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

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER AND Ms. PADMAVATHY S, ACCOUNTANT MEMBER

IT(TP)A No.719/Bang/2017
Assessment year : 2012-13

Tesco Bengaluru Pvt. Ltd. [formerly Tesco Hindustan Service Centre Pvt. Ltd.], 81 & 82, EPIP Area, Whitefield, Bangalore – 560 066. **PAN : AABCT 8915B**	Vs.	The Deputy Commissioner of Income Tax, Circle 7(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Tanmayee Rajkumar, Advocate
Respondent by	:	Shri Sanjay Kumar, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	14.06.2022
Date of Pronouncement	:	15.06.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal is against the final assessment order dated 31.1.2017 passed u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act] pursuant to the directions of the DRP for the assessment year 2012-13.

2. The assessee company was established as a 100% export oriented unit registered under the Software Technology Parks of India scheme of the Govt. of India. It is reportedly engaged in software development [SWD] services and Information Technology enabled Services [ITeS] to its Associated Enterprises [AEs]. The ITeS services rendered by the assessee includes business support services, property support services and commercial support services. The SWD services include software

development, quality deployment, testing and other related support services.

3. At the time of hearing, ground Nos. 1 to 9 relating to TP adjustment in software development services and ITeS were not pressed. Accordingly, these grounds are dismissed as not pressed.

4. Ground No. 10 is regarding vehicle lease rentals consisting of principal and interest of RS.1,27,61,031. The ld. AR submitted that the lower authorities disallowed the vehicle lease rentals on the ground that payment was made toward the cost of assets and that vehicles were purchased for the personal benefit of the employees and not for use of the assessee, disregarding the CBDT Circular No.2/2011 dated 9.2.2001. He further submitted that the DRP adopted a conflicting view in not allowing deduction for interest portion of the vehicle lease rentals, which was allowed by it for AY 2010-11 on similar facts. Reliance was placed on the decision of the Tribunal in assessee's own case for AY 2011-12.

5. The ld. DR supported the orders of the lower authorities.

6. We have considered the rival submissions and perused the material on record. Similar issue was considered by the coordinate Bench of this Tribunal in assessee's own case for AY 2011-12 by order dated 23.05.2022 wherein it was observed as under:-

> "6.1 We notice that it is an recurring issue and identical disallowance made in the assessee's own case relating to AY 2010-11 in IT(TP)A No.191/Bang/2015 dated 25.1.2017 has been deleted following the decision rendered by Hon'ble Supreme Court in the case of ICDS Ltd vs. CIT (2013)(350 ITR 527), wherein it was held that the lessor shall be entitled to depreciation on assets leased out by him. Consequently, the lease rental payments made by the lessee is allowable as expenditure in his hands. The above said decision rendered in AY 2010-11 was

> followed in the assessee's own case in AY 2009-10 in IT(TP)A No.262/Bang/2014 dated 25.10.2021. In the instant case, the assessee herein is the lessee and hence the lease rental payments are allowable as expenditure. Accordingly, following the above said decisions, we direct the AO to delete this disallowance."

7. Respectfully following the above order of the Tribunal, we hold that the vehicle lease rentals are allowable. It is ordered accordingly.

Sub-contracting expenses (Ground No.11)

8. During the year under consideration, the assessee made a provision of Rs.4,52,03,883 under the head 'sub-contracting expenses'. The AO disallowed the provision observing that it is only a provision and added back the same to total income. The DRP confirmed the addition on the ground that tax has not been deducted at source by the assessee.

9. In this regard, the ld. AR submitted that coordinate Bench of the Tribunal in the assessee's own case in IT(TP)A No.602/Bang/2016 for AY 2011-12 has dealt with the same issue and has remitted the issue back to the AO. He further submitted that the provisions are reversed in the subsequent year as per details of sub-contracting expenses at page …. of the PB and hence needs to be allowed on actual payment basis.

