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

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

IT(TP)A Nos.773 & 2041/Bang/2016
Assessment Years :2010-11 and 2011-12

IBM India Private Limited, 12, Subramanya Arcade, Bannerghatta Road, Bangalore 560 029. PAN NO :AAACI4403L	**Vs.**	**Assistant Commissioner of Income-tax Circle -3(1)(1) Bangalore**
APPELLANT		**RESPONDENT**

IT (TP) A. No.1228/Bang/2016
Assessment Year: 2010-11

Deputy Commissioner of Income tax, Circle-3(1)(1) Bangalore	**Vs.**	**IBM India (P) Ltd, No.12, Subramanya Arcade -1, Bannerghatta Main Road, Bangalore-560 029 PAN NO.; AAACI4403L**
APPELLANT		**RESPONDENT**

Assessee by	**:**	**Shri Ajay Rotti, C.A (A.R)**
Revenue by	**:**	**Shri Dilip, Advocate, Standing Counsel for revenue.**

Date of Hearing	**:**	**30.05.2022**
Date of Pronouncement	**:**	**18.07.2022**

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The cross appeals relating to Assessment Year 2010-11 and the appeal filed by the assessee for AY 2011-12 are directed against the assessment orders passed by the AO u/s 143(3) r.w.s 144C of the Act for the respective years in pursuance of directions given by Ld Dispute Resolution Panel (DRP). Since common issues are urged in these appeals, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The assessee herein is a group company of M/s IBM Organisation. It functions include providing services to its group companies and undertaking distribution of group company's products. It is engaged in the business of trading, leasing and financing of computer hardware, maintenance of computer equipment. It also provides software related services. The AO proposed various additions in the draft assessment orders of both the years, which were objected to by the assessee before Ld DRP. After receipt of directions from Ld DRP, the assessing officercompleted the assessments of both the yearsby making various additions.The assessee has preferred these appeals against the assessment orders so passed by the AO for both the years. The revenue has filed appeal for AY 2010-11 challenging relief granted by Ld DRP in that year.

ASSESSEE'S APPEAL FOR AY 2010-11

3. We shall first take up the appeal filed by the assessee for AY 2010-11. The Ground no.1 raised by the assessee is general in nature and hence it does not require any adjudication.

4. In Ground no.2, the assessee is questioning the wisdom of the AO in placing reliance on the "draft assessment order" passed for AY 2009-10 in drawing adverse conclusions in AY 2010-11. However, at the time of

hearing, the ld A.R did not press this ground. Accordingly, the ground no.2 is dismissed as not pressed.

5. Ground No.3 relates to the rejection of claim made u/s 10A and 10AA of the Act. The assessee had claimed deduction of Rs.793.18 crores u/s 10A of the Act and Rs.99.07 crores u/s 10AA of the Act in respect of various units. The AO rejected both the claims on the ground that the assessee has failed to comply with various conditions prescribed in those sections for allowing deduction. The violations noted down by the AO are discussed below:-

(a) **NON-SUBMISSION OF STATEMENT OF WORK(SOW) WITH STPI/SEZ AUTHORITIES:-**

The assessee has registered only one "Master Service Agreement" (MSA) dated 1.1.2004 with STPI/SEZ authorities. MSA is a general document and has no specific details regarding exact nature of work to be performed by the assessee. The assessee has claimed that the 'Document of Understanding' (DOU) and 'Inter Company Agreements' (ICA) supports MSA. However, the DOU/ICA were never registered with STPI/SEZ authorities. The AO referred to the Circular dated 17-01-2013 issued by CBDT, wherein the CBDT has stated that the "Statement of Work" (SOW) would normally prevail over MSA in determining the eligibility of the assessee for tax benefits unless the AO is able to establish that there has been splitting up or reconstruction of an existing business or non-fulfilment of any other prescribed condition. The assessee has not produced SOW for each and every STPI unit to support its contentions that the eligible unit has carried out software development activity.

(b) **ASSESSEE DID NOT PROVIDE SOFTWARE DEVELOPMENT SERVICES:-**

The sample ICA furnished by the assessee would show that ICA is only pricing agreement and not software development agreement. It is noticed from ICA's that the assessee has rendered only "Miscellaneous Services", which involve server management, technical services, providing financial services, software consultancy etc. Further, it is noticed from FIRCs that the purpose of remittance was clearly mentioned as "software consultancy, technical fee, system maintenance fee etc."

(c) **NEW BUSINESS COMMENCED BY SPLITTING UP OR RECONSTRUCTION OF EXISTING BUSINESS:-**

The AO also referred to the draft assessment order passed for AY 2009-10, wherein the details of violation of sub section (2) of section 10A has been discussed in detail. In AY 2009-10, the AO had held in the draft assessment order as under:-

> "As MSA was the only document registered with all the STPI/SEZ units invariably it is evident tat the units commenced its business activities in the year 2005-06, 2006-07 and 2007-08 are **nothing but splitting up or reconstruction of existing business**. It is a clear cut case with ample evidences on record that such units were not new undertaking to claim the tax benefit. Prima facie such DOU and ICA cannot be admitted as evidence on the ground that it was not certified and registered in any of the STPI/SEZ unit….."

Accordingly, the AO held that modus operandi of business, violation of SEZ Act, violation of foreign trade policy etc are similar to section 10A. The company has not given any of the software development agreement to SEZ authorities. The MSA is the prima facie evidence that they have violated sub-section 4 of section 10AA of the IT Act. In the present case, the assessee has continued the business already in existence without having any new contract agreement of alleged export of computer software. Hence the assessee is not eligible for deduction u/s 10AA of the Act.

(d) **EXISTENCE OF TWO TYPES OF INVOICES AND NON-FURNISHING OF ACCOUNTING INVOICES TO STPI/SEZ AUTHORITIES:-**

The AO noticed that the assessee was having two set of invoices, viz., Accounting invoice and Softex invoice. The accounting invoices are raised against various associated enterprises for whom services were rendered. The softex invoices a submitted to STPI/SEZ authorities. The AO noticed that it was not possible to match these two set of invoices completely, as the on site revenue is not declared in SOFTEX form submitted to STPI/SEZ authorities. It was also noticed that the accounting invoices are not submitted to STPI/SEZ authorities for verification of claim of software export.

(e) **INCOMPLETE DETAILS RELATING TO DATACOM SERVICE PROVIDERS:-**

The AO held that the assessee has not given satisfactory reply with regard to the details of datacom service providers through whom the data are transmitted, which raised doubt on export of software.

(f) **NON-APPROVAL OF BANK ACCOUNT MAINTAINED IN FOREIGN COUNTRY:-**

As per Explanation 2 to sec. 10A(3) of the Act, the sale proceeds shall be deemed to have been received to India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of RBI. The AO observed that the assessee appears to have got approval from RBI only after specific query was raised by the assessing officer. The Approval was also withdrawn in between and again given. Further, the assessee had no RBI approval during theFinancial year 2009-10 when the transactions were undertaken. Hence the assessee has not complied with the provision of Section 10A(3) of the Act.

(g) **UNRELIABLE NATURE OF UNIT WISE PROFIT AND LOSS ACCOUNT:-**

The assessee had claimed deduction u/s 10A/10AA of the Act based on unit wise P & L account. The AO noticed that the AO had discussed various discrepancies in the preparation of unit wise P & L account in the assessment proceedings of AY 2009-10. The AO had examined in that year the Statutory Auditor Shri J Majumdar, CA and Shri T Ravindra, who had issued certificate. By placing reliance on the findings given in AY 2009-10, the AO concluded in the current year that the assessee does not have details to establish genuineness of unit wise P & L account. Accordingly he held that the unit wise P & L account cannot be relied upon for allowing deduction u/s 10A/10AA of the Act.

(h) **NON-SATISFACTORY REPLY RECEIVED FROM VARIOUS COUNTRIES:-**

The AO made requests through the competent authority of CBDT seeking information under DTAA from various Countries described in Form No.3CEB. The purpose of request was to verify genuineness of various details furnished by the assessee during assessment proceedings. The AO received replies from various Countries, but they had followed uniform pattern and further replies were not satisfactory. Accordingly, the AO concluded that the assessee has ensured that standard reply was provided by all the AEs so as to avoid submission of various details sought. He also held that no AE has confirmed that IBM India is providing software development service to them. He also held that no ledger in the name of IBM India and Bank account is available with AEs' which can support genuineness of payments made to IBM India.

5.1 In view of the above discussed discrepancies, the AO held that the assessee is not entitled for deduction of Rs.793.18 crores u/s 10A and

Rs.99.07 crores u/s 10AA of the Act. The AO has summarised his conclusion paragraph 1.5.8 at page 41 of the assessment order:-

1. The detailed discussion made in the previous paragraph has revealed a fact that the assessee company could not substantiate its claim of manufacture and export of computer software from eligible STPI/SEZ unit. Section 10A/10AA gives tax benefit on the profits and gains derived by an undertaking from export of computer software that has been manufactured from eligible STPI/SEZ units.

