

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI**

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 6219/Mum/2010

(Assessment Year 2005-06)

The ACIT
Ward 10(2),
Room no.432, 4th Floor,
Aayakar Bhavan, M.K. Marg,
Mumbai-400 020

Vs.

M/s Geometric Software
Solutions Company Ltd.
[Now merged with HCL
Technologies Limited]
806, Sidharth, 96 nehru
Place, New Delhi 19

(Appellant)**(Respondent)****PAN No. AABCG 0066 A****ITA No. 5975/Mum/2010**

(Assessment Year 2005-06)

CO No. 157/Mum/2011

(Arising in ITA no.6219/Mum/2010 for A.Y. 2005-06)

M/s Geometric Software
Solutions Company Ltd.
(Now Gemetric Ltd.) [Now
Merged with HCL
Technologies Limited]
806, Sidharth, 96 nehru
Place, New Delhi 19

Vs.

The ACIT
Ward 10(2),
Room no.432, 4th Floor,
Aayakar Bhavan, M.K. Marg,
Mumbai-400 020

(Cross objector)**(Respondent)**

Assessee by : Shri Porus F. Kaka &
Shri Manish Kanth, ARs'
Revenue by : Shri Sumit Kumar, DR

Date of hearing: 21.07.2022
Date of pronouncement : 29.07.2022

ORDER**PER PRASHANT MAHARISHI, AM:**

01. These are the Cross appeals filed in case of Geometric Software Solutions Company Ltd. now merged with HCL Technologies Limited (the appellant/ assessee), filed by the assessee as well as the Asst. Commissioner of Income-tax, 10(2), Mumbai (the learned Assessing Officer) for A.Y. 2005-06, against the order of the Commissioner of Income-tax (Appeals)-15, Mumbai [the learned CIT (A)] dated 8th June, 2010.
02. ITA No. 5975/Mum/2010 is filed by the assessee and ITA No. 6219/Mum/2010 is filed by the learned Assessing Officer. Assessee has once again filed Cross Objection no. 157/Mum/2011 in ITA No. 157 /Mum/2011 for the same assessment year.
03. Assessee in ITA No. 5975/Mum/2010 has raised following grounds of appeal:-

"This Appeal is against the Order of the Commissioner of Income Tax (Appeals) - 15 Mumbai, and relates to the Assessment Year 2005-2006,

1) The learned Commissioner of Income Tax (Appeals) erred in holding that in computing the deduction under Section 10A of the Act the loss of one eligible unit was required to be set off against the profit of the other eligible unit, and that the said loss could not be set off against the income computed under the head "Profits & Gains of Business or Profession".



2) *The learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in taxing the lease rent received for use of office space aggregating to Rs.3,17,26,468/- under the head "Income from House Property Having regard to the facts and circumstances of the case, the Appellant submits that the said income requires to be taxed under the head "Profits & Gains of Business or Profession":*

3) *The learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in disallowing depreciation claimed by the Appellant in respect of the said property amounting to Rs.2,06,09,324/-. Having regard to the facts and circumstances of the case, the Appellant submits that the Assessing Officer be directed to allow the depreciation as claimed.*

4) *Without prejudice to Ground No.2 above, the learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in taxing the amount received as "Income from House Property" instead of under the head "Income from Other Sources" Having regard to the facts of the case, the Appellant submits that the Assessing Officer be directed to tax the said amount under the head "Income from Other Sources"*

5) *The learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in computing the disallowance*

under Section 14A of the Act aggregating to Rs.3,82,733/-, in accordance with sub-clause (iii) of clause (2) of Rule 8D. Having regard to the facts and circumstances of the case, the Appellant submits that the unwarranted and arbitrary disallowance be deleted.

6) Without prejudice to the Appellant's contention that no expenditure is allocable to the earning of exempt dividend income and in any event, the Appellant submits that the notional disallowance computed at Rs.3,82,733/- is arbitrary and grossly excessive and the same requires to be reduced substantially.

7) The learned Commissioner of Income Tax (Appeals) erred in relying on Rule 8D for computing the disallowance under Section 14A of the Act, without the Assessing Officer having recorded any satisfaction or finding that expenses had been incurred by the Appellant for earning of dividend income

8) The learned Commissioner of Income Tax (Appeals) erred in holding that Rule 8D read with Sections 14A(2) and 14A(3) of the Act could be applied retrospectively to the Assessment Year 2005-06.

9) The learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in allocating notional expenditure aggregating to Rs.3,82,733/- towards the earning

of exempt dividend income and thereafter reducing only the net dividend income, while computing book profits u/s. 115JB of the Act.

