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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA Nos.492 & 493/Bang/2018
Assessment Years: 2012-13& 2013-14

M/s. Infosys BPM Limited Electronic City Hosur Road Bangalore 560 100 **PAN NO :AACCP4478N**	**Vs.**	Deputy Commissioner of Income-tax Circle-3(1)(1) Bangalore
APPELLANT		**RESPONDENT**

ITA Nos.1151 & 1157/Bang/2018
Assessment Years : 2012-13 & 2013-14

Deputy Commissioner of Income-tax Circle-3(1)(1) Bangalore	**Vs.**	M/s. Infosys BPM Limited Electronic City Hosur Road Bangalore 560 100
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri P.C. Khincha, A.R.
Respondent by	**:**	Shri Pradeep Kumar, D.R.

Date of Hearing	**:**	22.07.2021
Date of Pronouncement	**:**	23.08.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

These cross appeals are directed against the orders passed by Ld CIT(A)-3, Bengaluru and they relate to the assessment years 2012-13 & 2013-14. Since most of the issues urged in these

appeals are identical in nature, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The grounds of appeal urged by the assessee in both the years give rise to the following issues:-

(A) Common issues urged in both the years:-

(i) Disallowance of Provision for Software expenses.

(ii) Disallowance of software expenses u/s 40(a)

(iii) Disallowance of software expenses treating it as Capital exp.

INDIVIDUAL ISSUES:-

(B) Granting of Foreign Tax Credit is urged in AY 2012-13.

(C) Disallowance made u/s 14A is urged in AY 2013-14.

3. Following issues are urged by the revenue in both the years.

(i) Computation of deduction u/s 10AA by reducing expenses from both export turnover and total turnover.

(ii) Whether Ld CIT(A) has got power to remit the issue relating to disallowance of software expenses treating it as Capital in nature.

4. The assessee is engaged in the business of providing "Business process outsourcing services".

5. We shall take up the appeals filed the revenue first. In both the appeals, the first issue contested by the revenue relates to deduction claimed u/s 10AA of the Act ,i.e. whether expenses that were reduced from export turnover should also be reduced from the total turnover or not. The assessee claimed deduction u/s 10AA of the Act. While computing deduction, the assessee reduced communication expenses from both export turnover and total

turnover and accordingly computed quantum of deduction. The A.O. was of the view that the communication expenses should be deducted from only export turnover and not from Total turnover. Accordingly, he recomputed the deduction u/s 10AA of the Act. The Ld. CIT(A) allowed the claim of the assessee in both the years by following the decision rendered by Hon'ble Karnataka High Court in the case of CIT Vs. Tata Elxsi Ltd. (2012) 349 ITR 98. The revenue has challenged the said decision of CIT(A) by submitting that the revenue has filed a SLP in the Hon'ble Supreme Court challenging the above said decision of the Hon'ble Karnataka High Court.

6. We heard the parties on this issue. The Ld. A.R. submitted that the decision rendered by Hon'ble Karnataka High Court in the case of Tata Elxsi Ltd. (supra) has since been upheld by Hon'ble Supreme Court in the case of CIT Vs. HCL Technologies Ltd. (2018) 93 Taxmann.com 33. We notice that the decision rendered by Hon'ble Karnataka High Court has been upheld by Hon'ble Supreme Court in the case of HCL Technologies Ltd (supra) with the following observations:

> *"17. The similar nature of controversy, akin this case, arose before the Karnataka High Court in CIT V. Tata Elxsi Ltd. (2012) 204 Taxman 321/17/taxmann.com 100/349 ITR 98. The issue before the Karnataka High Court was whether the Tribunal was correct in holding that while computing relief under section 10A of the I.T. Act, the amount of communication expenses should be excluded from the total turnover if the same are reduced from the export turnover? While giving the answer to the issue, the High Court, inter-alia, held that when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to it, the said ordinary meaning is to be in conformity with the context in which it is used. Hence, what is excluded from 'export turnover' must also be excluded from total turnover', since one of the components of 'total turnover' is export turnover. Any other interpretation would run counter to the legislative intent and would be impermissible."*

7. Since the decision rendered by Ld CIT(A) is in conformity with the decision rendered by Hon'ble Supreme Court, we do not find any

reason to interfere with the decision rendered by Ld. CIT(A) on this issue in both the years.

8. The next issue contested by the revenue in both the years is linked to the issue being contested by the assessee, i.e., the issue of disallowance of software expenses by treating the same as Capital in nature. Hence the relevant grounds of both the parties shall be adjudicated together in the later part of this order.

9. We shall now take up the appeal of the assessee. The first common issue urged by the assessee relates to disallowance of "Provision for software expenses". The assessee had claimed software expenses as deduction treating the same as revenue expenses in both the years. The AO disallowed the claim of the assessee partially under three different heads as given below:-

(a) Provision for software expenses – Contingent liability

(b) Disallowance of software expenses u/s 40(a)

(c) Disallowance of remaining software expenses treating the same as Capital in nature. However, the AO allowed depreciation there on and disallowed only net amount.

10. The first type of disallowance is the disallowance of "Provision for software expenses" claimed by the assessee treating the same as contingent liability. The Ld CIT(A) concurred with the view taken by him. However, he observed that, if the above said claim is treated as ascertained liability, then the disallowance of the said claim is warranted u/s 40(a)(i) of the Act for non-deduction of tax at source.

10.1 With regard to the question whether the "Provision for software" is a contingent liability or not, we notice the same has been decided in favour of the assessee by this bench of Tribunal in

the assessee's own case in AY 2011-12 in ITA No.491/Bang/2018 dated 11.12.2020. The decision rendered in assessment year 2011-12 on an identical issue is extracted below:-

> *"14. We heard the rival contentions on this issue and perused the record. The first question is whether the provision for software expenses is a contingent liability or not. There is no dispute with regard to the fact that the assessee is following mercantile system of accounting. The assessee being a company, it is required to follow accounting standards prescribed by ICAI and also by the Central Government under the Income Tax Act. As per accounting standard-1 prescribed by the Central Government, the assessee is required to make provision for all known liabilities and losses even though the amount cannot be determined with certainty. Paragraph (4)(i) of Accounting Standard - 1 provides as under:*
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> > *"Prudence: Provision should be made for all known liabilities and losses even though the amount cannot be determined with certainty and represents only a best estimate in the light of the available information."*
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> *Further, the Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd. (supra) has explained the nature of provision for expenses created by the assessee as under:*
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> > *"A provision is a liability which can be measured by using a substantial degree of estimation. A provision is recognised when; (a) an enterprise has a present obligation as a result of a past event; (b) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognised."*
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> *15. We notice that the assessee has furnished breakup details of provision for software expenses created by the assessee and also the basis for estimating the said expenses. The Ld. CIT(A) has extracted the same in paragraph 6 & 6.1 of his order as under:*
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> > *"During appellate proceedings the appellant was asked to provide the basis of estimating the provision and whether tax at source was deducted on the same (Order sheet entry dt. 8.11.2017). In response to the same the appellant made submissions vide letter submitted on 4.12.2017. The breakup of the vendors to whom payment was to be made and for which provision was created is as follows:*

Sl.No.	Particulars	Amount in (Rs.)
1.	CA (India)Technologies P. Ltd.	98,12,314
2.	Wipro Limited	9,34,510
3.	Sonata Information Technologies Ltd.	79,92,715
4.	Select Softwares (I) P Ltd.	6,000
5.	Microsoft Corporation	15,94,890
6.	Skelta Software Private Ltd.	1,52,070
7.	Ariba India Private Ltd.	12,50,000
8.	Thomson Financial	1,33,424
9.	BIQ LLC	5,52,000
10.	Hewlett Packard Singapore	32,790
11.	Oracle Corporation	45,57,088
12.	EMC Information Systems	1,08,810
13.	Tungsten Network	1,18,03,850
	Total	3,89,30,461

6.1 The appellant also made following submissions:

2. Provision for software expenses amounting toRs.3,89,30,461 was made in respect of software licenses used, license updates, support services, software implementation services, software AMC charges etc availed/utilized during the year from various vendors. In the absence of invoices received from vendors for these services, at year end, the respective user dept's provide the likely payments to be made for the software licenses/services utilized during the year. The appellant made provision for the said expenditure and included the same under the head 'software expenses' for the year ending 31st March, 2011."