2. For transmission of data from eligible STPI/SEZ units to outside India contradictory submission has been made by the assessee to different authorities.

3. The scheme of STPI notified by Government of India has been violated thoroughly by IBM India P Ltd. Not even a single software development agreement was registered by IBM India P Ltd with any of the STPI units. For the onsite development of computer software the company has unable to establish the direct nexus between the eligible unit and the client.

4. The DOU's was not registered with any of the STPI/SEZ unit.

5. The ICA given by the company has categorically revealed a fact that the company has rendered some miscellaneous services. Such miscellaneous services include system management, server management, technical support fee, software consultancy etc.

6. The MSA and ICA have revealed a fact that the undertakings commenced the business activity after 2004-05 were not new undertaking that began to manufacture or produce the computer software and rather all such undertakings have continued the business already in existence. It is violation of sub section (2) of section 10A.

7. Huge amount were remitted from HSBC New York for which RBI approval was not available during the year when transaction was carried out.

8. The references made u/s 90 of IT Act has revealed various discrepancy as discussed above.

9. It has been established that unit wise P & L account is not reliable document. The CA who has issued a certificate about the true and correct nature of the unit wise P&L account has admitted in sworn statement that it did not reflect the true and correct profit.

5.2 The Ld DRP confirmed the disallowance of deduction claimed u/s 10A/10AA of the Act for the reasons discussed hereinafter. With regard to the allegation of splitting up/reconstruction of existing business, the Ld DRP held as under:-

> "In regard to above, we agree with the submission of the assessee that the issue of splitting and reconstruction of the business can be examined only in the first year of the commencement of the undertaking. This view finds support from the rationale of the decision of Hon'ble Delhi High Court in the case of CIT vs. Tata Communication Internet Services Ltd 17 taxmann.com 241 (Delhi HC) and the decision of the Hon'ble Karnataka High Court in the case of Nippon Electronics (India) P Ltd 181 ITR 518, however, the issue becomes academic in nature due to our directions (supra) confirming the denial of deduction u/s 10A and 10AA of the I T Act."

5.3 With regard to other discrepancies noticed by AO, the Ld DRP has referred to the notice u/s 142(1) issued on 02-12-2014 by the AO, wherein the AO had asked the assessee to furnish following information which are necessary to ascertain the correctness of claim of deductions u/s 10A and 10AA of the I T Act:-

1. Copy of bank book/bank ledger of all the bank accounts including the HSBC account maintained at New Yorkby explaining nature and sources of each credit and debit which was shown to the CA who has audited the books of accounts.
2. Reflect all the credits into the P & L account and so called P & L account submitted in ROI and subsequently.
3. Copies of all the FIRCs (both front and back side), invoices (accounting invoices and SOFTEX invoices) and SOFTEX regularised against each such FIRC. Reflect all the FIRCs into the books of accounts and P&L account. Under which head the corresponding income has been offered.
4. Unit wise offshore contract/onsite contract of software development, corresponding export invoices certified by STPI

authorities alongwith SOFTEX forms and link it to FIRC in following format:-

.....

5. Party wise ledger account of export revenue and match such export revenue with the so called unit wise P&L account.
6. The AD bank has confirmed in the reply dated 18-03-2012 that the total Softex regularised by them for the AY 2010-11 was 1042,072,012 US $ (notice dated 16.4.2013). However, the turnover as per Form 56F was much more than the softex. If the company has developed any software and exported the same furnish the evidences like DOU, ICA, evidences for realisation, relevant bank account copies etc."

The Ld DRP concurred with the view expressed by AO in respect of above mentioned points and accordingly held as under:-

> "In view of the above, we are of the opinion that the assessee has failed to furnish the necessary information supported by the documents to establish the claim undertaking wise, accordingly, we uphold the disallowance of deduction u/s 10A and 10AA as proposed by the assessing officer in the draft assessment order."

5.4 **It is pertinent to note that the Ld DRP did not address on following issues/discrepancies discussed by the AO:**-

(a) Only Master Service agreement has been submitted. No Statement of Work/software development was registered with STPI. DOU was not registered with any of the STPI/SEZ unit.

(b) For transmission of data from eligible STPI/SEZ units to outside India, contradictory submission has been made by the assessee to different authorities, which raised doubts on export of software.

(c) The ICA given by the company has categorically revealed that the company has rendered only miscellaneous services.

(d) Non-reconciliation of accounting invoices and softex invoices.

(e) RBI approval was not available for the bank account maintained outside India for the year under consideration.

(f) Authenticity of information received from various Associated enterprises.

(g) Authenticity of unit wise Profit and Loss account prepared by the assessee for claiming deduction.

In effect, the Ld DRP has given its directions with regard to the allegation of splitting/reconstruction of existing undertakings, the reconciliation of payments received with the turnover reported by the assessee, compliance on reporting requirements of turnover through statutory forms.

5.5 We notice that many of the alleged violations pointed out by the AO have been addressed by the Tribunal in the assessee's own case in IT(TP)ANo.725/Bang/2018 dated 31.7.2020 relating to AY 2013-14. Relevant discussions made by the Tribunal are extracted below in the same seriatim discussed in Paragraph 5 supra:-

(A) **NON-SUBMISSION OF STATEMENT OF WORK (SOW) WITH STPI/SEZ AUTHORITIES:-**

This objection has been addressed by the co-ordinate bench in AY 2013-14 as under:-

"A.5 We have perused submissions advanced by both sides in light of records placed before us.

Objection raised by authorities below is that, assessee did not establish by way of documentary evidences regarding services rendered to its AE's globally, and that, these were in the nature of software development services. It has been alleged by revenue that, MSA dated 01/01/2004, was the only document registered with STPI/SEZ authorities, which do not specify the scope of work.

We place reliance upon Circular no.01/2013, dated 17/01/2013 issued by CBDT, wherein, necessity to have separate master service agreement for each work contract and to what extent it is relevant has been dealt with as under:

"(2)……..
(i)…….
(a)……
(b)……

(ii). Whether it is necessary to have separate master service agreement (MSA) for each work contract and to what extent it is relevant.

As per the practice prevalent in the software development industry, generally two types of agreement entered into between the Indian software developer and the foreign client. Master Service Agreement (MSA) is an initial general agreement between a foreign client and the Indian software developers setting out the broad and general terms and conditions of business under the umbrella of which specific an individual Statement of Work (SOW) are formed. These SOW, is in fact, enumerate the specific scope and nature of the particular task or project that has to be rendered by a particular unit under the overall ambit of the MSA. Clarification has been sought whether more than one SOW can be executed under the ambit of a particular MSA and whether SOW should be given preceded and over MSA.

The matter has been examined. It is clarified that the tax benefit under section 10 AA, 10 AA and 10 B would not be denied merely on the ground that a separate and specific MSA does not exist for each SOW. The SOW would normally prevail over MSA in determining the eligibility for tax benefits unless the assessing officer is able to establish that there has been splitting up or reconstruction of an existing business or non-fulfilment of any other prescribed condition."

From the above, it is clear that, benefit under section 10A,10AA and 10 B cannot be denied as separate and specific MSA does not exist for each SOW. Be that as it may, from SOFTEX forms placed in paper book at page 536 onwards, columns 7 specifically reveals, export contract/ purchase order, being filed with SEZ. We also note that, each form consist enclosures, like copies of export contract, royalty agreement, communication from foreign customers.

Submissions by Ld. Standing Counsel for revenue is thus found to be contrary to SEZ approvals placed at page 782 onwards of paper book volume 3. Ld. Standing Counsel for revenue also placed reliance on Circular no.1/2013 dated 17/01/2013 issued by CBDT, which addresses various requirements for being eligible to claim deduction under section 10AA of the Act, but did not bring to our notice, anything contrary except for saying that assessee did not file separate SOW with SEZ."

(B)**ASSESSEE DID NOT PROVIDE SOFTWARE DEVELOPMENT SERVICES:-**

This objection has been addressed by the co-ordinate bench in AY 2013-14 as under:-

"A.5 .....

Ld. Counsel submitted that, assessee claimed deduction under section 10AA of the Act for year under consideration, however, for purposes of definition of 'computer software', one has to refer to Explanation 2 to Section 10A(8) of the Act. Ld. Counsel submitted that 'computer software' for purposes of section 10AA would mean:

" (i) "computer software" means,-

(a) any computer program recorded on any disk, tape, perforated media or other information storage devices; or

(b) any customised electronic Data or any product or service of similar nature, as may be notified by the board,

which is transmitted or exported from India to any place outside India by any means."