10) The learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in relying on the provisions of Section 14A of the Act and Rule 8D of the Rules while computing the amount liable for being added back to the book profits to be computed under section 115JB of the Act.”

04. The learned assessing officer has raised following grounds of appeal:-

1. On the facts and circumstances of the case and are as well as in Law, the learned CIT (A) has erred in holding that the operating margin earned by the assessee company for its international transaction is higher than the arithmetic mean of margins of comparable companies , the assessee company is considered to have earned an arm’s-length operating margin in respect of the transactions with its associated enterprises
2. on the facts and circumstances of the case as well as in Law, the learned CIT (A) has erred in deciding that as the addition was made on account of transfer pricing adjustments, the other grounds like calculation of operating margins, benefit of deduction of +_5% Under proviso to Section 92C (2) et cetera, becomes of

academic interest only and do not require any adjudication.”

05. Brief facts of the case show that Assessee Company is engaged in software development. Various undertakings of the assessee have been recognized under software technologies Park scheme and unit no. 2 situated at Pune and Unit no.3 situated at Bangalore are eligible to claim benefit under Section 10A of the Income-tax Act, 1961 (the Act). Assessee filed its return of income on 31st October, 2005 at ₹93,92,66,195/-. The assessment order under Section 143(3) of the Act was passed on 16th December, 2008 at a total income of ₹21,97,67,392/-. Book profit of the assessee was determined at ₹17,78,16,217/-.

06. Ld AO made following additions/ disallowances :-

a. In the normal computation of total income, the claim of the deduction under Section 10A of the Act was examined. During the course of assessment proceedings, assessee has also raised additional claim for deduction under Section 10A of the Act. The learned Assessing Officer re-computed the deduction and allowed the net deduction of ₹3,51,39,439/- against the claim of the assessee of ₹4,57,53,077/-. Learned assessing officer excluded certain items from export turnover for computing the deduction u/s 10 A of the act. The learned assessing officer for the purpose of computation u/s 10 A

reduced losses of unit III against the eligible profit of unit II.

- b. Assessee treated the lease rental income as business income whereas the learned Assessing Officer treated it as rental income. thus, lease rent of ₹ 31,726,468/- was treated as rental income and assessee was granted statutory deduction at the rate of 30% of rental income amounting to ₹ 9,517,940 – and the balance amount of Rs 2,22,08,528 – is taxed Under the income from house property.
- c. learned Assessing Officer asked the assessee about disallowance under Section 14A of the Act as assessee did not disallow any sum , the learned Assessing Officer computed disallowance u/s 14 A of The Act of Rs 3,82,733/- as per Rule 8D of the Income Tax Rules, 1962 (the Rules). Disallowance under Section 14A of the Act of ₹3,82,733/- was also added while computing profit u/s 115 JB of the Act.
- d. The adjustment on account of Arm's Length Price of international transaction of ₹5,84,12,442/- was also made. Assessee is providing Solution in the domain of engineering and technology services. It provides software technology and development services in the area of CAD CAM CAE and PDM. The assessee entered into three types of international transactions. Assessee paid ₹5,01,50,314/- for availing of marketing support services and rendered on site services of ₹3,63,91,932/-and also rendered support

services of ₹6,83,41,998/-. These transactions were benchmarked by the assessee by adopting the Transactional Net Margin Method (TNMM) as the most appropriate method taking net margin as profit level indicator. Assessee selected 28 comparables, whose margin was 9.76% where as assessee's margin was 20.27% and therefore, according to assessee the international transactions are at Arm's Length Price. Reference was made to The Additional Commissioner Of Income Tax, Transfer Pricing - 1 (3) Mumbai (the learned TPO). The learned TPO found that assessee has taken a multiple year data and for other reasons he rejected the comparability analysis. Thereafter he carried out fresh search, selected 19 comparables, computed their profit level indicator of OP/TC of 27.70%, compared it with the margins of the assessee at 20.34 percentages and thereafter proposed an adjustment of ₹ 58,412,442 as arm's-length price of the services rendered abroad. This was included as addition by the learned AO.

07. This assessment order was challenged before the learned CIT (A), who partly allowed the appeal of the assessee. the learned CIT (A)
 - a. decided against the assessee with respect to the set off of losses of the eligible unit for deduction under Section 10A of the Act against the profit of non-

eligible units for deduction under Section 10A of the Act.

