

**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.2492/Bang/2017
Assessment year : 2013-14

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	:	13.06.2022
Date of Pronouncement	:	15.06.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal is against the final assessment order dated 26.9.2017 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.

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. Similarly, the Id. AR did not press ground No.11 relating to reduction of telecommunication, freight, insurance expenses and expenditure incurred in foreign currency from export turnover. Accordingly, these grounds are dismissed as not pressed.

4. Ground Nos. 13 to 16 are consequential in nature and therefore does not require any specific adjudication.

5. The issue that arises for consideration out of the rest of grounds of appeal are as follows:-

- (i) Disallowance of sub-contracting expenses (Ground No.9)
- (ii) Restriction of disallowance u/s. 10AA of the Act to the extent of that claimed in the return of income (Ground No.12).

Sub-contracting expenses (Ground No.9)

6. During the year under consideration, the assessee made a provision of RS.1,65,60,808 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.

7. In this regard, the Id. 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 47 of the PB and hence needs to be allowed on actual payment basis.

8. The Id. DR supported the orders of the lower authorities.
9. 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.”

10. 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:-

Tescro Bengaluru Private Limited <i>(formerly known as Tescro High Street, formerly Tescro Private Limited)</i> Assessment Year 2013-14				
Details of sub-contracting expenses				
Sl. No.	Party Name	Amount	TDS	Remarks
1	SI Infotech Limited	735,146	82,601	
2	Abhinand Computer Services	47,438	5,298	
3	Amambassy Technology Services	3,980,099	350,650	
4	Ascending Solutions India Pvt Ltd	10,835,041	1,284,253	
5	Axvas Infotech Pvt Ltd	6,020,283	678,437	
6	BC D Travels India Pvt Ltd	195,000	4,363	Services received are non-technical in nature and hence tax deducted under Section 194C of the Act
7	Cusat Technologies Pvt Ltd	3,177,826	356,354	
8	Endeavour Software Technologies Private Limited	9,377,828	1,051,541	
9	HCL Technologies Limited	80,550,213	9,051,076	
10	Hexaware Technologies Limited	14,342,857	1,637,526	
11	Hoimar Tekworks Consulting LLP	1,597,320	164,668	
12	IT Communication Private Limited	218,212	12,341	Some part of the services received are non-technical and some are technical in nature and hence tax deducted under Section 194C and 194D of the Act, wherever applicable
13	Latus7 Systems Consulting Private Limited	3,460,704	388,181	
14	Magna Infotech Pvt Ltd	65,178,703	2,285,226	Lower with holding certificate enclosed as Exhibit - 8A
15	Maveric Systems Limited	12,718,047	1,425,520	
16	McIndy Consulting Software India Pvt Ltd	4,420,264	496,661	
17	Microsoft Corporation (India) Pvt Ltd	40,964,400	4,589,037	
18	Meelya Software Testing Private Ltd	6,321,361	742,734	
19	Pankaj Software Solutions	3,750,798	417,414	
20	Provision	16,560,808	-	
21	Quadrat Multilingual Consultant Pvt Ltd	209,281	23,354	
22	Radiant Infosystems Pvt Ltd	2,804,779	314,062	
23	Radiant Systems (India) Pvt Ltd	1,715,861	192,801	
24	Radiant Software Solutions Private Limited	19,528,850	2,189,506	
25	Satyam Computers Services Ltd.	2,249,000	252,697	
26	Softinger India Private Limited	1,400,526	31,439	Lower with holding certificate enclosed as Exhibit - 8B
27	Sonata Information Technology Limited	11,812,423	223,407	Lower with holding certificate enclosed as Exhibit - 8C
28	Tadepos India HR Private Ltd	2,207,946	33,522	Lower with holding certificate enclosed as Exhibit - 8D
29	Tescra Software Pvt Ltd	19,668,897	2,212,972	
30	ThinkSoft Global Services Ltd	11,021,952	1,232,728	
31	Vhenom Solutions Private Limited	10,836,357	1,214,798	
	Total	367,708,223	32,945,167	

Needless to mention that assessee may be afforded reasonable opportunity of being heard.

Restriction of disallowance u/s. 10AA of the Act to the extent of that claimed in the return of income (Ground No.12)

11. 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	79,06,40,703
Telecommunication expenses	43,31,867
Freight Expenses	3,523
Insurance expenses	1,57,439
Expenses incurred in foreign currency	4,93,54,669
Revised Export Turnover	73,67,93,205

12. Accordingly, the AO recomputed the deduction u/s. 10AA to Rs.15,95,69,848 and disallowed an amount of Rs.1,16,61,939 against the amount of Rs.17,12,31,787 claimed by the assessee in the return of income. The DRP issued directions to the AO to reduce the above expenses from the total turnover also. Accordingly, the AO reduced the expenses from total turnover also. However, for the purpose of computation of deduction u/s. 10AA of the Act, the AO considered the profits of the business as returned by the assessee and not the assessed income. Aggrieved, the assessee is in appeal before the Tribunal.

13. The contention of the Id. 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.*

14. We have considered the rival submissions and perused the material on record. 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/ ESIC 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."

15. 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.”

16. 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. This ground is allowed.

17. 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/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

Sd/-
(PADMAVATHY S.)
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.