We note that transfer pricing adjustment proposed by Ld.TPO was in respect of payments received on account of services rendered by assessee under software development segment. Therefore, it cannot be held that services rendered by assessee, does not fall under software development service

segment. So, to allege that, assessee was providing miscellaneous services, is like blowing hot and cold at the same time. Revenue has not been able to prove anything contrary by way of documentary evidences on this aspect before us. Therefore, this objection raised by revenue does not hold good in eyes of law and is rejected."

(C) **NEW BUSINESS COMMENCED BY SPLITTING UP OR RECONSTRUCTION OF EXISTING BUSINESS:-**

This view of the AO has been rejected by Ld DRP in this year.

(D) **EXISTENCE OF TWO TYPES OF INVOICES AND NON-FURNISHING OF ACCOUNTING INVOICES TO STPI/SEZ AUTHORITIES:-**

This objection has been addressed by the co-ordinate bench in AY 2013-14 as under:-

(I) Arguments of Counsel have been captured by the Tribunal as under in AY 2013-14:-

"C.1 Ld. Counsel submitted that accounting invoices raised on associated enterprises and SOFTEX invoices are submitted to STPI/SEZ authorities. It has been submitted that the work contract received from group entities, are executed through STPI unit's and finished work are exported there from, as evidenced in SOFTEX Forms. Referring to page 536 of paper book Volume 2, being SOFTES Form Ld. Counsel submitted that in Column-9, under 'Type of software exported', assessee selected, 'Software development'. Referring to page 539 being part of SOFTEX form.

C.2. Ld. Counsel at this juncture, took us through written submission dated 7/12/2016, filed in paper book at page 416 of paper book, to demonstrate that, invoices raised could not be co-related with work carried out for a particular overseas client by assessee. Extract of procedure adopted by assessee as submitted in written submission dated 7/12/2016 are reproduced as under:

- Ld. Counsel submitted that, IBM group entities across the globe, procure businesses from various end customers. Part of the contractual commitments of IBM group entity is sub contracted to assessee on need basis. Services rendered by assessee based on nature of work assigned, could be carried either from offshore or on-site. He submitted that IBM overseas entities sub-contracts work in a composite form and assessee determines the basis of servicing the project.

- Ld. Counsel submitted that assessee uses common intercompany accounting system and Internet Labour Clocking System, to record time utilised for software development work, person went to DOU's with other IBM group entities and to generate invoices for services rendered to IBM group companies.

- Ld. Counsel submitted that, when IBM overseas entity enters into an ICA/SOW/DOU with assessee, a unique Account ID is created for assessee. For each Account ID created by IBM overseas entity, sub ID's in the form of work items are created based on nature of work items assigned and work deliverables for each project. He submitted that employees are assigned to each of these Account ID's and work items, wherein labour time is recorded via Internet labour clocking system.

- Ld. Counsel further submitted that employees performing export activity are tacked to particular building/license (STPI/SEZ unit). All resource/work performed by such employees are tacked to respective license to which the employee is tagged. Seat verification tool is used as a framework, in order to control, identify and tag employees to particular STPI/SEZ license for purpose of software development work.

- Ld. Counsel further submitted that a global rate card to capture hourly cost on an absorption costing principle for India is agreed and finalised on an annual basis. He

submitted that the rate card contains details of hourly, employee band wise charge out rates and this so is from the Project and Accounts Controlled Table for purpose of invoice generation.

- Finally, he submitted that, the System Service Costing Ledger Bridge, calculates labour cost, based on input from, labour hours and rate card of employees in India from project and Accounts Controlled Tables. Other cost elements also flow into the System Service Costing Ledger, which are in the nature of employee reimbursements and project specific expenses. The data from System Costing Ledger then feeds into common intercompany accounting system that generates invoices.

C.3. Ld. Counsel submitted that, such common intercompany accounting system/accounting invoices, are for specific country and is composite in nature, which means that it may contain multiple Account IDs and billing referred for multiple STPI/SEZ. He submitted that accounting invoices may contain revenue of different STPI/SEZ locations, and revenues for both offshore and on-site services. It is also submitted that, such invoice would also include reimbursement of project specific cost if any.

C.4. Ld. Counsel submitted that, SOFTEX forms are required to be submitted for each STPI/SEZ locations separately, but is not applicable for on-site revenues. In view of composite nature of system generated accounting invoices, a split in composite invoices into offshore/on-site raised on STPI/SEZ location for filing of SOFTEX forms are carried out. Ld. Counsel thus submitted that SOFTEX invoices are separate and derived as a subsection of accounting invoices, but separately maintained for filing with STPI/SEZ authorities, with respect to offshore services only.

On the basis of above complex procedure for invoicing, Ld. Counsel submitted that, it would not be possible to identify each invoices *qua* services rendered by assessee.

C.5. On the contrary, Ld. Standing Counsel for revenue, submitted that, there may be no denying of fact that, whatever work assessee carried out, may have been done at various units, but, the main question still remains is, whether, such work was software development work or other works. He also contended that, none of the units were registered with SEZ Authority, and therefore eligibility of such units has also not been established by assessee.

C.6. In rejoinder, Ld. Counsel for assessee submitted that assessee submitted relevant documents to establish granting of approval by SEZ Authorities in respect of units for which relief was claimed under section 10AA of the Act. He referred to pages 782-783, 791, being extension received or fresh approval and various other letters from authorities for setting up of new unit placed at pages 784-790 and 792-807 of paper book volume 3.

C.7. Ld. Counsel, without prejudice, submitted that, compliance with SEZ regulations is not a mandatory condition for eligibility of benefit under section 10AA of the Act. In support of this contention, he referred to decision of *Mumbai Tribunal* in case of *M/s. HDFC Property Fund vs ITO in ITA No. 7472/MUM/2017 for assessment year 2014-15* by *order dated 28/02/2019*. Placing reliance on para 10 of the order, Ld. Counsel submitted that, in the absence of any adverse action by SEZ authority, it is incorrect to assume that assessee has not complied with requirements under SEZ Act, 2005. Placing reliance upon decision of *Hon'ble Supreme Court* in case of *Gestentner Duplicators Pvt. Ltd vs CIT* reported in *117 ITR 1*, it has been emphasised that, it was not open for authorities below to assume any violation under SEZ Act, 2005 so long as the certificates of approval/renewal of a unit is not withdrawn by a process known to law."

(II) The co-ordinate bench has decided this issue as under in AY 2013-14:-

"C.8. We have perused submissions advanced by both sides in light of records placed before us.

C.8.1. Upon a query being raised by the bench regarding producing invoices for verification before authorities below, Ld. Counsel on instructions, submitted that, these are huge voluminous documents, which are difficult to compile. However he submitted that, assessee would be in a position to file documents as far as possible to co-relate invoices with SOFTEX forms.

C.8.2. Ld. Standing Counsel for revenue placed reliance upon decision of *Hon'ble Supreme Court* in case of *DCIT vs ACE Multi Axis systems Ltd.*, reported in *(2017) 88 Taxmann.com 69*. Ld. Standing Counsel by relying on this decision, proposed that, eligibility/satisfaction under the section 10A/10AA has to be established every year by assessee for claiming deduction. On perusal of the decision, it is noted that the ratio laid down by *Hon'ble Supreme Court* is in the context of section 80 IB, which is a separate code in itself. Further *Hon'ble Supreme Court* upheld denial of exemption for the reason that, section 80 IB is available to an undertaking that remains a small scale industry for the period when deduction is claimed and assessee therein ceased to be a small scale industry. It was for this violation that the claim u/s 80IB was denied.

C.8.3 In the present facts of the case assessee placed on record approvals obtained by SEZ authorities which has not been rejected. It is noticed that nothing has been brought on record by Ld. Standing Counsel to show that alleged units ceases to be an eligible unit registered with SEZ authority. Further we refer to the decision relied upon by Ld. Counsel in case of *CIT vs Nippon Electronics (supra)* by *Hon'ble Karnataka High Court* and *CIT vs Tata Communications Internet services Ltd (supra)* by *Hon'ble Delhi High Court*.