10. The ld. DR supported the orders of the lower authorities.

11. We have considered the rival submissions and perused the material on record. We notice that the coordinate Bench of the Tribunal in the assessee's own case (*supra*) by order dated 23.5.2022 has considered the issue and held as follows:-

> "8.2 We heard Ld DR and perused the record. We notice from the objections filed by the assessee before Ld DRP, the assessee has submitted that it has deducted tax at source on the amount of Rs.7.34 crores, the details of which are furnished below:-

(a) TDS deducted & paid in FY 2010-11 - Rs.7,02,34,983
(b) Deductee submitted NIL certificate - Rs. 30,84,366
(c) In the nature of reimbursements - Rs. 1,40,446
(d) Reversal of provision entry - Rs. 1,26,665
(e) Transfer of expenses to different account And TDS deducted - Rs. 6,77,676
(f) Difference - Rs. 5,25,438

Before us, the Ld A.R submitted that the assessee may be given deduction in the succeeding year, when the TDS was deducted. However, the details have been furnished only to the extent of Rs.7.34 crores. We notice that this bench of Tribunal has analysed the issue relating to liability to deduct tax at source from yearend provisions in the case of Biocon Ltd vs. DCIT (ITA No.1248/Bang/2014 dated 21.03.2022), wherein the Tribunal has analysed the TDS liability under different situation and rendered its decision on each of the situation. Different kinds of situations are warranted, since the yearend provisions are made on estimated basis and most of the times it is so made without receipt of invoices from the goods supplier/service provider. Accordingly, we are of the view that this issue requires fresh examination at the end of AO by duly considering the decision rendered by the Tribunal in the case of Biocon Ltd (supra). Accordingly, we set aside the order passed by the AO on this issue and restore the same to his file for examining this issue afresh. All contentions are left open."

12. Respectfully following the above decision of the Tribunal, we set aside the orders of the lower authorities on this issue and restore it to the Assessing Officer for fresh consideration and decision in accordance with law, with similar directions as contained in the order of the Tribunal for the AY 2011-12 in assessee's own case. The AO will also verify the actual payment details and TDS thereon as per details of sub-contracting expenses given below:-

Tesco Bengaluru Private Limited
(formerly known as Tesco Hindustan Service Center Private Limited)
Assessment Year - 2011-12

Summary of sub-contacting expenses of AY 2012-13 showing the reversal of provision created in AY 2011-12

Particulars	Amount	TDS	Remarks
Accenture Services Private Limited	1,225,652	135,191	
An-nabasys Technology Services	2,348,500	259,040	
Ascendum Solutions India Pvt Ltd	9,879,654	1,090,277	
Avvas Infotech Pvt Ltd	8,567,726	967,686	
gnizant Technology Solution India Pvt Ltd	3,935,526	432,623	
Cusat Technologies Pvt Ltd	5,650,887	641,195	
DCM Data Systems	802,595	88,530	
Endeavour Software Technologies Private Limited	11,456,646	1,263,670	
HCL Technologies Limited	30,920,327	3,409,930	
Hexaware Technologies Limited	16,033,732	1,632,816	
Magna Infotech Pvt Ltd	27,998,264	488,683	Lower withholding certificate
Maveric Systems Limited	19,899,435	2,216,892	
McFadyen Consulting Software India Pvt Ltd	4,942,512	545,159	
Moolya Software Testing Private Ltd	3,721,344	410,466	
NIIT Technologies Limited	8,163,868	900,478	
Pankaj Software Solutions	3,797,722	418,887	
Quadrate Multilingual Consultant Pvt Ltd	583,874	64,403	
Radiant Infosystems Pvt Ltd	6,409,302	706,972	
Radiare Software Solutions Private Limited	55,020,201	5,398,069	Lower withholding certificate
Satyam Computers Services Ltd.	2,588,126	285,471	
Shruthi Maintenance Services	59,558	657	
Softenger India Private Limited	849,134	25,019	Lower withholding certificate
Tata Information Technology Limited	15,379,286	310,463	Lower withholding certificate
Sukumar Daniel	2,223,000	245,198	
Talentpro India HR Private Ltd	5,229,273	119,621	Lower withholding certificate
TechMantra Software Solutions Pvt Ltd	4,384,536	483,615	
Tescra Software Pvt Ltd	4,742,644	522,743	
ThinkSoft Global Services Ltd	22,468,636	2,478,290	
TIBIL COMPUTER SOLUTIONS PVT. LTD.	1,338,637	141,523	
Vinculum Solutions Private Limited	16,153,801	1,781,767	
Audit entry passed in FY10-11 reversed in FY11-12	(12,525,656)	-	
Provision entries passed in FY10-11 reversed in FY 11-12	(60,954,597)	-	
Provision entry for March 2012 reversed in Apr 2012	45,203,883	-	
Credit Notes/Audit entries/Reimbursements	(104,412)	-	
Grand Total	268,393,616	27,465,334	