- b. With respect to the taxability of the lease rent Under the head income from house property or business income, he followed his own decision for assessment year 2004 - 05 and confirmed the action of the learned assessing officer of charging it Under the head income from house property.
- c. On the issue of disallowance u/s 14 A of the act, he confirmed the action of the learned assessing officer by following the decision of the coordinate bench in case of Daga capital management Ltd in 117 ITD 169
- d. he also confirmed the addition of the above sum profit u/s 115JB of the act.
- e. On the issue of the transfer pricing adjustment, the learned CIT - A considered the various arguments of the assessee with respect to inclusion/exclusion of certain comparables. Finally, the learned CIT - A agreed for 27 comparable is whose arithmetic mean was 18.30% whereas the margin of assessee was 20.34%, he held that operating margin earned by the assessee for its international transaction is higher than the arithmetic mean of the margin of comparable companies even on the basis of the fresh search undertaken by the TPO. He further held that the appellant is enjoying 10 A holiday benefits makes



it a very low risk case for transfer pricing perspective. Accordingly, he deleted the addition.

08. Therefore, both the parties aggrieved with the above order of the learned CIT – A are in appeal before us. Assessee is contesting corporate tax addition confirmed whereas the revenue is contesting transfer pricing addition deleted by the learned CIT – A.
09. We first take up the appeal of the learned AO. The AO is aggrieved by the findings of the learned CIT – A that operating margin earned by the assessee company is higher than the arithmetic mean of the margins of the comparable company and therefore the international transactions are at arm's-length.
010. The learned DR supported the order of the learned assessing officer/transfer pricing officer whereas the learned authorised representative submitted that learned AO does not have any grievance with respect to the comparability analysis but has merely challenged the finding of the learned CIT – A.
011. We have carefully considered the rival contentions. In fact the learned CIT – A has categorically, after including/excluded certain comparables computed the arithmetic mean of the comparable companies at 18.30%, compared with the margin of the assessee as computed by the TPO at 20.34% and as the margin of the assessee is higher than the margin of the comparables, he deleted the transfer pricing adjustment. Here, the learned



assessing officer is not aggrieved with any of the comparables included or excluded by the learned CIT – A. Therefore, we do not find any merit in any of the 2 grounds raised by the learned assessing officer. Accordingly, those are dismissed.

012. In the result ITA number 6219/M/2010 filed by the learned assessing officer is dismissed

013. Now we come to the appeal of the assessee. Ground number 1 is against the order of the learned CIT – A in setting of the loss of one eligible unit against the profit of the other eligible unit. The learned Authorized Representative submitted that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Supreme Court in assessee's own case in case of CIT v. Yokogawa India Ltd. [2017] 77 taxmann.com 41, 391 ITR 274.

014. The learned Departmental Representative supported the orders of the lower authorities.

015. We have carefully considered the rival contentions and found that in assessee own case Hon'ble Supreme Court has held that from reading provisions of section 10A it is more than clear that the deductions contemplated therein is *qua* the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. Thus, it was held that though section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total



income of the eligible undertaking under Chapter IV and not at the stage of computation of the total income under Chapter VI.

016. In view of this, ground no.1 of the appeal of the assessee is allowed.
017. Ground no. 2 to 4 of the appeal is with respect to the treatment of lease rent received whether chargeable to tax as income from house property as per learned Assessing Officer or under the head business profit as per assessee.
018. The learned Authorized Representative submitted that this issue is covered against the assessee by the decision of co-ordinate Benches in assessee's own case in earlier years.
019. The learned Departmental Representative also confirmed the same.
020. We find that this issue is squarely covered against the assessee in assessee's own case for A.Y. 2002-03 to 2006-07 as per order dated 11 March 2015. The coordinate bench held as Under:-

"9. We have carefully perused the orders of the authorities below and the decision of the Hon'ble Supreme Court relied upon by the Ld. Counsel. At the outset, the decision of the Hon'ble Supreme Court relied upon by the Ld. Counsel is misplaced and do not match with the facts of the case in hand because in the case of the Hon'ble Supreme Court, the commercial asset of the business were temporarily



put out of use and let out to another person and on this temporary let out, the Hon'ble Supreme Court held that the yield of income by way of commercial asset is the profit of the business. However, in the case in hand, the let out was not temporary, more so the leased out premises were never got vacated but were sold subsequently therefore the decision of the Hon'ble Supreme Court do not support the case of the assessee. The assessee has also not submitted the copy of lease agreement neither before the Revenue authorities nor before us.