C.8.4. Respectfully following afore stated decision we agree with submissions of Ld. Counsel that, in absence of any

adverse action by SEZ Authorities, no presumption could be drawn that assessee violated any requirements under the scheme. We refer to decision of *Ahmedabad Tribunal* in case of *ITO vs E-Infotech Ltd* reported in *(2009) 124 TTJ 176*, to support the afore stated view. This *Tribunal* in the said case has held as under:

> *"As regards violation of norms of STPI, we are of the view that unless violation of conditions of approval, impinge on conditions for grant of deduction under the relevant provisions of the Act, there is no ground for denial of deduction. In this case the status of tax bear as hundred percent EOU and under STPI scheme continues. For the default, already penalty has been imposed by concerned authorities"*

Facts in present case are more stronger than facts based upon which Hon'ble *Ahmedabad Tribunal.* Nothing has been placed on record by Revenue to show that approvals relied upon by Ld. Counsel referred to herein above has been rejected by SEZ authority. Therefore, respectfully following ratio laid down by *Hon'ble Supreme Court* in case of *Gestentner Duplicators Pvt. Ltd vs CIT (supra),* it was not open for authorities below to assume any violation under SEZ Act, 2005 so long as certificates of approval/renewal of units are not withdrawn by a process known to law.

We are therefore of opinion that this objection raised by Ld.AO does not hold good in test of law."

(E) **INCOMPLETE DETAILS RELATING TO DATACOM SERVICE PROVIDERS:-**

The Co-ordinate bench has dealt with this issue in AY 2013-14 as under:-

"B. No evidence of data transmission and export of software outside India:

B.1. Ld. Counsel submitted that, authorities below erred in concluding that, assessee did not transmit or export

computer software outside India from its SEZ units. He submitted that, various details were filed before authorities below to prove, manner in which data was transmitted/exported. Ld. Counsel relied on, copies of royalty agreement, export contract and communication with foreign customers, placed in paper book Volume 2 at page 416-696 & 697-834, filed with authorities below, vide submissions dated 7/12/2016. He submitted that, assessee works on various technical platforms to transmit software from its various unit, and that, one such platform is, worldwide IP-based wide area network, referred to as "Power 9", provided by AT&T to assessee globally.

B.2. He submitted that, strategic network designed by AT&T meets assessee's data communication requirement globally. He submitted that, these network are cost-effective architecture and flexible as per assessee's needs, as it is built on a global Multi-Protocol Switched Shared Backbone, that provides foundation for the logical, any to any IP connectivity, among all IBM sites, that are connected to the Mighty Protocol Switched backbone, in the AP region. He further submitted that in terms of global connectivity, each geographical area is a self-contained network with a high-speed backbone and carrier aggregation of individual sites and sub-networks. This enables assessee to transmit data to its group companies across the globe through multiprotocol switched shared backbone.

However, Ld. Counsel also emphasized that, this is not a requirement to be satisfied for being eligible to claim deduction under section 10AA of the Act.

B.3. On the contrary, Ld. Standing Counsel appearing for revenue submitted that, replies filed by assessee with SEZ Authority regarding details of service provider who rendered services for transmission of data exported by assessee is inconsistent with submissions made by assessee for year under consideration. He vehemently supported observations of authorities below.

B.4. In rejoinder, Ld. Counsel for assessee submitted that, authorities below have relied on replies filed by assessee, relating to export of software for year 2008-09. He submitted that, authorities below reproduced replies filed by assessee and notice issued by SEZ authorities calling for details of service provider who assisted assessee for transmission of data. Referring to letter dated 10/10/2013 filed by assessee before Ld.AO reproduced at page 28 of impugned order, Ld. Counsel submitted that, for year under consideration, datacom service provider for international link was AT&T, whereas local link was Tata Tele Services and Bharathi.

B.5. Ld. Counsel referring to the said letter, submitted that during initial days AT&T and VSNL had an arrangement to jointly offer Multiprotocol Switched Networking Services in India, as infrastructure of AT&T was co-located with VSNL. VSNL was therefore considered to be the parent service provider and was consistently mentioned in SOFTEX form. He submitted that though VSNL was being mentioned in SOFTEX form, the international traffic for software development export services was always being supported through AT&T. For assessee in India most of WAN links are owned and managed by AT&T and, access links where international traffic is carried out was also through AT&T Ld. Counsel submitted that all these evidences/details have been held to be inconsistent by authorities below. However, he again submitted that, for purposes of eligibility under section 10 AA of the Act, this alleged deficiency pointed out by Ld.AO is not of any relevance.

B.6. Ld. Standing Counsel for revenue, placed reliance on, observations authorities below.

B.7. We have perused submissions advanced by both sides in light of records placed before us.

It is observed that, coordinate bench of this *Tribunal* for assessment year 2008-09 (supra) has already taken a view that declaration on STPI forms should be held to be sufficient in this regard. Further, we agree with Ld. Counsel that, for purpose of eligibility of claim under section 10AA of the Act, this objection does not have any relevance.

Therefore, respectfully following the same, this objection raised by authorities below is rejected at the threshold."

(F) **NON-APPROVAL OF BANK ACCOUNT MAINTAINED IN FOREIGN COUNTRY:-**

This issue has been remanded by the co-ordinate bench to the file of Ld DRP in AY 2013-14, following decision rendered in AY 2008-09. The relevant discussions made by the co-ordinate bench in AY 2013-14 are extracted below:-

D. RBI Approval for bank account maintained outside India with regard to export earnings not obtained:

D.1. At the outset, Ld. Counsel vehemently urged that, this condition is not a requisite to claim deduction under section 10AA of the Act, and therefore deduction cannot be denied on this basis.

Be that as it may, referring to submissions dated 07/09/2015 filed before Ld.AO during assessment proceedings under section 144C (1), Ld. Counsel submitted that, section 10A(3), allow assessee to either;

(i) directly receive export proceeds in India, or

(ii) bring export proceeds to India after the same is received outside India.

D.2. Ld. Counsel submitted that, as per *Explanation 2* to *Section 10A(3)*, sale proceeds referred to therein, shall be deemed to have been received to India, where such sale proceeds are credited to a separate account maintained for the purpose, by assessee, with any bank outside India, with approval of RBI.

D.3. It has been submitted that, even otherwise, an unapproved bank account maintained by assessee outside India, in which export sale proceeds are deposited, still assessee would be entitled to benefits of section 10A, to the extent that, it is brought into India in convertible foreign exchange as per section 10A(3)(i) of the Act.

D.4. However, Ld. Counsel submitted that, vide letters dated 24/08/2012 and 04/01/2013, RBI granted permission to assessee, to hold and maintain foreign currency account outside India, which was placed before authorities below.

D.5. It is submitted that assessee received part of export proceeds from sale of computer software into foreign currency account maintained outside India with approval of RBI and accordingly company is eligible to claim tax holiday as per section 10A of the Act. It has been also submitted that amount of export proceeds from sale of computer software received into foreign currency account maintained outside India, being HSBC (USA), is to be treated as sale proceeds deemed to have been received in India.

Ld. Counsel submitted that authorities below do not dispute satisfaction of conditions laid down in section 10 A (1) and (2) of the Act. It is also been submitted that, Ld.AO do not dispute that assessee derived profits from export of computer software and that, export turnover in respect of such activity has also not been disputed by Ld.AO in Transfer Pricing Proceedings. Ld. Counsel thus, submitted

that, under such circumstances, Ld.AO cannot reject claim of assessee in totality under section 10A/10AA of the Act.

D.5. Ld. Counsel referred to and relied upon date wise events, showing reinstatement of approval by RBI vide letter dated 28/02/2014 which is reproduced as under:

Date	Particulars
22 Jan1998	Approval granted by the RBI to open and maintain a FCA with HSBC (erstwhile Midland Bank or City Bank), New York, USA (copy enclosed as Annexure 10)
1998 0nwards	Annual certifications/ approvals from the RBI was received by IBM India -latest approval being received vide letter dated 10 November 2001.
June 2002	RBI issued Circular No 54 dated 29 June 2002 pertaining to maintenance of FCA abroad by a company/ firm/ body corporate registered or incorporated in India (copy enclosed Annexure 11). The circular provided for liberalization in approvals and delegation process in connection with FCA opened for normal business operations subject to certain conditions. IBM India was of the bonafide belief that it did not require to obtain renewal of its RBI approval on the basis of the above- mentioned circular.
2011-12	IBM India approached RBI and requested for ratification to maintain the FCA for the period 2002-2011.
Aug 2012 and Jan 2013	RBI grants approval to hold and maintain the FGA for one year. Further, RBI condoned the lapse on part of IBM India in not obtaining the renewal of RBI approval to maintain FCA at regular intervals after the last renewal given in November 2001 (copy of letters enclosed as Annexure 12).
April 2013	RBI requested additional information following notices issued/ enquiries conducted by the erstwhile Assessing Officer.
8 May 2013	RBI revoked the approval granted vide letters in August 2012 and January 2013 (copy enclosed as Annexure 13).
23/26 August 2013	Deutsche Bank ('DB) received a letter (copy enclosed as Annexure 14) from RBI instructing it to conduct a transactional audit of export transactions undertaken by IBM India by the DB officers or by an external statutory auditor. Pursuant to this, DB appointed Deloitte Haskins and Sells ('DHS') as the independent auditor to perform the transactional audit, the scope of which was us follows: a. Transactional audit highlighting transparently the trail of each and every export transaction pertaining to the exporter from 2001 to 2012;

	b. Contract wise matching of repatriation of 30% onsite revenue for the period till February 2007) / profit (February 2007 onwards); and C. Certify that the actions of the Company are in accordance with FEMA and relevant guidelines issued by Reserve Bank of India.
Oct 2013	DB submitted DHS audit report (copy enclosed as Annexure 8) to RBI on the process review, sample testing, transaction audit and FEMA guidelines review.
Dec 2013	DB submitted a letter to RBI stating, inter-alia, that IBM has largely complied with the provisions of FEMA and other guidelines issued by RBI in this regard (copy enclosed as Annexure 15).
28 Feb 2014	Letter from RBI stating, inter-alia, that after a careful analysis of the audit report submitted by DHS and subsequent clarifications, the FCA facility has been restored (copy enclosed as Annexure 9).

