenditure will qualify for deduction as per section 35ABB.

32. Facts of the present case appears to be similar to the facts involved in the case of CIT Vs Bharti Hexacom Ltd. (Delhi) (supra), we, therefore, restored this issue to the file of the AO to be decided in accordance with the findings given by the Hon'ble Jurisdictional High Court in the case of Bharti Hexacom Ltd. (supra) and if any expenditure on account of licence fee was payable up to 31.07.1999, it should be treated as capital expenditure and the licence fee on revenue sharing basis after 01.08.1999 should be treated as revenue in nature."

35. On finding parity on the facts of the case under consideration we direct accordingly. Ground Nos. 2 and 3 are dismissed.

36. Ground Nos. 4 and 5 relate to the determination of deduction u/s 10A of the Act in respect of expenditure in nature of communication expenses or expenses incurred in foreign exchange.

37. An identical issue has been considered and decided by us hereinabove in assessee's appeal in ITA No. 5555/DEL/2014 [supra] in para No. 20. For our detailed discussion given therein, Ground Nos. 4 and 5 are dismissed.

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

ITA No. 6162/DEL/2013 [Assessee's appeal for A.Y 2006-07].

39. Ground Nos. 1, 2 and 3 relate to the determination of deduction u/s 10A of the Act for ascertaining the correct amount of foreign currency expenses and telecommunication costs for exclusion from "Export Turnover" for working out the deduction u/s 10A of the Act.

40. This issue has been considered by us elaborately while disposing the assessee's appeal [supra] in A.Y 2005-06 vide Ground Nos. 2, 3 and 4 of that appeal. For our detailed discussion given therein, we order accordingly.

41. The assessee has raised an additional ground vide application dated 1.8.2016 and the same reads as under:

> *"That the Assessing Officer ought to have allowed Foreign Tax Credit of Rs. 56,86,248/- in pursuance to law clarified by the Hon'ble Karnataka High Court in the case of Wipro Ltd 382 ITR 179."*

42. The ld. counsel for the assessee drew our attention towards the decision of the Hon'ble Supreme Court in the case of NTPC 229 ITR 383 and Jute Corporation of India 187 ITR 686. It is the say of the ld. counsel for the assessee that this additional ground has been raised pursuant to the law being clarified by the Hon'ble Karnataka High Court, which is the first decision on this issue and, therefore, the omission to raise the aforesaid additional ground of appeal earlier was neither wilful nor deliberate.

43. The ld. DR strongly objected to the admission of the aforesaid additional ground. It is the say of the ld. DR that no such claim was made in the return of income, neither during the assessment proceedings nor before the first appellate authority and, therefore, the authorities below had no occasion to examine the claim of the assessee.

44. We have given thoughtful consideration to the contents of the additional ground. We find force in the contention of the ld. counsel for the assessee. The Hon'ble Supreme Court in the case of NTPC [supra] has laid down the ratio that the legal issue can be raised by way of additional ground before the appellate authorities.

45. Similar issue arose before the Tribunal in the case of Maruti Suzuki in ITA No. 961/DEL/2015 wherein the co-ordinate bench by way of an interim order held as under:

> *"11. We have given thoughtful consideration to the submissions made by the rival representatives and have carefully considered the issues raised vide additional ground mentioned elsewhere. At the very outset, we have to state that a legal plea can be raised at any point of time. In the present case, the appeal was heard earlier,*

but marked as 'Part Heard' and subsequently released, which means that the appeal was never adjudicated by the Tribunal. In our considered opinion, there is no limit of time to raise an additional ground of appeal, which can be raised at any time before disposal of the appeal. Further, there is no estoppel in law. It is the settled proposition of law that mere procedural lapse, or omission on the part of assessee, cannot lead to denial of substantive benefit/ eligible claim in the hands of such assessee."

46. The aforesaid decision in the case of Maruti Suzuki India Ltd [supra] has been upheld by the Hon'ble Delhi High Court in WPC 13241/2019 vide order dated 16.12.2019.

47. Representatives of both the sides agreed that no interim order is necessary for admission of additional ground and the same may be considered in the body of the order of the Tribunal itself. On such concession, the additional ground is admitted. Now we proceed to address the additional ground.

48. Facts on record show that during the year under consideration, the assessee has PE in USA and accordingly paid tax in USA on the income arising therefrom. The income which was subjected to tax in USA was included in the total income computed for payment of tax in

India. However, in respect of the said income earned from USA, the assessee claimed deduction u/s 10A of the Act in the return of income filed in India and did not claim credit of foreign taxes.