16. We notice that the assessee has explained the basis for creating the provision for expenses. The Ld. A.R. also submitted that the accounts of the assessee have been audited by the statutory auditors and they did not find any fault with the quantum of provision for software expenses created by the assessee. Hence it is not a case that there was no basis for creating the Provision for software purchases. Accordingly, we are of the view that the

provision for software expenses created by the assessee cannot be considered as contingent liability. Accordingly, we set aside the orders passed by tax authorities in this regard."

10.2 In both the years under consideration also, the assessee has furnished break-up details of "Provision for software expenses" identifying the provision so made with the vendors, who had supplied software. The Ld CIT(A) has extracted the relevant details in paragraph 6.0 of his order passed for both the years under consideration. Hence the reasoning given by the Tribunal in AY 2011-12 for allowing the identical claim is applicable to these two years also. Accordingly, following the decision rendered by the Tribunal in the assessee's own case for AY 2011-12, we hold that the "Provision for software expenses" cannot be considered as contingent liability. Accordingly, we set aside the orders passed by Ld CIT(A) on this aspect in both the years under consideration.

10.3 The Ld CIT(A) has also expressed the view that, if the provision for software expenses is held to be ascertained liability, then the same is liable to disallowed u/s 40(a)(i) for non-deduction of tax at source, apparently following the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (2011)(203 Taxman 477).

10.4 The Ld A.R, by placing reliance on the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd (2021)(432 ITR 471)(SC), contended that there is no income chargeable to tax in the hands of the non-resident suppliers of software and hence there is no requirement of deducting tax at source u/s 195 of the Act. Accordingly he contended that the disallowance u/s 40(a)(i) could not be made.

10.5 We heard Ld D.R and perused the record. The claim of the assessee is that the software has been purchased from foreign

suppliers or through their distributors. The Hon'ble Supreme Court, in the case of Engineering Analysis Centre of Excellence (P) Ltd (supra), has examined the question whether the payments made to non-resident software suppliers is "royalty" and hence TDS u/s 195 of the Act was required to be deducted on those payments or not. The Hon'ble Supreme Court examined this question considering four types of situations, which has been narrated as under:-

> *"**4.** The appeals before us may be grouped into four categories:*
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> *(i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.*
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> *(ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.*
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> *(iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.*
>
> *(iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users.*

10.6 The Hon'ble Supreme Court analysed sample agreements in respect of all the four categories and gave the following finding:-

*"**45.** A reading of the aforesaid distribution agreement would show that what is granted to the distributor is only a non-exclusive, non-transferable licence to resell computer software, it being expressly stipulated that no copyright in the computer programme is transferred either to the distributor or to the ultimate end-user. This is further amplified by stating that apart from a right to use the computer programme by the end-user himself, there is no further right to sub-license or transfer, nor is there any right to reverse-engineer, modify, reproduce in any manner otherwise than permitted by the licence to the end-user. What is paid by way of consideration, therefore, by the distributor in India to the foreign, non-resident manufacturer or supplier, is the price of the computer programme as goods, either in a medium which stores the software or in a medium by which software is embedded in hardware, which may be then further resold by the distributor to the end-user in India, the distributor making a profit on such resale. **Importantly, the distributor does not get the right to use the product at all**.*

46.** When it comes to an end-user who is directly sold the computer programme, **such end-user can only use it by installing it in the computer hardware owned by the end-user and cannot in any manner reproduce the same for sale or transfer, contrary to the terms imposed by the EULA.