D.6. Ld. Counsel submitted that Ld.AO did not agree with submissions by observing as under:

"…….. The submissions made by assessee have been considered. It is seen from the submission that the DB had submitted a letter to RBI stating that IBM has largely complied with the provisions of FEMA and other guidelines issued by RBI. In view of the details available it is clear that assessee has not fully complied with the requirements of income tax act as per RBI approval has been taken only after specific findings made by the assessing officer."

D.7. It has been submitted that this issue stands concluded by coordinate bench of this *Tribunal* in assessee's own case for assessment year 2008-09 (supra) in para 3.84-3.86.

D.8. On the contrary, Ld. Standing Counsel for revenue submitted that, RBI has to grant approval to hold and maintain foreign currency account, outside India, as a requirement, for eligibility to claim deduction under section 10A/10AA under scheme of SEZ. In the present facts of the case, RBI has not approved bank account outside India, in which sale proceeds were deposited. He submitted that,

assessee violated condition required 10A (3) of the Act. He vehemently supported observations of authorities below for denial of claim, due to relation of the specific condition.

D.9. We have perused submissions advanced by both sides in light of records placed before us.

D.9.1. We note that, deduction U/s.10AA is denied for violating Explanation 2 to section 10A(3), as, it is alleged by authorities below that, bank account outside India in which sale proceeds were deposited was not approved by RBI.

As rightly submitted by Ld. Counsel, this would be material only for claiming benefit of *Explanation 2* to *Section 10A(3)* of the Act. At the outset we also note that this is not a requirement to be fulfilled under section 10AA of the Act. Even otherwise, considering this objection, assessee is anyways not barred from claiming deduction under main provisions of section10A(3) of the Act, whereby, it can satisfy Ld.AO regarding receipt of sale proceeds out of India being brought into India in convertible foreign exchange within the period stipulated in the provisions of the Act.

D.9.2. At this juncture, we understand the apprehension of revenue regarding the question as to whether, foreign exchange remittances were in relation to export of computer software outside India.Assessee has placed on record SOFTEX forms at pages 536 of volume 2. Category mentioned in Column 9 in the form indicates that proceeds have been received for software exported under. However, from the reasoning by authorities below, it is noted that it has not verified, as to whether, convertible foreign exchange brought into India, represents consideration received towards export of computer software.

D.9.3. We note that, *Hon'ble Bench* of this *Tribunal* in assessee's own case for AY:2008-09 dealt with this objection

in light of identical argument raised by Ld. Counsel therein as under:

"3.84. *We now take up the question with regard to the absence of an RBI approved bank account in which the export sale proceeds have to be deposited outside India. On this aspect, we find that the assessee has been depositing the export proceeds in HSBC account in New York. It was also seen that this bank account had approval only for the period up to 2001, Thereafter, the approval was required to be renewed, but had not been renewed by the assessee. We have also seen that if there had been a RBI approved bank account in which the export proceeds were deposited outside the country, than under Exptanation-2 to -section 10A(3) of the Act the assessee would satisfy the requirements of section 10A(3) of the Act viz., bringing into India the sale proceeds of computer software exported out of India In convertible foreign exchange.*

3.85 *We have also seen that even before the AO, the assessees put forth a claim that even in the absence of a RBJ approved bank account maintained by the assessee outside India in which the sale proceeds of computer software exported out of India are deposited, still the assessee would be entitled to benefits of section 10A deduction to the extent it brings into India the sale proceeds in convertible foreign exchange. We have also seen that the assessee in this regard has filed details before the AO. These are detailed in the earlier part of this order in which the submission of the ld counsel for the assessee with regard to the various documents filed by the assessee before the AO are discussed. We have also admitted as additional evidence the letter dated 12.07.2013 addressed by the Deutsche Bank to the RBI, certifying the inward remittances received by the assessee on account of export of computer software.*

3.86 *As rightly submitted by the ld. counsel for the assessor, the AO as well as the DRP projected the claim of the assessee far deduction u/s 10A of the Act only on the ground that there was no RBI approved bank account outside India In which the sale proceeds of computer software exported out of India were deposited This would be material only for taking the benefit of Explanation to section 10A(3) of the Act The assessee is not barred from claiming deduction under the main provisions of section 10A(3) of the Act, whereby it can satisfy the AO about the receipt of sale proceeds of computer software exported out of India being brought into India in convertible foreign exchange within the period stipulated in the provisions u/s 10A(3) of the Act. As rightly submitted on behalf of the assesses, deduction u/s. 10/10AA of the Act cannot be totally denied. The fact that the assessee has exported computer software out of India and brought convertible foreign exchange into the country is not disputed. The quantum has lo be*

arrived at on the deduction which the assessee is entitled to has to be allowed.

***3.87** We are therefore of the view that it would be just and appropriate to set aside the order of the DRP and remand the issue to the DRP for fresh consideration and direct the DRP to examine the claim of the assessee on the basis of evidence that the assessee may lead to prove the receipt of sale proceeds of computer software exported out of India being brought into India in convertible foreign exchange. The DRP will be at liberty to examine as to whether the convertible foreign exchange was brought Into India and that they represent consideration received for export of computer software. The AO in the set aside proceedings before the DRP will be at liberty to rebut such claim of the assessee including the claim that the foreign exchange brought in does not represent safe proceeds of computer software exported out of India. As mentioned in para 3.56 of this order, the assessee should produce before the AO all documents referred to in the letter dated 12.07.2012 of Deutsche Bank to RBI. We give liberty to the assesses to file such documents as may be necessary to establish its claim for deduction u/s. 10A/10AA of the Act Thus, ground Nos. 3 1 to 3.4 raised by the assessee are treated as allowed for statistical purposes."*

D.9.4. Respectfully following the same, we remand this issue to DRP to verify receipts if sale proceeds of computer software exported out of India, being brought into India in convertible foreign exchange. DRP is at liberty to examine whether, convertible foreign exchange brought into India represents consideration received for export of computer software.

Accordingly, this objection is remanded to DRP."

With regard to the receipt of money towards export of software, the co-ordinate bench has restored the issue to the file of AO in AY 2013-14 by observing as under:-

G. Conclusion:

Based upon arguments advanced by both sides and discussions, in respect of each objection raised by authorities below, we observe thatexports proceeds declared by assessee in SOFTEX forms, has not been considered by

authorities below, though, assessee filed voluminous details. We are of the view that, Ld.AO failed to verify whether, revenue received by assessee was on account of computer software exported out of India. Coordinate bench of this *Tribunal* in assessee's own case for assessment year 2008-09 (supra), in this context observed as under:

3.86 *As rightly submitted by the ld. counsel for the assessee, the AO as well as the DRP rejected the claim of the assessee far deduction u/s 10A of the Act only on the ground that there was no RBI approved bank account outside India in which the sale proceeds of computer software exported out of India were deposited. This would be material only for taking the benefit of Explanation to section 10A(3) of the Act The assessee is not barred from claiming deduction under the main provisions of section 10A(3) of the Act, whereby it can satisfy the AO about the receipt of sale proceeds of computer software exported out of India being brought into India in convertible foreign exchange within the period stipulated in the provisions u/s 10A(3) of the Act. As rightly submitted on behalf of the assesses, deduction u/s. 10/10AA of the Act cannot be totally denied. The fact that the assessee has exported computer software out of India and brought convertible foreign exchange into the country is not disputed. The quantum has to be arrived at on the deduction which the assessee is entitled to has to be allowed.*

3.87 *We are therefore of the view that it would be just and appropriate to set aside the order of the DRP and remand the issue to the DRP for fresh consideration and direct the DRP to examine the claim of the assessee on the basis of evidence that the assessee may lead to prove the receipt of sale proceeds of computer software exported out of India being brought into India in convertible foreign exchange. The DRP will be at liberty to examine as to whether the convertible foreign exchange was brought Into India and that they represent consideration received for export of computer software. The AO in the set aside proceedings before the DRP will be at liberty to rebut such claim of the assessee including the claim that the foreign exchange brought in does not represent sale proceeds of computer software exported out of India. As mentioned in para 3.56 of this order, the assessee should produce before the AO all documents referred to in the letter dated 12.07.2012 of Deutsche Bank to RBI. We give liberty to the assesses to file such documents as may be necessary to establish its claim for deduction u/s. 10A/10AA of the Act Thus, ground Nos. 3 1 to 3.4 raised by the assessee are treated as allowed for statistical purposes"*

G.1. Assessee is thus directed to file all relevant documents to substantiate the exports proceeds, brought into India,

claimed as deduction under section 10AA. Assessee is directed to file all requisite information, as far as possible, mentioned in paragraph D..6.9.4, hereinabove. Ld.AO is directed to verify these documents and allow deduction to assessee relatable to sale proceeds from export of software development services.

Accordingly this ground raised by assessee stands allowed for statistical purposes as indicated hereinabove.

(G) **UNRELIABLE NATURE OF UNIT WISE PROFIT AND LOSS ACCOUNT:-**

This issue has also been addressed by the co-ordinate bench in AY 2013-14 as under:-

E.4. We have perused submissions advanced by both sides and observations of authorities below on record.

E.4.1. In this connection, we refer to and rely upon findings of coordinate bench of this *(Tribunal)* in assessee's own case for assessment year 2008-09 (supra) wherein, *Hon'ble Bench* after analysing various rulings of *Hon'ble Supreme Court* in case of *CWT vs Kripashankar Dayashankar Worah* reported in *(1971) 81 ITR 763*, *Philip John Plasket Thomas vs CIT* reported in *(1963) 49 ITR 97* and *Smt. Tarulata Shyamvs CIT* reported in *(1977) 108 ITR 345, Hon'ble Karnataka High Court* in case *of CIT vs Fusion Software Engineering Pvt. Ltd.,* reported in *(2012) 18 Taxmann.com 57* observed as under:

> *"3.77. Apart from the above, we find that that this issue has already been concluded by ITAT Bangalore bench in assessee's own case for assessment year 2000-01 in ITA No. 3464/Bang/2004 by order dated 31/10/2007. One of the issues dealt with by the Tribunal in the aforesaid decision was as to whether there was requirement of assessee in maintaining separate books of account with regard to each STPI unit. This Tribunal after elaborate discussion on the issue held that, there*

was no requirement of maintenance accepted separate books of account for various STPI units. At page 23 of Tribunal's order revenue has accepted the identification of sales turnover of various STPI unit was possible. This decision of Tribunal has been followed in assessee's own case for assessment year 2002-03 in ITA No. 1151/B Angel/2009 by order dated 24/06/2011.

.....

3.81 . Another basis given by the AO in para 3.4 of his order is that there is no system of identifying expenses and revenues and that books of accounts are written without primary documents being in existence. On the various books of account maintained by the assessee, we have already elaborated as to how the assessee has explained before the AO its method of maintaining books of account and arriving at the profits of various STP units. The order of assessment as well as the order of the DRP is absolutely silent on the plea put forth by assessee in this regard. We have to therefore proceed on the basis that the revenue has found no fault whatsoever with the various system of accounting maintained by the assessee."

E.4.2. For year under consideration, Ld.AO at page 36 of impugned order accepts that, assessee maintained books of accounts in the same manner as in past.

We note that Ld.AO sought to rely on statements of CA Sh.J.Majmudar and Sh.T.Ravindra even for asst. year 2008-09. This *Tribunal* while considering the objection for assessment year 2008-09 (supra) observed as under:

> *"3.82. The AO has also sought to rely on statement of Mr T Ravindra, partner of Krishnaswamy and Co., Who have given reported in form 50 6F certifying the claim of the assessee for deduction under section 10 A of the act. We observe that the deduction under section 10A of the act is dependent on fulfilment of conditions laid down in that section, the statement of auditor cannot alter the claim for deduction under section 10A of the act, if otherwise the conditions laid down in the said section are fulfilled by an assessee. Besides the above, the CA has given a detailed explanation as to how profitability of various STP units have been arrived at. The AO has also referred to the fact that audited financial statements of statutory auditors was relied upon by Krishnaswamy and Co., While certifying form 53F of the act. We have already explained the various*

documents filed by assessee before the AO on the method of maintaining books of account. There is neither a discussion not errors pointed out by the AO or the DRP on the claim of the assessee that the documents maintained by it sufficiently enables determination of profits of each of the STPI units"

E.4.3. Admittedly, facts and circumstances for year under consideration is identical and similar to assessment year 2008-09. We refer to page 835 of paper book volume 3, wherein, assessee filed unit wise profit and loss account and cost identification/ allocation methodology between exports and domestic operation. It is apparent that Hon'ble Bench for asst. year 2008-09 also noted that, view taken by coordinate bench of this *Tribunal* for assessment year 2000-01 and 2002-03, has not been disputed by revenue. Further, it is also a matter of fact, that, authorities below have not disputed sale proceeds claimed by assessee against each SEZ units, and therefore, we have to proceed on the footing that bifurcations of profits of various SEZ units as given by assessee are correct.

E.4.4. In view of the above, respectfully following observations by this Tribunal in asst. year 2008-09, we are of the view that there is no requirement for maintaining separate books of account for claiming deduction under section 10A/10AA of the Act, and books of account maintained by assessee is sufficient to enable computation of profits of various SEZ units. Further the circular issued by CBDT dated 17/01/2013 (supra) also clarifies that there is no requirement in law to maintain separate books of account and the same cannot be insisted upon.

We therefore do not find any merit in this objection raised by Ld.AO.

(H) **NON-SATISFACTORY REPLY RECEIVED FROM VARIOUS COUNTRIES:-**

This is new issue during the year under consideration. We notice that the Ld DRP has also not addressed this objection of the AO. Accordingly, we restore this objection to the file of Ld DRP.

5.6 Accordingly, following the order passed by the Tribunal in AY 2013-14 and in accordance with the discussions made supra, we restore three issues, viz.,

(a) Approval for foreign bank account

(b) Nature of receipt of proceeds

(c) Enquiries made through CBDT on genuineness of transactions to the file of Ld DRP, so that all of them may be examined together. Accordingly, we reject all other objections raised by the AO. After examining the above said three issues, the Ld DRP may issue appropriate directions to the AO on the issue of allowing deduction u/s 10A/10AA of the Act.

6.0 Ground No.4 urged by the assessee relates to the disallowance of expenses to the tune of Rs.400.15 crores u/s 37(1) of the Act. Following expenses have been disallowed by the assessee voluntarily u/s 40(a)(ia) of the Act for non-deduction of tax at source:-

S. No.	Particulars of Payment	Amount disallowed u/s 40(a)
1	Professional fees (sec. 194J)	14,61,90,726
2	Amount payable to contractors/sub-contractors (40(a)(ia))	19,73,13,108
3	Commission (40(a)(ia))	24,13,57,581
4	Rent 40(a)(ia))	39,51,02,273
5	Foreign (sec. 195)(40(a)(i))	53,72,36,606
6	Others (40(a)(ia))	248,43,21,418
	TOTAL	**400,15,21,712**

During the course of assessment proceedings, the AO asked the assessee to furnish specific details of all the expenses to prove the genuineness and business expediency of incurring those expenses. However, the assessee has failed to furnish the relevant ledger copies, party wise ledger account, subsequent reversal/evidence for payment/deduction of tax and remitting the same to the Government. Accordingly, even though the assessee had disallowed the above said expenses u/s 40(a)(i)/ 40(a)(ia) of the Act, the AO held that these expenses are disallowed u/s 37(1) of the Act as well.

6.1 Before Ld DRP, the assessee submitted that the above said claim represents Provision for expenses made as on 31.3.2010 as per generally accepted accounting principles and policies followed by the company. It was also submitted that the provision is made by the company on the basis of its knowledge of expenses that would have been incurred by it, for which invoices have not been received. Since the provision for expenses are not supported by the evidences, the Ld DRP confirmed the disallowance.

6.2 We heard the parties on this issue and perused the record. We noticed that the assessee has voluntarily disallowed the above said expenses u/s 40(a)(i) / 40(a)(ia) of the Act for non-deduction of tax at source. The AO has disallowed the expenses alternatively u/s 37(1) of the Act for non-production of details relating to these expenses. From the submissions made before Ld DRP, we notice that the above said expenses represent year end provisions made by the assessee company as on 31.3.2010.