49. Subsequently, the Hon'ble High Court of Karnataka in the case of Wipro Ltd [supra] clarified the law in relation to the claim of foreign tax credit. The Hon'ble High Court, while interpreting the provisions of section 90(1)(a)(ii) of the Act, providing for relief from double taxation where income of the assessee is chargeable under the Act as well as in the corresponding law in force in foreign country has held that income u/s 10A of the Act is chargeable to tax u/s 4 of the Act and is includible in the total income u/s 5 of the Act, but no tax is charged on such income because of exemptions given u/s 10A of the Act only for a period of 10 years.

50. The Hon'ble Karnataka High Court was seized inter alia, with the following substantial question of law:

> "Whether the Tribunal was right in holding that the credit for Income tax paid in a country outside India in relation to income eligible for deduction u/s 10A of the Act would not be available u/s 90(1)(a) of the ACT."

51. The Hon'ble High Court observed as under:

*"**26**. The answer to the question depends on the interpretation to be placed on Section 90 which is found in Chapter IX which deals with Double Taxation Relief.*

***27**. Section 90 deals with agreement with foreign countries or specified territories. The present Section came into force from 01.04.2004. Earlier to that period, Section 90 read as under:*

"90. Agreement with foreign countries.—(1) The Central Government may enter into an agreement with the Government of any country outside India—

(a) for the granting of relief in respect of income on which have been paid both income-tax under this Act and income-tax in that country; or…"

***28**. The notes on clauses to Finance Bill, 2003 which explains Clause 43 seeking amendment to the Act reads as follows:*

"Clause 43 seeks to amend section 90 of the Income-tax Act relating to agreement with foreign countries.

The existing provisions of the said section, inter alia, provide that the Central Government may enter into agreement with the Government of any country outside India for granting of relief in respect of income on which have been paid both income-tax under the Income Tax Act and income-tax in that country, or for the avoidance of double taxation of income under that Act and under the corresponding law in force in that country, etc.

It is proposed to substitute clause (a) of sub-section (1) of the said section to provide that the Central Government may enter into an agreement with the Government of any country outside India for the granting of relief, inter alia, in respect of income-tax chargeable under the Income-tax Act or under the corresponding law in force in that country to promote mutual economic relations, trade and investment."

***29**. The memorandum explaining provisions in the Finance Bill 2003 reads as follows:*

"Double Taxation Avoidance Agreements- extending the scope to include agreements for developing mutual trade and investment

Under the existing section 90, the Central Government may enter into an agreement with the Government of any country outside India for granting of relief in respect of income on which have been paid both income-tax under the Income-tax Act and income-tax in that country, or for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, etc.

In order to encourage international trade and commerce, it is proposed to insert a new clause in sub-section (1) of Section 90 so as to provide that the Central Government may also enter into an agreement with the Government of any country outside India, for granting relief in respect of income-tax chargeable under this Act or under the corresponding law in that country to promote mutual economic relations, trade and investment."

The amended Section 90 reads as under :—

"Agreement with foreign countries or specified territories.

90 (1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India, —

(a) for the granting of relief in respect of —

(i) income on which have been paid both income tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be, and may, by notification in the Official Gaxette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(2A) Notwithstanding anything contained in sub- section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf."

***30**. Sub-section (1) lays down that the Central Government may enter into an agreement with the Government of another country. Clause (a) (i) contemplates situation when tax is already paid on the same income in both the countries and it empowers the Central Government to grant relief in respect of such double taxation. Clause (b) which is wider than clause (a) provides that any agreement may be made for the avoidance of*

the double taxation of income under the Act and under the corresponding law in force in that country. Clauses (c) and (d) essentially deals with the agreements made for the exchange of information, investigation of cases and recovery of income tax. With effect from 1.4.2004, clause (a)(ii) was substituted to provide for entering into an agreement for granting relief in respect of income tax chargeable under this Act and under corresponding law in force in that country, to promote mutual economic relations, trade and investment. With this amendment the power of the Central Government has been greatly widened and it can now enter into agreement not only for avoidance of double taxation, but also for granting relief for income exempt from taxation.