***47.** In all these cases, the "licence" that is granted vide the EULA, is not a licence in terms of section 30 of the Copyright Act, which transfers an interest in all or any of the rights contained in sections 14(a) and 14(b) of the Copyright Act, but is a "licence" which imposes restrictions or conditions for the use of computer software. Thus, it cannot be said that any of the EULAs that we are concerned with are referable to section 30 of the Copyright Act, inasmuch as section 30 of*

the Copyright Act speaks of granting an interest in any of the rights mentioned in sections 14(a) and 14(b) of the Copyright Act. The EULAs in all the appeals before us do not grant any such right or interest, least of all, a right or interest to reproduce the computer software. In point of fact, such reproduction is expressly interdicted, and it is also expressly stated that no vestige of copyright is at all transferred, either to the distributor or to the end-user. A simple illustration to explain the aforesaid position will suffice. If an English publisher sells 2000 copies of a particular book to an Indian distributor, who then resells the same at a profit, no copyright in the aforesaid book is transferred to the Indian distributor, either by way of licence or otherwise, inasmuch as the Indian distributor only makes a profit on the sale of each book. Importantly, there is no right in the Indian distributor to reproduce the aforesaid book and then sell copies of the same. On the other hand, if an English publisher were to sell the same book to an Indian publisher, this time with the right to reproduce and make copies of the aforesaid book with the permission of the author, it can be said that copyright in the book has been transferred by way of licence or otherwise, and what the Indian publisher will pay for, is the right to reproduce the book, which can then be characterised as royalty for the exclusive right to reproduce the book in the territory mentioned by the licence.

10.7 After analysing the provisions of Income tax Act, provisions of DTAA, the relevant agreements entered by the assessees with non-resident software suppliers, provisions of Copy right Acts, the circulars issued by CBDT, various case laws relied upon by the parties, the Hon'ble Supreme Court concluded as under:-

"CONCLUSION

***168**. Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that there is no*

obligation on the persons mentioned in section 195 of the Income-tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. ***The provisions contained in the Income-tax Act (section 9(1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.***

169*. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income-tax Act were not liable to deduct any TDS under section 195 of the Income-tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment."*

It is pertinent to note that the Hon'ble Supreme Court has reversed the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (supra).

10.8 A perusal of the decision rendered by Hon'ble Supreme Court would bring out following principles: -

(a) Relevant DTAA provisions are required to be considered for determining the question whether the payments made by the assessee to non-resident companies for purchase of software are in the nature of Royalty or not.

(b) Where ever India has entered Double Taxation Avoidance Agreement with the country of non-resident supplier, there is no necessity to refer to

the provisions of sec. 9(1)(vi) of the Act for the payments made to the non-resident persons, unless the domestic provisions are beneficial to those persons.

(c) The agreements entered by the assessee with the non-resident software suppliers are required to be examined to find out whether the "licence" that is granted vide the EULA, is not a licence in terms of section 30 of the Copyright Act, which transfers an interest in all or any of the rights contained in sections 14(a) and 14(b) of the Copyright Act, but is a "licence" which imposes restrictions or conditions for the use of computer software.

10.9 In the instant cases, the relevant agreements have not been examined by the tax authorities. In fact, the assessee has also appears to have not produced the agreements before the AO. Accordingly, we are of the view that the issue relating to disallowance u/s 40(a)(i) requires to be set aside to the file of the AO for deciding this issue in accordance with the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd (supra), after duly examining the relevant agreements. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO.

11. The next common issue urged by the assessee relates to the disallowance made u/s 40(a) of the Act in respect of software purchases. It is pertinent to note that the AO has stated that the disallowance is made u/s 40 of the Act. The assessee has also not mentioned, whether the disallowance was made u/s 40(a)(i) or 40(a)(ia) of the Act.

11.1 During the year relevant to AY 2012-13, the AO disallowed a sum of Rs.2,79,199/-, being cost of purchase of software invoking

the provisions of sec.40 for non-deduction of tax at source. The AO followed the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Co Ltd (supra). The Ld CIT(A) also confirmed the same.

11.2 During the year relevant to AY 2013-14, the AO disallowed a sum of Rs.11,91,455/- on identical reasoning as given in AY 2012-13. The Ld CIT(A) confirmed the disallowance in this year also.

11.3 We heard the parties on this issue. Before us, the Ld A.R placed his reliance on the decision rendered by Hon'ble Supreme court in the case of Engineering Analysis Centre of Excellence (P) Ltd (supra) and contended that there is no necessity to deduct tax at source from the payments made for software purchases. As noticed earlier, the details relating to this disallowance made in both the years are not forthcoming from the assessment record or from the submission made by the assessee. The decision rendered by Hon'ble Supreme Court shall apply only to the payments made for non-resident suppliers of software or through their distributors (Indian or foreign), since the provisions of sec. 195 is applicable on "sum chargeable under the provisions of this Act", subject to the principles discussed in an earlier paragraph. If the assessee has purchased the software from the domestic supplier, then the decision rendered by the Hon'ble Supreme Court will not apply. In that case, the nature of payments needs to be examined in accordance with the provisions of sec. 9(1)(vi) of the Act. In the absence of relevant details, we are unable to decide this issue. Accordingly, we restore this issue also to the file of the AO for examining it afresh in the light of discussions made supra.

12. The next issue contested in both the years relates to the disallowance of software expenses treating the same as capital in nature. Since the Ld CIT(A) has remanded this issue to the file of the AO with certain directions, the revenue is questioning the authority of Ld CIT(A) to do so. We notice that an identical issue has been decided by this bench of Tribunal in the assessee's own case relating to AY 2011-12 in ITA No.491/Bang/2018 dated 11-12-2020. The relevant observations made and the decision taken by the Tribunal are extracted below:-

> *"20. The next issue contested by the assessee relates to disallowance of software expenses treating the same as capital in nature. Since the Ld CIT(A) has remanded this issue to the file of the AO with certain directions, the revenue is questioning the authority of Ld CIT(A) to do so.*
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> *21. The facts relating to this issue are discussed in brief. We noticed earlier that the assessee had claimed expenses towards software purchases as deduction to the tune of Rs.24,97,00,999/-. The AO disallowed following items out of the above said claim:-*
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> *Provision for software purchases - Rs.3,89,30,461*
>
> *Disallowance u/s 40(a)(i)/(ia) - Rs.1,35,82,093*
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> *The balance amount was Rs.19,71,88,445/-. The AO treated this amount as capital in nature. The observations made by the AO are extracted below:-*
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> *"6.3 For the balance amount of Rs.19,71,88,445/- it is seen that the company has treated it as revenue expenditure. It is to be stated that considering the life of software, this expenditure has been included in section 32 of the I T Act and accordingly depreciation at the rate of 60% per year has been allowed. The assessee has not given dates of purchases of these licenses. Hence the depreciation is being allowed at the rate of 30% of Rs.5,91,56,534/- and the balance amount of Rs.13,80,31,912/- is disallowed. The assessee would be eligible for claiming depreciation on the balance portion in the future years."*
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> *22. Before Ld CIT(A), the assessee placed its reliance on the decision rendered by Hon'ble jurisdictional Karnataka High Court in the case of CIT vs. Toyota Kirlosakar Motors (P) Ltd (ITA No.176 of 2009), wherein the Hon'ble High Court had held that the software licence fee paid for use of software for a limited duration upto two years is allowable as revenue expenditure. Hence the Ld CIT(A) asked the assessee to furnish the details*

of software purchases along with their period of validity. The assessee furnished the details as per which a sum of Rs.17.95 crores was related to software licenses valid up to 1 year and the balance amount of Rs.1.77 crores was related to software implementation, maintenance services, support services, software licenses having validity of 1 year or more, software AMC charges, fee for included services, consumables, etc. The assessee also furnished sample copies of purchase invoices.