The assessee may be afforded reasonable opportunity of being heard, before deciding the issue. Ordered accordingly.

Restriction of disallowance u/s. 10AA of the Act (Ground No.13)

13. The AO in the assessment reduced the following expenditure from export turnover for computing deduction u/s. 10AA of the Act :-

(Amount in Rupees)

Particulars	STPI
Export turnover	67,79,76,344
Telecommunication expenses	53,06,950
Freight Expenses	4,13,256
Insurance expenses	5,67,846
Expenses incurred in foreign currency	4,21,58,202
Revised Export Turnover	62,95,30,090

14. Accordingly, the AO recomputed the deduction u/s. 10AA to Rs. 62,95,30,090. The DRP directed the AO to reduce the above expenses from the total turnover also. The grievance of the assessee is that the AO in the final assessment order has not complied with the directions of the DRP.

15. We have considered the rival submissions and perused the material on record. The Hon'ble Supreme Court in the case of *CIT v. HCL Technologies Ltd. 404 ITR 719 (SC)* has held that when object of formula in section 10A for computation of deduction is to arrive at profit from export business, expenses excluded from export turnover have to be excluded from total turnover also; otherwise, any other interpretation makes formula unworkable and absurd and hence, such deduction shall be allowed from total turnover in same proportion as well. Accordingly, we direct the AO to reduce the expenditure incurred in foreign currency both from export turnover as well as total turnover while computing deduction u/s. 10AA of the Act.

16. The other contention of the ld. AR is that the AO ought to have considered the assessed income and not the returned income for the purpose of computation of deduction u/s. 10AA. He brought to our attention that similar issue has been considered by the Hon'ble Karnataka High Court in the case of *CIT v. M Pact Technology Services P. Ltd. in ITA No.228/2013, judgment dated 11.7.2018.*

17. The Hon'ble High Court of Karnataka in *CIT v. M Pact Technology Services P. Ltd. (supra)* has held as follows:-

> "5. In so far as the **substantial question of law Nos.5 and 6** are concerned, learned counsel for the Revenue submitted that the ITAT in its Order dated 21.12.2012 has recorded the findings, the relevant portion of which is extracted below for ready reference:-
>
> > 14. Having heard both the parties and having considered their rival contentions, we find that the disallowance u; s 40a (ia) is to be made of the expenses incurred and claimed by the assessee but before the payment of which, the assessee has failed to deduct tax at source. The genuineness of the expenditure is not in dispute. The dispute is whether TDS was to be made before making the payment. Without going into the nature of the transaction, we are inclined to accept the alternate plea of the assessee that the disallowance of the expenditure would automatically enhance the taxable income of the assessee and the assessee is eligible for the deduction u/ s 10A of the Income-tax Act on the enhanced income. Thus, this ground of appeal is allowed".
>
> 6. The relevant portion of the Circular No.37/2016 dated 02.11.2016 issued by the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India, relating to the subject. Chapter VI-A deduction on enhanced profits, is quoted hereunder:
>
> > "The issue of the claim of higher education on the enhanced profits has been a contentious one. However, the courts have generally held that if the expenditure disallowed is related to the business activity against which the Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits. Some illustrative cases upholding this view are as follows:
> >
> > > (i) If an expenditure incurred by assessee for the purpose of developing a housing project was not allowable on account of non-deduction of TDS under law, such disallowance would ultimately increase assessee's profits from business of developing housing project. The ultimate profits of assessee