31. *Thus, Section 90 empowers the Central Government to enter into an agreement with the Government of any country for two purposes:*

(a) for granting of relief in respect of income tax paid or payable

(b) for avoidance of double taxation of income

32. *Prior to the amendment, the relief was granted in respect of income on which the income tax is paid under the Income Tax Act in the contracting country. Therefore to get the benefit of the said provision, payment of income tax in both the countries was sine qua non. However, by the amendment made by the Finance Act 2003, the benefit of granting the relief was extended to even in respect of income tax chargeable under the Act. Therefore, the payment of income tax in both jurisdictions is not sine qua non any more for granting the relief. This provision was introduced with the object of promoting mutual economic*

relations, trade and investment. In other words, it was a policy of the Government.

***33**. When there is a specific provision in the double taxation avoidance agreement providing for a particular mode of computation of income or granting of relief, the same should be followed irrespective of the provisions of the Act. If the agreement with the foreign country is under Clause (a)(i) for relief against double taxation and not under Clause (b) for the avoidance of double taxation; the assessee must show that the identical income has been doubly taxed and that he has paid tax both in India and in the foreign country on the same income. Section 91 makes it clear that if a person who is residing in India has paid tax in any country with which, there is no agreement under Section 90 for the relief or avoidance of double taxation, income tax if deducted or otherwise paid as per law in force in that Country, then he shall be entitled to the deduction from the Indian Income Tax payable by him in a sum computed on such doubly taxed income, at the Indian rate of tax or the rate of tax of the said country, whichever is lower or the Indian rate of tax, if both the rates are equal.*

***34**. In fact, the Circular No.333 dated April 2, 1982 clarifies the legal position. The said circular reads as under:—*

"The correct legal position is that where a specific provision is made in the Double Taxation Avoidance Agreement, that provision will prevail over the general provisions contained in the Income Tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under Section 90 of the Income Tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country

except where provisions to the contrary have been made in the agreement. Thus where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income Tax Act. Where there is no specific provision in the agreement, it is the basic law i.e., Income tax Act that will govern the taxation of income."

35. *It is necessary to notice that if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by the Act.*

36. *The Apex Court had an occasion to go into the validity of the agreements entered into under these provisions and their enforceability in the case of Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706/132 Taxman 373 (SC). Dealing with the purpose of provisions for avoidance of double taxation, the Supreme Court at page 721 held as under :—*

"Every country seeks to tax the income generated within its territory on the basis of one or more connecting factors such as location of the source, residence of the taxable entity, maintenance of a permanent establishment, and so on. A country might choose to emphasise one or the other of the aforesaid factors for exercising fiscal jurisdiction to tax the entity. Depending on which of the factors is considered to be the connecting factor in different countries, the same income of the same entity might become liable to taxation in different countries. This would give rise to harsh consequences and impair economic development. In order to avoid such an anomalous and incongruous situation, the Governments of different countries enter into bilateral treaties,

Conventions or agreements for granting relief against double taxation. Such treaties, conventions or agreements are called double taxation avoidance treaties, conventions or agreements.

The power of entering into a treaty is an inherent part of sovereign power of the State. By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision making legislation a condition for the entry into an international treaty in time either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The Executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaty incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of the citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.

When it comes to fiscal treaties dealing with double taxation avoidance, different countries have varying procedures. In the United States such a treaty becomes a part of municipal law upon ratification by the Senate. In the United Kingdom such a treaty would have to be endorsed by an order made by the Queen in Council. Since in India such a treaty would have to

be translated into an Act of Parliament, a procedure which would be time consuming and cumbersome, a special procedure was evolved by enacting section 90 of the Act."

37. *It is in this background, when we notice Section 90 of the Act - relief from double taxation is granted in the following circumstances.*

Firstly, Section 90 (1)(b) of the Act speaks about avoidance of double taxation i.e., Central Government may enter into an agreement with the Government of any country for the avoidance of double taxation of income under this Act and under the corresponding law in force in other country i.e., when tax is payable on income under this Act as well as under the corresponding law in that country they could agree to tax in one country. This happens even before payment of any tax. By virtue of such agreement, tax is paid only in one country, that is how the benefit of double taxation relief by way of avoidance is granted to the assessee in both the countries.