23. The Ld. CIT (A) noticed that some of the invoices were related to financial year 2009-10 and not to the year under consideration. Accordingly, the Ld. CIT(A) restored the matter to the file of the A.O. with the following directions.

> *"All purchase of software licenses, for which detail of license period is available on the invoices or is produced by the appellant and if the same is for a period up to two years, the same should be allowed as revenue expenditure, provided the invoice relates to the FY 2010-11 and tax at source has been deducted on the same.*
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> > *• In case the invoice relates to some earlier year, the expenditure needs to be disallowed as prior period expenditure. • In case relevant invoice is not produced, the amount needs to be disallowed as being not verifiable.*
> >
> > *• In relation to expenditure incurred for software implementation, maintenance services, software AMC charges and fees for included services, the same needs to be treated as revenue expenditure and allowed as such provided tax at source has been deducted on the same. In case of non deduction of tax at source the same needs to be disallowed under Section 40(a) of the Act.*
> >
> > *• In relation to expenditure incurred for IT consumables e.g. CDs, printer cartridges etc., the same needs to be treated as revenue expenditure.*
> >
> > *• In case of software where the same can be used perpetually e.g.Operation system software like Windows, Application software like MS Office etc., the same needs to be treated as capital in nature. This is for the reason that in case of such software there is no restriction or limitation on its period of use. New versions of these software keep on becoming available in the market however there is no restriction on the use of the earlier version and a person can always choose not to buy the new version and continue with the version. A high rate of depreciation, which is 60% takes care of obsolescence of such software."*

24. The revenue is questioning the authority of Ld. CIT(A) in restoring the matter to the file of A.O. The assessee is contending that the entire amount of Rs.19.71 crores should be allowed as revenue expenditure.

25. The Ld A.R submitted that the Hon'ble jurisdictional Karnataka High Court, in a subsequent decision rendered in the case of CIT vs. IBM India Ltd (2013)(357 ITR 88)(Kar), has held that software expenses is revenue in nature. Accordingly he submitted that the entire expenses should be allowed as deduction. On the contrary, the Ld D.R submitted that the assessee has to show that the validity of software licenses is less than two years. He submitted that the Ld CIT(A) should have decided the issue himself instead of restoring the same to the file of AO, since the Ld CIT(A) does not have power to remand the matters.

26. We heard the parties on this issue and perused the record. We notice that the Hon'ble Karnataka High Court has held in the case of Toyota Kirloskar Motors (P) Ltd (supra) has held that, when the life of a computer or software is less than two years and the right to use it is for a limited period, the fee paid for acquisition of right is allowable as revenue expenditure and if the software is licensed for a particular period, fresh license fee is to be paid for utilizing it for subsequent years. In the case of IBM India Ltd (supra), it was decided by the Hon'ble jurisdictional High Court as under:-

> *"9. The second substantial question of law relates to application of the amount utilized for projects of Software in a sum of Rs.33,14,298/-.*

The Tribunal on consideration of the material on record and the rival contentions held, when the expenditure is made not only once and for all but also with a view to bringing into existence an asset or an advantage for the enduring benefit, the same can be properly classified as capital expenditure. At the same time, even though the expenses are once and for all and may give an advantage for enduring benefit but is not with a view to bringing into existence any asset, the same cannot be always classified as capital expenditure. The test to be applied is, is it a part of company's working expenses or is it expenditure laid out as a part of process of profit earning. Is it on the capital layout or is it an expenditure necessary for acquisition of property or of rights of a permanent character, possession of which is condition on carrying on trade at all. The assessee in the course of its business acquired certain application software. The amount is paid for application of software and not system software. The application software enables the assessee to carry out his business operation efficiently and smoothly. However, such software itself does not work on stand alone basis. The same has to be fitted to a computer system to work. Such software enhances the efficiency of the ITA No.491/Bang/2018 Infosys BPM Ltd., Bengaluru operation. It is an aid in manufacturing process rather than the tool itself. Thus, for payment of such application software,