> after adjusting disallowance under section 2101affictl of the Act would qualify for deduction under section 80IB of the Act. This view was taken by the courts in the following cases:
>
> (a) Income-tax Officer-Ward 5[1] vs. Keval Construction, Tax Appeal No.443 of 2012, December 10 2012, Gujarat High Court
>
> (b) Commissioner of Income-tax-IV, Nagpur vs. Sunil Vishwambharnath Tiwari, IT Appeal No.2 of 2011, September 11 2015, Bombay High Court
>
> (ii) If deduction under section 40A(3) of the Act is not allowed, the same would have to be added to the profits of the undertaking on which the assessee would be entitled for deduction under section 80-IB of the Act."

7. Applying the same analogy, it can be held that if deduction u/s. 401aHial of the Act is not allowed, the same would have been to be added to the profits of the undertaking on which the Assessee would be entitled for deduction u/s. 10A of the Act. This view is fortified by the decision of Bombay High Court in the case of `Commissioner of Income Tax v. Gem Plus Jewellery India Ltd.,' [20111 330 ITR 175 [Born] , wherein it is held thus:

> "13. By reason of the judgment of the Supreme Court in Commissioner of Income Tax v. Alom Extrusions Limited /2009] 319 II 'R 306 the employer's contribution was liable to be allowed, since it was deposited by the due date for the filing of the return. The peculiar position, however, as it obtains in the present case arises out of the fact that the disallowance which was effected by the Assessing Office? has not, the Court is informed, been challenged by the assessee. As a matter of fact the question of law which is formulated by the Revenue proceeds on the basis that the assessed income was enhanced due to the disallowance of the employer's as well as the employees' contribution towards Provident Fund /ESIC and the only question which is canvassed on behalf of the Revenue is whether on that basis the Tribunal was justified in directing the Assessing Officer to grant the exemption under Section 10A. On this position, in the present case it

> cannot be disputed that the net consequence of the disallowance of the employer's and the employee's contribution is that the business profits have to that extent been enhanced. There was, as we have already noted, an add back by the Assessing Officer to the income. All profits of the unit of the assessee have been derived from manufacturing activity. The salaries paid by the assessee, it has not been disputed, relate to the manufacturing activity. The disallowance of the Provident Fund/ ES1C payments has been made because of the statutory provisions - Section 4313 in the case of the employer's contribution and Section 36(v) read with Section 2(2,1)(x) in the case of the employee's contribution which has been deemed to be the income of the assessee. The plain consequence of the disallowance and the add hack that has been made by the Assessing Officer is an increase in the business profits of the assessee. The contention of the Revenue that in computing the deduction under Section 10A the addition made on account of the disallowance of the Provident Fund / ESIC payments ought to be ignored cannot be accepted. No statutory provision to that effect having been made, the plain consequence of the disallowance made by the Assessing Officer must follow. The second question shall accordingly stand answered against the Revenue and in favour of the assessee."

18. We also notice that the coordinate Bench of this Tribunal in the assessee's own case for AY 2011-12 has dealt with this issue and held as follows:-

> "7.2 We heard the parties on this issue and perused the record. The plea of Ld A.R was that the AO should have allowed the deduction as per the direction given by Ld DRP. The Ld D.R, on the contrary, submitted that the deduction was allowed as claimed by the assessee. Section 10A is a beneficial provision and the said deduction has to be computed in accordance with the provisions of sec.10A of the Act. The mistake, if any, made by the assessee in computing the quantum of deduction, in our view, cannot be a ground to reduce the amount of deduction. What is allowable as per law should have been allowed by the AO. Accordingly, we direct the AO to allow deduction u/s 10A of the Act as per law,

irrespective of the quantum of deduction claimed by the assessee."

19. Respectfully following the decision of the jurisdictional High Court and the above decision of the coordinate Bench of this Tribunal, we direct the AO to allow deduction u/s. 10AA of the Act in accordance with law, irrespective of the quantum of deduction claimed by the assessee in the return of income. It is ordered accordingly.

20. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Pronounced in the open court on this 15th day of June, 2022.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(PADMAVATHY S.)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 15th June 2022.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.