38. *Secondly, under Section 90 (1)(a)(i) of the Act, once such assessee has paid Income Tax, under the Act as well as the Tax in the other country, by such agreement, relief could be given by giving credit of the tax paid in the foreign country to the assessee in India. In cases covered under this provision the assessee pays tax in both the jurisdictions. After payment of such tax, he is entitled to double taxation relief by way of credit in respect of the tax paid in the foreign jurisdiction.*

39. *Thirdly, in cases covered under Section 90 (1)(a)(ii) of the Act it is not a case of the income being subjected to tax or the assessee has paid tax on the income. This applies to a case where the income of the assessee is chargeable under this Act as well as in the corresponding law*

in force in the other country. Though the income tax is chargeable under the Act, it is open to the Parliament to grant exemptions under the Act from payment of tax for any specified period. Normally it is done as an incentive to the assessee to carry on manufacturing activities or in providing the services. Though the Central Government may extend the said benefit to the assessee in this country, by negotiations with the other countries, they could also be requested to extend the same benefit. If the contracting country agrees to extend the said benefit, then the assessee gets the relief. In another scenario, though the said income is exempt in this country, by virtue of the agreement, the amount of tax paid in the other country could be given credit to the assessee. Thus for the payment of income tax in the foreign jurisdiction, the assessee gets the benefit of its credit in this country.

40. *However, if the contracting country is not agreeable to extend the said benefits, then in terms of the agreement and probably in terms of the exemption granted, the assessee would be entitled to benefit only in this country on account of the exemption and the benefit in the other country is not extended. Thus when exemption is granted in respect of the income chargeable to tax under this Act in respect of which no benefit is granted in the corresponding country the assessee gets no benefit. However, if the benefit is extended to a portion of the income say for example 90% and 10% is subjected to tax then to that extent the assessee would be entitled to benefit of tax credit as he has paid tax in the foreign jurisdiction as per Section 90 (1)(a)(i) of the Act.*

41. *In this connection, it is contended on behalf of the Revenue that if the income is chargeable to tax in India, then only the assessee can have the benefit of tax credit in respect of the tax paid in foreign*

jurisdiction. In respect of exemption under Section 10A, the income derived is not included in the total income. It is not charged to income tax. Therefore, Section 90 of the Act has no application at all.

42. *Section 4 of the Act is the charging section. It provides,*

"Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and (subject to the provisions (including provisions for the levy of additional income tax) of this Act) in respect of the total income of the previous year of every person".

Sub-section (2) of Section 4 provides,

"In respect of income chargeable under sub- section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act".

Section 2(45) of the Act defines total income as under:—

"Total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act.

Section 5 deals with the scope of total income. It reads as under :—

"(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived, which —

(a) is received or is deemed to be received in India in such year by or on behalf of such person, or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year".

The proviso speaks about a person not ordinarily resident.

***43**. Chapter III deals with Incomes which do not form part of Total Income. One such income which does not form part of a total income is contained in Section 10A; i.e. income of newly established undertakings in free trade zone, etc. Section 10A(1) provides,*

"Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee."

***44**. This provision provides for a deduction of profits or gains derived from export by an undertaking for a period of ten years. The profits and gains derived by such undertaking would form part of the income chargeable to income tax under Sections 4 and 5 of the Act. Therefore, when an assessee is having several undertakings, one of which falls under Section 10A, the assessee's entire income from all the undertakings is computed to arrive at the total income. However, the income from such undertaking falling under Section 10A has to be deducted from the total income.*

51. *If section 10A is to be given effect to as a deduction from the total income as defined in Section 2(45), it would mean that section 10A is to be considered after Chapter VI-A deductions are given from out of the gross total income. The term "gross total income" is defined in section 80B(5) to mean the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter. As per the definition of gross total income, the other provisions of the Act will have to be first given effect to. There is no reason why reference to the provisions of the Act should not include Section 10A. In other words, the gross total income would be arrived at after considering section 10A deduction also. Therefore, it would be inappropriate to conclude that section 10A deduction is to be given effect to after Chapter VI-A deductions are exhausted.*

52. *Section 10A (1) speaks of "deduction". The deduction is of profits and gains for a period of ten consecutive assessment years. The said deduction is from the total income of the assessee. Therefore, the total income before allowing the said deduction includes the profits and gains from the business referred to in Section 10A(1). Section 5 of the Act explains the scope of total income to mean all income from whatsoever source derived. Section 4 of the Act charges this total income. However, Section 10A (1) provides that, subject to the provisions of the said Section, profits and gains derived by an undertaking referred to in that Section shall be allowed as deduction from the total income of the assessee. Therefore, by virtue of the aforesaid statutory provision namely Section 10A of the Act, the income of the assessee from exports in respect of the said unit is exempted from payment of income tax. The very fact that it is exempted from payment of tax means but for that*