though there is an enduring benefit, it does not result into acquisition of any capital asset. The same merely enhances the productivity or efficiency and hence to be treated as revenue expenditure. Infact, this Court had an occasion to consider whether the software expenses is allowable as revenue expenses or not and held, when the life of a computer or software is less than two years and as such, the right to use it for a limited period, the fee paid for acquisition of the said right is allowable as revenue expenditure and these softwares if they are licensed for a particular period, for utilizing the same for the subsequent years fresh licence fee is to be paid. Therefore, when the software is fitted to a computer system to work, it enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself. Though certain application is an enduring benefit, it does not result into acquisition of any capital asset. It merely enhances the productivity or efficiency and therefore, it has to be treated as revenue expenditure. In that view of the matter, the finding recorded by the Tribunal is in accordance with law and do not call for any interference. Accordingly, the second substantial question of law is answered in favour of the assessee and against the Revenue."

27. We notice that the Hon'ble High Court has held in the case of Toyota Kirloskar Motors P Ltd (supra) that the software expenses are allowable as revenue expenses, if the validity of licenses is less than two years. The High Court has also laid down the tests that should be conducted to determine the nature of software expenses in the case of IBM India Ltd (supra). Accordingly, we are of the view that the nature of software expenses, i.e., whether it is capital or revenue in nature, has to be determined by following the two decisions of Hon'ble Karnataka High Court referred above. We notice that the tax authorities have not examined this issue on the above said lines. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of the AO for examining it afresh in the light of discussions made supra."

12.1 The facts relating to this issue are identical in both the years under consideration. Accordingly, we set aside the order passed by Ld CIT(A) on this issue in both the years and restore the same to the file of the AO for examining it afresh in the light of discussions made supra.

13. In AY 2012-13, the assessee has raised a ground relating to rejection of claim for credit of "Foreign Tax Credit". The assessee has raised this issue before Ld CIT(A). We notice that the assessee has placed reliance on the decision rendered by Hon'ble jurisdictional Karnataka High Court in the case of Wipro Ltd

(2016)(382 ITR 179) in support of its claim. However, the Ld CIT(A) rejected the claim of the assessee with the following observations:-

> *"10.4 However, it is important to note that issue of benefit under Section 10A which is parimateria to Section 10AA of the Act was recently decided by the Hon'ble Supreme Court in the case of Yokogawa India Ltd. (supra) and the SC held that the provision of Section 10A of the Act is in nature of deduction. The conclusion which can be drawn from a combined reading of the decision in case of Wipro Limited (Supra) and Yokogawa India Ltd. (Supra) will thus be that appellant would be eligible to claim benefit of Section 90/91 of the Act in relation to Foreign Tax Credit/State taxes paid in foreign country including the tax credit for which claim was made during assessment proceedings except in relation to such taxes paid in foreign country on an income on which benefit of Section 10AA is available to the appellant as the benefit under 10AA is in nature of a deduction and not exemption.*
>
> *10.5 Further the accounting year in India starts from 1st of April and closes on 31st of March of the succeeding 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. So while claiming credit in India, the appellant would be entitled to only the tax paid for that relevant financial year in USA 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 in two financial years in India.*
>
> *10.6 In relation to credit for the State taxes, if the appellant gets tax credit for the State taxes, the corresponding amount claimed as deduction in the P&L account would be required to be disallowed.*
>
> *10.7 Considering above the grounds of appeal 9 and 10 of the appellant are partly allowed for statistical purposes."*

13.1 We notice that the Ld CIT(A) has taken the view that the decision rendered by Hon'ble Karnataka High Court in the case of Wipro Ltd (supra) is distinguishable in view of the decision rendered by Hon'ble Supreme Court in the case of Yokogawa India Ltd, wherein it was held that the provision of sec. 10A of the Act is in the nature of deduction. The Ld CIT(A) has expressed the view that

the decision in the case of Wipro Ltd (supra) was rendered by considering the provision of sec.10A as exemption provision. Accordingly, the Ld CIT(A) has taken the view that the said decision cannot be applied in these years, since the provisions of sec.10AA is now a deduction provision.

13.2 We are unable to agree with the above said view expressed by Ld CIT(A). The Hon'ble Karnataka High Court has given following reason for allowing Foreign Tax credit in the case of Wipro Ltd (supra):-

> *"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)."*

13.3 On a careful perusal of the decision rendered by Hon'ble Karnataka High Court, we are of the view that, what is required to be seen is whether the income u/s 10AA is chargeable to tax u/s 4 and is includible in the total income u/s 5. The fact that the assessee is not paying tax due to exemption or deduction granted under the Act is not relevant. Accordingly, we set aside the order of Ld CIT(A) in so far as it is contrary to the decision rendered by Hon'ble Karnataka High Court in the case of Wipro Ltd (supra). The other directions given by Ld CIT(A) with regard to the accounting year, claim of state tax , do not require any disturbance.

13.4 Accordingly, we restore this issue to the file of AO to determine the Foreign Tax credit in the light of decision rendered by

Hon'ble Karnataka High Court in the case of Wipro Ltd and also the direction given by Ld CIT(A) with regard to the accounting year, claim of state tax.

14. In AY 2013-14, the assessee is urging the issue relating to disallowance made u/s 14A of the Act.

14.1 The AO noticed that the assessee has declared exempt income of Rs.6,79,42,191/-. It disallowed a sum of Rs.10,81,981/- u/s 14A of the Act. The assessee has allocated a portion of administrative expenses on some basis and accordingly arrived at the disallowance of Rs.10,81,981/-. However, the AO applied the provisions of Rule 8D without finding fault with the workings made by the assessee. Accordingly, he computed disallowance by applying provisions of Rule 8D(2)(iii) at Rs.42,85,269/- and accordingly added the difference amount of Rs.32,03,288/-. The Ld CIT(A) also confirmed the same.

14.2 We heard the parties and perused the record. We notice that the assessee, in the tax audit report, has furnished the basis of computing disallowance u/s 14A of the Act as under:-

1. 5% of the salary cost of Chief Financial Officer.
2. 10% of the salary cost of Chief Financial controller
3. 50% of the salary cost of treasury department employees, who are handling the treasury functions of the company.

Accordingly, the assessee has computed the disallowance of Rs.10,81,981/-. However, a perusal of the assessment order would show that the AO did not examine the above said computation of the assessee and did not find any fault or error in the above said computation. The AO simply observes that section 14A provides that the expenditure has to be computed as per Rule 8D.

14.3 The provisions of sec.14A(2) read as under:-

"The assessing officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act."

Hence it is imperative that the AO should examine the claim of the assessee having regard to the accounts of the assessee and if he is not satisfied with the said workings, then only the AO can have resort to the provisions of Rule 8D of I T Rules. The Mumbai bench of Tribunal has also expressed identical view in the case of Tata Projects Ltd vs. ACIT (ITA No.459/Mum/2019 dated 22.10.2020). In the instant case, admittedly the AO did not examine the correctness of the workings furnished by the assessee by having regard to the accounts of the assessee. Hence the AO could not have resorted to apply provisions of Rule 8D for computing disallowance as required u/s 14A of the Act. For the above said reason, the Ld CIT(A) was not justified in confirming the working made by the AO.

14.4 In view of the above, we set aside the order passed by Ld CIT(A) on this issue in AY 2013-14 and direct the AO to delete the addition of Rs.32,03,288/- made by him u/s 14A of the Act.

15. In the result, both the appeals of the assessee are treated as allowed and both the appeals of the revenue are treated as partly allowed.

Order pronounced in the open court on 23rd Aug, 2021.

Sd/-	**Sd/-**
(N.V. Vasudevan)	**(B.R. Baskaran)**
Vice President	**Accountant Member**

Bangalore,
Dated 23rd Aug, 2021.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.