6.3 There is no dispute with regard to the fact that the assessee is following “mercantile system of accounting”. Under the mercantile system of accounting and also as per the requirement of AS-29 issued by the Institute of Chartered Accountants of India (ICAI), a provision for expenses should be made when:-

a. an enterprise has a present obligation as a result of past event.

b. it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation, and

c. a reliable estimate can be made of the amount of obligation.

Hence it is imperative for a concern, following mercantile system of accounting, to provide for all known expenses and losses as at the year end, even if the relevant bills have not been received. As per standard accounting practices, not providing for known expenses/losses would, in fact, distort the operating results of the business concern and it would not reflect true and fair profit of the year. It is the case of the assessee that it has provided for expenses for which services have been availed by it, meaning thereby, the liability to pay for those expenses has already accrued to the assessee. Accordingly, there should not be any reason to disallow the expenses u/s 37(1) of the Act. However, as noticed earlier, the AO has disallowed the expenses for non-furnishing of details that were called for by the AO. Accordingly, in the interest of natural justice, we are of the view that the assessee may be provided with one more opportunity to furnish the details that were called for by the AO. Accordingly, we restore this issue to the file of the AO for examining it afresh. We also direct the assessee to furnish the details that were called for by the AO.

7.0 Ground no.5 relates to the disallowance of Rs.371.22 crores and Rs.278.68 crores confirmed by Ld DRP.

7.1 The facts relating to the disallowance of Rs.371.22 crores are stated in brief. The AO noticed that the assessee has paid a sum of Rs.1417.60 crores to its Associated Enterprises, which included payments made for purchase of finished goods, purchase of capital goods – tangible property, payment of royalty and payments for availing services. The AO noticed that the assessee did not deduct TDS on payments of Rs.530.96 crores, out of

which, the assessee had voluntarily disallowed a sum of Rs.53.72 crores while computing total income. Hence the AO proposed disallowance of Rs.477.24 crores in the draft assessment order. The AO also proposed following further disallowances:-

Payments made to IBM, Singapore	-	Rs.278.69 crores
Payments made to IBM, Philippines	-	Rs. 9.45 crores
Payments made to IBM Corporation	-	Rs. 87.65 crores

Before Ld DRP, the assessee demonstrated that a sum of Rs.96.56 crores has been reversed out of the above said amount of Rs.477.24 crores. It was further demonstrated that the payment of Rs.9.45 crores made to IBM Phillipines has already been included in the above said sum of Rs.477.24 crores. Accordingly, the Ld DRP directed the AO to exclude both the above said amounts of Rs.96.56 crores and Rs.9.45 crores. Accordingly, it confirmed the disallowance to the extent of Rs.371.23 crores.

7.2 The Ld DRP noticed that the payment of Rs.278.69 crores made to IBM, Singapore is in the nature of 'royalty' as per the decision rendered by Hon'ble Karnataka High Court in the case of Samsung & Others (ITA No.2808/2005). Accordingly, the Ld DRP confirmed the disallowance of Rs.278.69 crores.

7.3 We heard the parties on this issue and perused the record. The ld A.R submitted that this issue has been restored back to the file of Ld DRP by the Tribunal in AY 2013-14 with the following observations:-

> **"8.7.6.** Ld. Counsel, however submitted that voluminous details were submitted by assessee, which has not been considered by Ld.AO, while passing impugned order. We have perused observations of this *Tribunal* for *assessment year 2008-09* wherein, *Hon'ble Bench* remanded the issue to DRP for fresh consideration and decision.

> Respectfully, following the same, we remand the issue to DRP with similar direction to consider the claim of assessee in light of evidences filed, after affording opportunity of being heard in accordance with law. Assessee is directed to file invoices raised in support of payments made by assessee to relevant parties. Assessee is at liberty to file all relevant details/evidences to substantiate its claim. DRP is then directed to verify nature of payment in the light of invoices filed by assessee. DRP is also directed to analyse payment made to non-residents on which tax has not been deducted at source in light of *Explanation 2* to *section 195*. DRP shall grant proper opportunity of being heard to assessee."

The Ld A.R further submitted that the amount of Rs.278.68 crores paid to IBM Singapore is towards purchase of shrink wrapped software and it has been held by Hon'ble Supreme Court in the assessee's own case reported as Engineering Analysis Centre of Excellence (2021)(432 ITR 471) that such kind of payments do not fall under the category of "Royalty" under India-Singapore DTAA.

7.4 We heard ld D.R and perused the record. The Hon'ble Supreme Court has held in the assessee's own case (referred supra) that the payments made for purchase of shrink wrapped software are not royalty within the meaning of India – Singapore DTAA. We noticed that the Ld DRP has confirmed the disallowance by following the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics (supra), which has been overruled by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (supra). Accordingly, we direct the AO to delete the disallowance of Rs.278.68 crores.

7.5 With regard to the remaining disallowance of Rs.371.23 crores, following the decision rendered by the co-ordinate bench in AY 2013-14, we restore the same to the file of Ld DRP with similar directions.

8.0Ground No.6 relates to the disallowance of Rs.41.12 lakhs relating to non-reconciliation of Professional charges narrated as Audit Journal Vouchers. The assessee claimed expenses towards Professional and Consultancy Charges to the tune of Rs.331.98 crores. From the details furnished, the AO noticed that a sum of Rs.184.22 crores was debited to Professional charges with the narration "Reclass from General Expenses" and a sum of Rs.23.99 lakhs was debited with the narration "Service tax Credit adjustment". Since the assessee company did not substantiate the above said claim with specific details, the AO proposed disallowance of both the above said amounts.

8.1 Before Ld DRP, the assessee submitted that the sum of Rs.184.22 crores represented expenses transferred from other heads, i.e., the expenses were originally booked under other heads and later transferred to "Professional and Consultancy charges" on the advice of auditors. The Ld DRP verified the claim of the assessee on test check basis and found that a sum of Rs.152.49 crores are re-classified entries, which are also subjected to TDS. It also noticed that a sum of Rs.7.68 crores and Rs.11.50 crores paid to IBM Philippines were not Subjected to TDS and both the sums have already been disallowed. The Ld DRP also noticed that a further sum of Rs.12.13 crores is in the nature of reversal of entries. In effect, the assessee could not reconcile a sum of Rs.41,12,780/-. Accordingly, the ld DRP confirmed the same.

8.2 The Ld A.R submitted that the AO has not made similar kind of disallowances in other years. However, we notice that the assessee has claimed a sum of Rs.184.22 crores as Reclassification of expenses, but it could not fully furnished details reconciling the above said amount. We notice that the ld DRP has granted relief to the extent of details furnished and confirmed disallowance of Rs.41,12,780/- for want of details. Before us, the assessee could not furnish the details for the above said amount.

Accordingly, we have no other option, but to confirm the disallowance of Rs.41,12,780/-.

9.0 Ground No.7 relates to the disallowance of depreciation claimed on leased assets. The AO disallowed claim of depreciation of Rs.132.11 crores claimed on leased assets following the view taken by him in AY 2009-10. The Ld DRP confirmed the view taken by the AO. However, it accepted the alternative plea of the assessee. The relevant observations made by Ld DRP are extracted below:-

> "Having considered the submission, it is noticed by us that the disallowance of depreciation is supported by the judicial pronouncements on which the reliance has been placed by the assessing officer and therefore, we do not find any infirmity in regard to disallowance of depreciation, however, in regard to the alternative claim of theassessee that if the depreciation is disallowed, then lease rental should be reduced from the income, the Assessing officer on page 80 of the draft assessment order has himself admitted the claim by observing that "once the company furnishes the details of lease rentals on those assets reflected in the depreciation schedule, the same can be reduced." Accordingly, we direct the Assessing officer to allow the alternative claimif the required details to substantiate the claim are submitted within 15 days of receipt of this order by the assessee, subject to the condition that the interest portion in the lease rental has to be assessed as income. The objection is disposed accordingly."

9.1 We notice that this issue has been restored back to the file of AO with the direction to follow the decision rendered by Hon'ble Supreme Court in the case of ICDS Ltd (2013)(29 Taxmann.com 129)(SC) . Following the same, we restore this issue to the file of AO with similar directions.

10.0 Ground No.8 relates to the disallowance of foreign exchange loss of Rs.11.84 crores. The assessee has debited above said amount to the Profit and loss account and claimed the same as deduction. The assessee had revalued all its monetary foreign currency liabilities / assets as at the year

end, which had resulted in a gain of Rs.1.27 crores and loss of Rs.13.11 crores, resulting in net loss of Rs.11.84 crores. The AO asked the assessee to substantiate its claim that the same is revenue in nature. Since the assessee did not furnish the details, the AO disallowed the above said claim.

10.1 The Ld DRP confirmed the disallowance with the following observations:-

> "Having considered the submission, it is noticed by us that the assessee before us submitted that the request for proof/item-wise details to justify the loss on foreign exchange debited to the profit and loss account is absurd. In our view, onus is on the assessee to produce the evidences to the satisfaction of the assessing officer, in regard to any deduction or expenditure claimed from the income, as the assessee failed to furnish such evidences to the satisfaction of the assessing officer, we do not find any infirmity in the disallowance made, the objection is accordingly rejected."

10.2 The Ld A.R submitted that the assessee has furnished the details of foreign exchange loss at pages 1028, 1029, 1705 to 1711 of Paper book 4. However, it is seen that the said explanations are mainly legal submissions and explanations.

10.3 We heard ld D.R and perused the record. We notice that the AO had requested the assessee to furnish:-

(a) break-up details of item wise loss/gain in respect of each of the foreign assets/liabilities.

(b) the details to show that all the foreign assets/liabilities are revenue assets/liabilities.

There should not be any quarrel that the loss arising on account of revaluation of the foreign assets/liabilities in revenue field is allowable as deduction as per the decision rendered by Hon'ble Supreme Court in the case of Woodward Governor case. The courts have also held that the loss

arising on revaluation of forward contracts, whose underlying assets/liabilities are revenue in nature, is also allowable as deduction. However, unless the assessee submits relevant details before the AO, it will not be possible for the AO to decide about the allowability or otherwise of the claim. We notice that the assessee has submitted the details in a broad manner and further submitted the explanations/legal submissions. As rightly observed by Ld DRP, it is the responsibility of the assessee to furnish the details in support of its claim for deduction of expenses. If the assessee fails in its responsibility, then the tax authorities do not have any other option, but to disallow the claim. In the instant case, admittedly, the assessee has not furnished the required details. Accordingly, in the interest of natural justice, we are of the view that the assessee may be provided with an opportunity to furnish the relevant details before the AO. Accordingly, this issue is restored to the file of AO, who may examine this issue afresh. If the assessee fails to furnish the details to the satisfaction of the AO, then the AO may disallow the claim.

11.0 Ground Nos. 9 to 12 relate to the addition made on account of Transfer Pricing adjustment. At the time of hearing, the Ld A.R submitted that the assessee is withdrawing these grounds, since the assessee has entered into APA agreement with CBDT. Accordingly, we dismiss these grounds as withdrawn.

12.0 Ground no.13 relates to the claim of short credit of TDS. We restore this issue to the file of AO for examining the claim of the assessee.

13.0 Ground no.14 to 16 are either general or consequential. Hence they do not require any specific adjudication.

REVENUE'S APPEAL FOR AY 2010-11

14. We shall now take up the appeal filed by the revenue for AY 2010-11, wherein relief granted by Ld DRP in respect of following two issues are agitated:-

(a) Deletion of disallowance of payments made to IBM Phillipines u/s 40(a)(ia) of the Act.

(b) The relief granted in respect of Transfer pricing adjustment.

With regard to the issue relating to transfer pricing adjustment, we noticed earlier that the assessee has settled the issue under APA entered with CBDT. Accordingly, the grounds urged by the revenue in respect of Transfer pricing issue shall become infructuous and accordingly, we dismiss them.

15. With regard to the relief granted in respect of payment of Rs.9,45,16,809/- made to M/s IBM Philippines treating the same as "Fee for technical services", we notice that assessee has submitted before Ld DRP that the payments were made to the above said AE towards rendering payroll related services and the ITAT, vide its order passed in IT(IT)A Nos. 489 to 498/Bang/2013 for AYs 2007-08 to 2011-12 has quashed the proceedings initiated u/s 201 holding that the payments made to IBM Philippines is not liable to TDS.Accordingly, following the above said decision rendered by ITAT in the assessee's own case, has directed the AO to delete the disallowance.

15.1 The contention of the revenue in its ground of appeal is that the above said decision rendered by the ITAT has not reached finality. However, since the Ld DRP has followed the decision rendered by the Tribunal in respect of very same issue in the proceeding initiated u/s 201 of the Act and held that the payments made to IBM Philippines is not liable to TDS in the assessee's own case for the current year, we have no other option but to confirm the

decision rendered by Ld DRP. Accordingly, we dismiss this ground of revenue.

ASSESSEE'S APPEAL FOR AY 2011-12

16. We shall now take up the appeal filed by the assessee for AY 2011-12. Ground No.1 is general in nature. The Ground no.2 is not pressed by Ld A.R.

17. Ground no.3 relates to the disallowance of deduction claimed u/s 10A and 10AA of the Act. Following the decision rendered by us in the preceding paragraph in AY 2010-11, we restore this issue to the file of Ld DRP on the following three issues:-

(a) Approval for foreign bank account

(b) Nature of receipt of proceeds

(c) Enquiries made through CBDT on genuineness of transactions

18. Ground No.4 relates to the addition relating to Audit journal vouchers amounting to Rs.5,09,655/-. For the reasons discussed in AY 2010-11 in the preceding paragraphs, we confirm this addition confirmed by Ld DRP.

19. Ground no.5 relates to the disallowance of payments made to AE. Following the decision rendered by us in AY 2010-11, we direct the AO to delete the disallowance relating to purchase of shrink wrapped software. The remaining disallowance is restored to the file of Ld DRP with similar directions.

20. Ground no.6 relates to the disallowance of 3.61 crores, being payment made to IBM Corporation. During the year relevant to AY 2011-12, the

assessee had paid a sum of Rs.110.30 crores to IBM Corporation as sub-contract payments. The AO asked the assessee to furnish details of tax deducted at source from this payment. The AO noticed that the assessee had not deducted tax at source from similar payments made in AY 2009-10. Since the assessee did not furnish details, the AO proposed disallowance of Rs.110.30 crores. The Ld DRP granted relief to the extent of Rs.106.68 crores. Accordingly, the AO made disallowance of balance amount of Rs.3.61 crores.

20.1 The Ld A.R submitted that the AO has erroneously taken the view that the amount of Rs.3.61 crores has been made to GS Technical Inc., USA. He submitted that this amount was also paid to IBM Corporation only. However, the disallowance has been made by the AO on the reasoning that the assessee has not proved that the tax was deducted at source from the above said payment. Before us also, the assessee did not furnish any details in this regard. Accordingly, we confirm the disallowance made by the AO.

21. Ground No.7 relates to the disallowance of depreciation on leased assets. In the earlier year, we have restored this issue to the file of AO with the direction to follow the decision rendered by Hon'ble Supreme Court in the case of ICDS Ltd (2013)(29 Taxmann.com 129)(SC) . Following the same, we restore this issue to the file of AO with similar directions.

22. Ground no.8 relates to the disallowance of foreign exchange loss. We have restored this issue to the file of AO in AY 2010-11 in the earlier paragraphs with certain directions. Following the same, we restore this issue in this year also to the file of AO with similar directions.

23. Ground No.9 to 12 relate to the addition relating to Transfer pricing adjustment. At the time of hearing, the Ld A.R submitted that the assessee is withdrawing these grounds, since the assessee has entered into APA agreement with CBDT. Accordingly, we dismiss these grounds as withdrawn.

24. Ground no.13 relates to the disallowance made u/s 14A of the Act. The AO noticed that the assessee has made huge investments in shares, but did not make any disallowance u/s 14A of the Act. When enquired, the assessee said that it has not earned any exempt income during this year and hence no disallowance is called for. The AO did not accept the same and accordingly computed disallowance of Rs.3,00,54,490/- as per Rule 8D of IT Rules.

24.1 We heard the parties on this issue and perused the record. The co-ordinate bench has deleted identical disallowance made in AY 2013-14 on noticing that the assessee did not earn any exempt income, by following the decision rendered by Hon'ble Delhi High Court in the case of Cheminvest Ltd vs. CIT (317 ITR 33)(Delhi). Identical view has been expressed by Hon'ble Delhi High Court in the case of PCIT vs. IL & FS Energy Development Company Ltd (250 Taxman 0174)(Delhi). Since the assessee did not earn any exempt income during the year relevant to AY 2011-12, no disallowance u/s 14A can be made. Accordingly, we direct the AO to delete the disallowance made by him u/s 14A of the Act.

25. Ground no.14 to 16 are general in nature and do not require adjudication.

26. In the result, the appeals filed by the assessee for AY 2010-11 and 2011-12 are treated as partly allowed. The appeal filed by the revenue for AY 2010-11 is dismissed.

Order pronounced in the open court on 18.07.2022.

Sd/-	Sd/-
(N.V. VASUDEVAN)	**(B.R.BASKARAN)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Place : Bangalore

Date : 18.07.2022

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.