exemption such income is chargeable to tax. This relief under Section 10A is in the nature of exemption although termed as deduction. But for this exemption, the said income namely profits and gains derived by an undertaking, is chargeable to tax under the Act. The said exemption is only for a period of ten years. After the expiry of the said ten years the said income is taxable. When such exemption is given under the Act, but the said income is taxed in foreign jurisdiction, there is no relief to the assessee at all. Therefore, to promote mutual economic relations, trade and investment, the Act was amended by way of Finance Act, 2003 which came into force from 1.4.2004. By insertion of a new clause (ii) in sub-section (1)(a) of Section 90 the Central Government has been vested with the power to enter into an agreement with the Government of any country outside India for the granting of relief in respect of income tax chargeable under the Income Tax Act or under the corresponding law in force in that country, to promote mutual economic relations, trade and investment. Therefore, the statute by itself is not granting any relief. But, by virtue of the statute, if an agreement is entered into providing for such relief, then the assessee would be entitled to such relief.

53. *Relying on the judgments in the case of Wallace Flour Mills Co. Ltd. v. Collector of Central Excise [1989] 4 SCC 592, and in the case of Kasinka Trading v. Union of India [1995] 1 SCC 274, it was held that merely because exemption has been granted in respect of the taxability of particular source of income, it cannot be formulated that the entity is not liable to tax as contended by the respondents.*

54. *In fact the Apex Court in the case of Kasinka Trading (supra), a case arising under Customs Act at para 21 has held as under:*

'The power to grant exemption from payment of duty, additional duty etc. under the Act, as already noticed, flows from the provisions of Section 25(1) of the Act. The power to exempt includes the power to modify or withdraw the same. The liability to pay customs duty or additional duty under the Act arises when the taxable event occurs. They are then subject to the payment of duty as prevalent on the date of the entry of the goods. An exemption notification issued under Section 25 of the Act had the effect of suspending the collection of customs duty. It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty, etc. wholly or partially and subject to such conditions as may be laid down in the notification by the Government in "public interest". Such an exemption by its very ;nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the "public interest" is an exercise of the statutory power of the State under the law itself as is obvious from the language of Section 25 of the Act.'

55. *Similarly, the Apex Court in the case of Wallace Flour Mills Co. Ltd. (supra) at para 4 has held as under:*

'Excise is a duty on manufacture or production. But the realization of the duty may be postponed for administrative convenience to the date of removal of goods from the factory. Rule 9A of the said Rules merely does that. That is the scheme of the Act. It does not, in our opinion, make removal the taxable event. The taxable event is the manufacture. But the liability to pay the duty is postponed till the time of removal under Rule 9- A of the said Rules. In this connection, reference may be made to the decision of the Karnataka High Court in Karnataka Cement Pipe Factory v.

Supdt. Of Central Excise (1986 23 ELT 313) (Karn HC)), where it was decided that the words 'as being subject to a duty of excise' appearing in section 2(d) of the Act are only descriptive of the goods and do not relate to the actual levy. "Excisable goods", it was held, do not become non-excisable goods merely by reason of the exemption given under a notification.'

56. *Therefore, it follows that the income under Section 10A is chargeable to tax under Section 4 and is includible in the total income under Section 5, but no tax is charged because of the exemption given under Section 10A only for a period of 10 years. Merely because the exemption has been granted in respect of the taxability of the said source of income, it cannot be postulated that the assessee is not liable to tax. The said exemption granted under the statute has the effect of suspending the collection of income tax for a period of 10 years. It does not make the said income not leviable to income tax. The said exemption granted under the statute stands revoked after a period of 10 years. Therefore, the case falls under Section 90(1)(a)(ii).*

57. *In the background of this legal position, we have to look into the Double Taxation Agreements entered into between India and United States, Canada.*

(1) INDO-US AGREEMENT:

58. *Article 25 of the Indo - US Double Taxation Agreement deals with Relief from double taxation. Clause 2(a) is the relevant provision. It reads as under:*

"2.(a) Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in the United States,

India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in the United States, whether directly or by deduction. Such deduction shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in the United States."

***59**. A perusal of the aforesaid provision makes it clear that if a resident Indian derives income, which may be taxed in United States, India shall allow as a deduction from the tax on the income of the resident, amount equal to the income tax paid in United States of America, whether directly or by deduction. The conditions mandated in the treaty is that if any "income derived" and "tax paid in United States of America on such income", then tax relief/credit shall be granted in India on such tax paid in United States of America. The said provision does not speak of any income tax being paid by the resident Indian under the Income-tax Act as a condition precedent for claiming the said benefit. Where the Indian resident pays no tax on such income derived, whereas the said income is taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in the United States. Therefore, this provision is in conformity with Section 90(1)(a)(ii) of the Act i.e., the income tax chargeable under the income-tax Act and in the corresponding law in force in United States of America. Therefore, it is not the requirement of law that the assessee, before he claims credit under the Indo - US convention or under this provision of Act should pay tax in India on such income. However, the said provision makes it clear that such deduction shall not, however, exceed that part of the income tax (as computed before the deduction is given)*

which is attributable to the income which is to be taxed in United States. Therefore, an embargo is prescribed for giving such tax credit. In other words, the assessee is entitled to such tax credit only in respect of that income, which is taxed in the United States. This provision became necessary because the accounting year in India varies from the accounting year in America. The accounting year in India starts from 1st of April and closes on 31st of March of the succeeding year. Whereas in America, the 1st of January is the commencement of the assessment year and ends on 31st of December of the same year. Therefore, the income derived by an Indian resident, which falls within the total income of a particular financial year when it is taxed in United States, falls within two years in India. Therefore, while claiming credit in India, the assessee would be entitled to only the tax paid for that relevant financial year in America, i.e., the income attributable to that year in America. In other words, the income tax paid in the same calendar year in United States of America is to be accounted for two financial years in India. Of course, this exercise should be done by the assessing authority on the basis of the material to be produced by the assessee.

52. In view of the above, we are of the considered view that the facts of the case in hand are in parity with the facts considered by the Hon'ble Karnataka High Court [supra] wherein Article 25 of Indo US DTAA has been elaborately explained by the Hon'ble High Court. The most relevant findings of the Hon'ble High Court are as under:

> "Therefore, while claiming credit in India, the assessee would be entitled to only the tax paid for that relevant financial year in America, i.e., the income attributable to that year in America. In other words, the income tax paid in the same calendar year in United States of America is to be accounted for two financial years in India. Of course, this exercise should be done by the assessing authority on the basis of the material to be produced by the assessee."

53. The issue raised by the ld. DR has been answered by the Hon'ble High Court of Karnataka and therefore, needs no separate adjudication. Respectfully following the decision of the Hon'ble Karnataka High Court, we direct the Assessing Officer to consider the claim of foreign tax credit as per the directions of the Hon'ble Karnataka High Court mentioned elsewhere. The assessee is directed to furnish necessary evidences before the Assessing Officer. The additional ground is, accordingly, decided in favour of the assessee.

54. In the result, the appeal filed by the assessee is allowed.

ITA No. 6181/DEL/2013 [Revenue's appeal for A.Y 2006-07]

55. Ground No. 1 relates to restriction of the addition of Rs. 34,78,410/- made by the Assessing Officer u/s 14A r.w.r 8D of the Rules to 5% of dividend earned.

56. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has earned dividend income of Rs. 6,68,731/- which was claimed to be exempt from tax. The Assessing Officer was of the firm belief that the disallowance u/s 14A r.w.r 8D of the Rules is imperative and accordingly, disallowed Rs. 34,78,410/-.

57. The assessee carried the matter before the ld. CIT(A) and vehemently argued that Rule 8D of the Rules is not applicable for the year under consideration.

58. The ld. CIT(A) was convinced that the applicability of Rule 8D of the Rules is prospective from A.Y 2008-09 and accordingly, restricted the disallowance to 5% of the dividend income earned by the assessee.

59. Before us, the ld. DR strongly supported the findings of the Assessing Officer.

60. Per contra, the ld. counsel for the assessee reiterated what has been stated before the lower authorities.

61. We have given thoughtful consideration to the orders of the authorities below. It is a settled law that Rule 8D of the Rules is applicable from A.Y 2008-09 onwards. However, some reasonable expenditure needs to be disallowed for earning exempt income. Since the ld. CIT(A) has considered the reasonableness and restricted the disallowance to 5% of dividend income, we do not find any error or infirmity in the findings of the ld. CIT(A). Ground No. 1 is accordingly, dismissed.

62. Ground Nos. 2 and 3 relate to the deletion of addition of Rs. 14,08,85,409/- on account of license fee paid to DOT which was treated as capital expenditure by the Assessing Officer.

63. An identical issue has been considered and decided by us hereinabove in ITA No. 5924/DEL/2014 [supra] vide Ground Nos. 2 and 3. For our detailed discussion given therein, Ground Nos. 2 and 3 are dismissed.

64. Ground Nos. 4 and 5 relate to the determination of deduction u/s 10A of the Act with respect to expenses in the nature of communication expenses and expenses incurred in foreign currency.

65. These issues have been elaborately considered and decided by us hereinabove in assessee's appeal in ITA No. 5924/DEL/2014 [supra] vide ground Nos. 4 and 5. For our detailed discussion given therein, Ground Nos. 4 and 5 are dismissed.

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

TA No. 835/DEL/2014 Assessee's appeal for A.Y 2008-09.

67. Ground No. 1 relates to the disallowance made u/s 14A of the Act r.w.r 8D of the Rules amounting to Rs. 32,91,173/-.

68. During the course of scrutiny assessment proceedings, the Assessing Officer found that the assessee has earned dividend income of Rs. 2,31,458/- which was claimed as exempt from tax. Invoking provisions of section 14A r.w.r 8D of the Act, the Assessing Officer computed the disallowance at Rs. 32,91,173/-.

69. The assessee carried the matter before the ld. CIT(A) but without any success.

70. Before us, the ld. counsel for the assessee vehemently stated that the dividend income was earned out of investments in those mutual fund schemes in which units were purchased and sold off during the same financial year. It is the say of the ld. counsel for the assessee that the opening value and closing value of investment yielding dividend income was NIL and, accordingly, computation of disallowance by the Assessing Officer invoking Rule 8D of the Rules is

erroneous on facts of the case. The ld. counsel for the assessee prayed for deletion of disallowance made by the Assessing Officer.

71. Per contra, the ld. DR strongly supported the findings of the lower authorities. It is the say of the ld. DR that since Rule 8D of the Rules is applicable from the year under consideration, there is no error in the computation made by the Assessing Officer.

72. We have given thoughtful consideration to the orders of the authorities below. There is no dispute that the exempt income has been received by the assessee only in relation to investments made in mutual funds which were purchased and sold during the year, namely, Templeton India Treasury Management Account SIP, Birla Cash Plus Institutional Premium Daily Dividend Reinvestment and HDFC Liquid Fund Daily Dividend. All the units purchased in the aforementioned mutual funds were sold during the year under consideration itself which means that the opening and closing balance of these investments is zero on account of being purchased and sold during the year.

73. We are of the considered view that the disallowance u/s 14A r.w.r 8D of the Rules is in relation to the income which does not form part of the total income and this can be done by taking into consideration the investment which has given rise to exempt income which does not form part of the total income.

74. We find that the Tribunal in assessee's own case for A.Y 2011-12 has held that wherein dividend was received from investments made in mutual funds which were brought and sold during the year and since there was no opening and closing balance of investments from mutual funds, it is impossible to determine the average value of investments for the purpose of Rule 8D(2)(ii) of the Rule and accordingly, disallowance made u/s 14A of the Act r.w.r 8D of the Rules was deleted.

75. Respectfully following the findings of the co-ordinate bench in assessee's own case, the additions are deleted. Ground No. 1 is allowed.

76. Ground Nos. 2, 3 and 4 relate to determination of deduction u/s 10A of the Act in respect of foreign currency expenses and tele-communication charges.

77. This issue has been considered and decided by us hereinabove in ITA No. 5555/DEL/2014 [supra] vide Ground Nos. 2, 3 and 4. For our detailed discussion given therein, Ground Nos. 2, 3 and 4 are dismissed.

78. Ground No. 5 relates to addition of Rs. 25,69,000/- being advances given by the assessee in earlier year.

79. During the course of scrutiny assessment proceedings, the assessee was asked to give details of debts/advances written off amounting to Rs. 37,91,456/-.

80. In its reply, the assessee contended that the advances written off during the year are trade advances, which were expended by the assessee in the normal course of its business to its associates and have been actually written off in the books of accounts as irrecoverable.

81. In respect of advances written off amounting to Rs. 25.69 lakhs, it was explained that the assessee was required to pay 1000/- per VSAT linking as WPC charges initially debited to DOT account on the assumption that the same is being adjustable to normal revenue share paid to DOT on quarterly basis. But this amount was supposed to be paid over and above revenue share.

82. This contention of the assessee did not find any favour with the Assessing Officer who was of the opinion that it is arising merely on the basis of accounting entry and the same cannot change nature of advance. The advance is of capital in nature and the same cannot be allowed and accordingly, Rs. 25.69 lakhs was added to the income of the assessee.

83. Before the ld. CIT(A), the assessee reiterated its claim but without any success.

84. The ld. CIT(A), while dismissing the appeal of the assessee on this count, held that the written off is neither permissible as business loss u/s 28 of the Act nor a business expense u/s 37 of the Act. The ld.

CIT(A) further observed that the assessee did not make any effort with the DOT in respect of its claim of advance.

85. Before us, the ld. counsel for the assessee stated that inadvertently, sum of Rs. 25.69 lakhs was shown as advance recoverable from DOT. It is the say of the ld. counsel for the assessee that the said amount was not an advance which subsequently came to the notice of the assessee and accordingly, the same was written off and claimed as business loss u/s 28 of the Act.

86. Reliance was placed on the decision of the Tribunal in the case of Vodafone Mobile Services Ltd ITA No. 4722/DEL/2013 wherein it has been held that WPC paid to DOT on quarterly basis as a percentage of revenue was payment necessary for running business and the assessee could not run the business without making these payments on quarterly basis and, thus, this could not be held as capital in nature. The ld. counsel for the assessee prayed for deletion of Rs. 25.69 lakhs.

87. Per contra, the ld. DR strongly supported the findings of the authorities below. It is the say of the ld. DR that at the most, the claim of Rs. 25.69 lakhs is prior period expenses and, therefore, being

prior period expenses cannot be allowed in the year under consideration and should have been claimed in the relevant A.Y.

88. We have given thoughtful consideration to the orders of the authorities below. It is not in dispute that Rs. 25.69 lakhs were paid to DOT as advance recoverable from DOT. The assessee may have taken wrong stand while claiming it as advance recoverable from DOT, but, at the same time, write off during the year under consideration cannot be brushed aside lightly as in case the same has to be considered as business loss.

89. Now the only issue which needs our consideration is whether the same is prior period expenses. In our considered opinion, and looking to the returned income of the assessee, in earlier years, we find that there would be no revenue leakage as the assessee is consistently subjected to same rate of income tax. Therefore, in the interest of justice and fair play, we do not find any merit in the disallowance made. We, accordingly, direct the Assessing Officer to delete the addition of Rs. 25.69 lakhs. Ground No. 5 is allowed.

90. By way of an application dated 01.08.2016, the assessee has raised an additional ground which reads as under:

> *"That the Assessing Officer ought to have allowed Foreign Tax Credit of Rs. 2,20,61,027/- in pursuance to law clarified by the Hon'ble High Court of Karnataka in the case of Wipro 382 ITR 179.*

91. The issue relating to admission of additional ground and adjudication thereon has been elaborately considered by us in ITA Nos. 6162/DEL/2013 for A.Y 2006-607. For our detailed discussion therein, the additional ground is, accordingly, adjudicated.

92. In the result, the appeal of the assessee is allowed.

ITA No. 922/DEL/2014 [Revenue's appeal A.Y 2008-09].

93. Ground No. 1 relates to deletion of addition of Rs. 3,93,02,416/- on account of license fee paid to DOT.

94. Similar issue has been considered and decided by us in ITA No. 5984 for A.Y 2006-07 vide ground Nos. 2 & 3 of that appeal. For our detailed discussion therein, Ground No. 1 is dismissed.

95. Ground Nos. 2 and 3 relate to determination of deduction u/s 10A of the Act with respect to telecommunication expenses and foreign currency expenses.

96. Similar issue has been considered and decided by us in ITA No. 5924 for A.Y 2005-06 vide ground Nos. 4 & 5 of that appeal. For our detailed discussion therein, Ground No. 2 and 3 are dismissed.

97. In the result the appeal of the Revenue is dismissed.

98. To sum up, in the result,

Assessee's appeals

ITA No. 6162/DEL/2013 [A.Y 2006-07]	-	Partly Allowed
ITA No. 835/DEL/2014 [A.Y 20***08-09***]	**-**	**Allowed**
ITA No. 5555/DEL/2014 [A.Y 20***05-06***]	**-**	**Allowed**

Revenue's appeal

ITA No. 6181/DEL/201***3***[A.Y 20***06-07***]	-	Dismissed
ITA No. 922/DEL/2014 [A.Y 20***08-09***]	-	Dismissed
ITA No. 5924/DEL/2014 [A.Y 20***05-06***]	-	Dismissed

The order is pronounced in the open court on 25.06.2020.

Sd/-	**Sd/-**
[SUSHMA CHOWLA]	**[N.K. BILLAIYA]**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 25th **June, 2020.**

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	