9.1. The Ld. Counsel for the assessee reiterated its alternative claim that the income should be taxed under the head 'Other Sources'. It is the say of the Ld. Counsel that the Ld. CIT(A) has himself contradicted his own evaluation of facts. On the one hand, the Ld. CIT(A) has observed that the provisions of Sec. 56(2)(iii) are applicable where the machinery, plant or furniture are let out alongwith building and letting out of building is inseparable from the letting out of said machinery, plant or furniture and on the other hand the Ld. CIT(A) observed that there was no machinery or plant which were let out alongwith the building. The Ld. Counsel further stated that the Ld. CIT(A) has dismissed the claim of depreciation holding that the items like UPS, Plant and machinery and furniture and fixtures are part of the business premises let out. The Ld. Counsel pleaded that the income should be taxed under the head "other



sources” and accordingly depreciation should be allowed.

10. The Departmental Representative strongly submitted that there is no contradiction in the findings of the Ld. CIT(A). The Ld. CIT(A) has very categorically stated that provisions of Sec. 56(2)(iii) are not applicable on the facts of the case.

11. We have given a thoughtful consideration to the submissions of the rival parties. The Hon’ble Supreme Court in the case of CIT Vs Shambu Investment Pvt. Ltd. 249 ITR 47 has held as under: “Where prime object of the assessee under the agreement was to let out the portion of the said property to various occupants by giving them additional right of using the furniture and fixtures and other common facilities for which rent was being paid month by month. Income derived from the said property is an income from property and should be assessed as such.”

12. Considering the facts of the case in the light of the decision of the Hon’ble Supreme Court in the case of Shambu Investment (supra), we do not find any reason to interfere with the findings of the Ld. CIT(A). Ground No. 1,2 & 3 are accordingly dismissed.”

021. Accordingly, respectfully following the decision of the co-ordinate Bench ground no. 2-4 of the appeal is dismissed.



022. Ground no. 5 to 8 of the appeal is with respect to the disallowance under Section 14A of the Act made by the AO in accordance with rule 8D of the income tax rules 1962.
023. The learned Authorized Representative submitted that during this year Rule 8D is not applicable but the learned Assessing Officer has made disallowance on that basis. He otherwise submitted that for earlier years the disallowance of ₹1 lacs out of administrative expenses was made.
024. The learned Departmental Representative supported the order of the lower authorities.
025. We have carefully considered the rival contentions and perused the orders of the lower authorities. The learned Assessing Officer has disallowed ₹2,23,000/- under Section 14A of the Act invoking the provisions of rule 8D which is not in existence for A.Y. 2005-06. Therefore, disallowance cannot be upheld, hence deleted. However, though the disallowance as per Rule 8D of the Rules is deleted but section 14A cannot be ignored. In earlier years for A.Y. 2002-03, 2004-05 and 2006-07 in assessee's own case the disallowance of ₹1 lacs upheld by the co-ordinate bench. Therefore, respectfully following the same, for this year also we uphold the disallowance of ₹1 lacs.
026. Ground nos. 9 to 10 are with respect to disallowance under Section 14A of the Act whether to be added while computing the book profit under Section 115JB of the Act as per Rule 8D of the Rules or not. The learned Assessing

Officer while computing the disallowance under Section 14A of the Act as per Rule 8D of the Rules in the normal computation of income has also, while working out the book profit, added identical amount to the book profit. Therefore, as per ground no. 9 and 10, assessee has agitated the same. On careful consideration, we find that there is no relation of disallowance under Section 14A of the Act while computing the book profit u/s 115 JB of the Act. The reason being that explanation (1) of Section 115JB of the Act adjustment is to be worked out as clause (f) where the amount of expenditure in relation to any exempt income other than specified income is required to be added to the book profit. Therefore, there is a separate mechanism provided for adjustment to the book profit of this kind of expenditure. Identical issue has been decided by Special bench in case of ACIT vs. Vireet Investment Pvt. Ltd. 58 ITR (T) 313. Therefore, we hold that the lower authorities are not correct in adding notional expenditure as computed u/s 14 A of the Act of ₹3, 82,733/- and increasing the book profit by that sum under Section 115JB of the Act. In the result, ground no. 9 and 10 are allowed.

027. Accordingly, appeal of the assessee is partly allowed.

028. Parties submitted that Cross objections filed by the assessee is merely supportive in nature, if appeal of revenue is decided in favour of the assessee, it becomes merely academic. Therefore, we dismiss the same.



029. In the result, Appeal of assessee is partly allowed, Appeal of The Id AO is dismissed, and CO of assessee is also dismissed as academic.

Order pronounced in the open court on 29.07.2022.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 29.07.2022

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai