IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBERA
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

Appeal No.	Appellant	Respondent	Assessment Year
ITA Nos. 1530 to 1532/Bang/2017	M/s. Infosys Ltd., Electronic City, Hosur Road, Bangalore – 560 100. **PAN: AAACI4798L**	The Assistant Commissioner of Income Tax, Circle – 3(1)(1), Bangalore.	2007-08, 2008-09 & 2009-10
IT(TP)A No. 532/Bang/2016			2011-12
IT(TP)A No. 449/Bang/2015	M/s. Infosys Ltd., Electronic City, Hosur Road, Bangalore – 560 100. **PAN: AAACI4798L**	The Deputy Commissioner of Income Tax, Circle – 3(1)((1), Bangalore.	2010-11
ITA No. 1557/Bang/2017	The Deputy Commissioner of Income Tax, Circle – 3(1)(1), Bangalore.	M/s. Infosys Ltd., Electronic City, Hosur Road, Bangalore – 560 100. **PAN: AAACI4798L**	2007-08
ITA No. 1849/Bang/2017			2008-09
ITA No. 1848/Bang/2017			2009-10
IT(TP)A No. 509/Bang/2015			2010-11
IT(TP)A No. 613/Bang/2016	The Assistant Commissioner of Income Tax, Circle – 3(1)(1), Bangalore.	M/s. Infosys Ltd., Electronic City, Hosur Road, Bangalore – 560 100. **PAN: AAACI4798L**	2011-12

Assessee by	:	Shri Padamchand Khincha, CA
Revenue by	:	Shri K.V. Arvind, Shri Dilip, Standing Counsels for Dept.

Date of Hearing	:	15-09-2022
Date of Pronouncement	:	30-11-2022

ORDER

PER BENCH

Present appeals are filed by assessee and revenue for A.Ys. 2007-08 to 2011-12.

2. It is submitted that following issues are common with A.Y. 2012-13 and facts and circumstances of these issues are also identical with that of A.Y. 2012-13. The Ld.DR did not object to the above submissions of the assessee. This *Tribunal* has considered the common issues in A.Y. 2012-13 in *IT(TP)A No. 718/Bang/2017* by order dated *28/11/2022* in great detail. The view taken therein are applied *mutatis mutandis* for the years under consideration. For the sake of convenience and to put in summary manner, we are only referring to the relevant paragraphs wherein these issues have be considered and decided in the order dated 28/11/2022.

A.Y.	**Ground No.**	**Issue Contested in the Appeals**	**Covered by Paras of A.Y. 2012-13**
2010-11 2011-12	15 to 18 2 to 6	Denial of deduction claimed under section 10AA totally amounting to 1472,93,64,010 in respect of 4 SEZ units viz., Chennai – Unit 1, Chandigarh, Mangalore - Unit 1 and Pune Unit 1. Losses of Trivendrum SEZ unit amounting to Rs. 1,52,56,742 was not set off against other taxable income Erred in concluding that the 5 SEZ units have been formed by splitting up and reconstitution of an already existing business Deduction claimed u/s 10AA amounting to Rs.1920,38,02,954 in respect of profits of 5 SEZ units was denied. Erred in denying deduction in respect of profit of Trivandrum SEZ Unit – 1 and not giving effect to Hon'ble DRP	**Ground nos. 2-5 Paras 6 to 6.15. Issue allowed in favour of assessee vide para 6.15**

		directions. Erred in concluding that 5 SEZ units have been formed by splitting up and reconstruction of an already existing business and hence these SEZ units are not eligible for deduction under section 10AA.	
2010-11 (Dept. appeal) 2011-12 (Dept. appeal)	2 2 to 4	Transfer pricing adjustment in respect of interest receivable from Infosys China Transfer pricing adjustment in respect of interest receivable from Infosys China and Infosys Brazil	**Ground nos. 6-9** **Paras 7-7.7** **Issue is dismissed against revenue by upholding 6% interest rate computed by assessee.**
2007-08 2008-09 2009-10 2010-11 2011-12	2 (Dept. appeal) 2 & 3 2 & 3 2 & 3 7 & 8	Disallowance under section 14A	**Ground nos. 10-13** **Paras 8-.8.8** **The issue is remanded to the Ld.AO to compute the disallowance as per the directions.** **Assessee's appeals partly allowed.** **Revenue's appeal dismissed.**
2007-08 2008-09 2009-10 2010-11 2011-12	2 & 3 4 & 5 4 & 5 4 to 6 9 to 11	Disallowance under section 40(a)(i) in respect of subscription charges paid / payable to M/s Forester Research and M/s Gartner No disallowance as there was no amount payable as on last day of previous year	**Ground no. 25** **Paras 12-12.8** **Allowed in favour of assessee.**
2007-08 2008-09 2009-10 2010-11 2011-12	7 to 10 9 to 12 9 to 12 7 to 9 12 to 14	Disallowance under section 40(a)(ia) / 40(a)(i) in respect of software expenses paid to residents and non residents No disallowance as there was no amount payable as on last	**Ground nos. 14-21** **Paras 9 – 9.1** **The issue is remanded to the Ld.AO to consider in accordance with the decision of *Hon'ble Supreme***

		day of previous year	***Court* in case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT* reported in *(2021) 432 ITR 471***
2007-08 2008-09 2009-10 2010-11 2011-12	4 to 6 6 to 8 6 to 8 3 (Dept. appeal) 6 (Dept. appeal)	Disallowance of software expenses as capital expenditure Without prejudice, depreciation to be allowed at 60% instead of 25% Without prejudice, depreciation should also be allowed in respect of software expenses of earlier years held as capital in nature.	**Ground nos. 22-24** **Paras 11-11.7** **The issue is remanded to the Ld.AO to verify the claim as per the decision of *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT* reported in *(2021) 432 ITR 471*. In the alternative claim if at all needs to be considered, the directions in para 11.6 has to be followed.** **Both revenue and assessee's appeals allowed for statistical purposes.**
2007-08 2008-09 2009-10 2010-11 2011-12 2011-12	11 13 13 10 15 16, 17	Disallowance of 'brand building expenditure' Percentage of total business revenues of 10A, 10AA(50%) and 10AA(100%) units wrongly computed by including other business income having no	**Ground no. 25** **Paras 12 – 12.8** **The issue is allowed in favour of assessee by following the decision of *Coordinate Bench of this Tribunal* in case of *Infosys BPO Ltd v DCIT in ITA No. 1367/Bang/2014 by order dated 27.09.2019***

		element of turnover and rounding off the said % to whole number instead of absolute % at two decimal points). Consequential wrong allocation of disallowances	**referred to in para 12.5**
2007-08 2008-09 2009-10 2010-11 2011-12	12 14 14 4 (Dept. Appeal) 7 (Dept. Appeal)	Disallowance of Commission paid to non resident agents	**Ground no. 26** **Paras 13.1 – 13.11** **The issue is remanded to the Ld.AO to verify the claims in accordance with the directions of the *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT* reported in *(2021) 432 ITR 471*.** **Both revenue and assessee's appeals allowed for statistical purposes.**
2007-08 2008-09 2009-10 2010-11 2011-12	(Dept appeal) 4 & 5 2 & 3 2 & 3 7 & 8 8 & 9	Communication expenses and expenses incurred in foreign currency reduced from export turnover but not reduced from total turnover while computing deduction under section 10A and 10AA	**Ground nos. 27-30** **Paras 14-14.3** **The issue is allowed in favour of assessee following the decision of *Hon'ble Supreme Court* in case of *CIT v HCL Technologies Ltd* reported in *(2018) 93 taxmann.com 33*.**
2007-08 2008-09 2009-10 2010-11	18 to 20 26 to 28 26 & 27 9 (Dept. appeal)	Foreign currency expenses should not be reduced from export turnover while computing deduction u/s 10A.	**Ground nos. 27-30** **Paras 14 to 14.3** **The issue is allowed in favour of assessee by**

2011-12	10 (Dept. appeal)		**following decision of *Hon'ble Supreme Court* in case of *CIT v HCL Technologies Ltd* reported in *(2018) 93 taxmann.com 33.***
2009-10 2010-11 2011-12	24 & 25 13 18	Reduction of interest income on GLES deposit from profits of 10A and 10AA	**Ground nos. 31-42 Paras 15 to 15.11 Dismissed as the same is not eligible for deduction u/s. 10A/AA.**
2007-08 2008-09 2009-10 2010-11 2011-12	23 & 24 33 & 34 31 & 32 14 19 to 21	Reduction of deduction under section 10AA in respect of pure onsite revenue and deputation of technical manpower on an estimated basis	**Ground nos. 41-42 Paras 16.1 to 16.11 Remanded to the Ld.AO to verify the documents filed by assessee and consider the claim in accordance with law.**
2011-12	13 (Dept. appeal)	Deduction under section 80JJAA	**Ground no. 43 Paras 17 to 17.7 Remanded to the Ld.AO to consider in accordance with principles laid down by *Coordinate Bench of this Tribunal* in case of *SAP Labs India Pvt. Ltd.* in *IT(TP)A Nos. 623, 566/Bang/2016* for *Assessment Year 2011-12 by order dated 29/11/2021***
2007-08 2008-09 2009-10 2010-11	29 35 35 Additional Gr. No 1 to 3	**<u>AY 2007-08 to 2011-12</u>**:- Erred in not allowing foreign tax credit under section 90 in respect of income eligible for deduction under section 10A and 10AA as per the decision of the Jurisdictional High Court	**Ground no. 54 Paras 23 to 23.6 The issue has been remanded to the Ld.AO to verify the FTC paid and to allow the claim**

2011-12 2011-12	25 & 26 23 & 24	in the case of Wipro Ltd v DCIT[2016] 382 ITR 179 (Karnataka) Foreign tax credit and incremental deduction state tax paid claimed during the course of assessment not allowed	**u/s. 90 of the Act. Relied on *Hon'ble Karnataka High Court* in case of *Wipro Ltd. vs. DCIT* reported in *382 ITR 179*.**
2007-08 2008-09 2009-10	30 36 36	Deduction for taxes paid to Local municipal authorities in Japan and Italian regional production tax paid in Italy which was not in the nature of 'Income tax'	**Ground nos. 55-57, was not pressed by assessee for A.Y. 2012-13.**
2010-11 2011-12	19 22	TDS credit	**Ground no. 53 Para 22.1. Remanded to the Ld.AO for verification and consideration in accordance with law.**
2007-08 2008-09 2009-10 2010-11 2011-12	32 38 38 20 31	Interest levied under section 234B and 234D	**Consequential in nature.**

We have already tabulated hereinabove the issues that stands covered by the observations of the decision of *Coordinate Bench of this Tribunal* in assessee's own case for *A.Y. 2012-13 (supra)* by order dated 28/11/2022 which is annexed to this order and marked as **"Annexure – A"**. For the sake of convenience and brevity, the relevant decision paragraphs which are identical and covered for the years under consideration has been mentioned hereinabove in the table. Accordingly, all the above grounds raised by assessee and revenue on common issues for the years under consideration vis-a-vis 2012-13 stands partly allowed as indicated hereinabove.

3. There are certain issues that are not common with A.Y. 2012-13 and are dealt with independently hereinbelow. The Ld.AR submitted that some of the issues arise in all the years under consideration which has been identified. As the facts and circumstances of these issues that are common to the years under consideration, they are principally decided commonly issue wise and shall apply *mutatis mutandis* for the assessment years wherever they are raised.

4. <u>Disallowance of Building repair expenses</u>

This issue has been commonly raised in following years.

Assessment Year	Ground Nos.	Appeal filed by
2007-08	13 & 14	Assessee
2008-09	15 to 20	Assessee
2009-10	15 & 16	Assessee
2010-11	5	Dept.
2011-12	12	Dept.

4.1 The Ld.AR submitted that for all the years there was an adhoc disallowance of 10% by the Ld.AO. The Ld.AR submitted that the expenditure was incurred towards repairs and maintenance of building, maintain and preserve the existing assets in good condition, and it was not incurred to bring new asset into existence. The Ld.AR submitted that the expenditure did not result in increase in the capacity. The Ld.AR submitted that the expenditure was routine in nature and was less than 2% approximate of net book value of the buildings owned by the assessee.

4.2 The Ld.AR submitted that the DRP for A.Ys.2010-11 and 2011-12 on identical facts has allowed the building repair

expenses as revenue in nature. He referred to the DRP directions for A.Y. 2010-11 at page 41, para 3.38.2 for A.Y. 2010-11 of the DRP direction wherein it is held that the disallowance made by the AO on an adhoc basis is bad in law. The DRP observed that the Assessing Officer has not brought on record any expenditure of capital in nature.

4.3 The Ld.AR placed reliance on the decision of *Hon'ble Karnataka High Court* in case of *CIT v Mac Charles (India) Ltd* reported in *[2015] 233 Taxman 177 (Karnataka),* wherein *Hon'ble High Court* held that, expenditure incurred on replacing flooring, false roofing, furniture, carpets and refurbishing of hotel rooms in tune with international standards without addition of extra floor space or extra room capacity was allowable as revenue expenditure. The Ld.AR thus submitted that in the present case also, the expenditure did not result in increase in the capacity or extra building space. He also submitted that the expenditure was not capable of enhancing the future benefits from the existing asset (buildings) beyond its previously assessed standard of performance. The Ld.AR submitted that the DRP gave factual observation that building repair expenses has been incurred in respect of existing assets and there is no change in facts and circumstances over the years. It is submitted that the disallowance is made only from AY 2007-08 to 2009-10 by the Ld.AO and for A.Ys. 2010-11 and 2011-12 the revenue is in appeal. The Ld.AR also submitted that for A.Y. 2012-13, the revenue has not preferred any appeal on this issue.

4.4 The Ld.DR relied on the orders passed by authorities below.

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

4.5 *Hon'ble Bonbay High Court* in the case of *CIT vs. Oxford University Press* reported in *108 ITR 166* has expounded that, the test for judging the nature of capital or revenue expenditure is to see whether as a result of expenditure what is being done is to preserve and maintain an already existing asset or whether as a result of expenditure a new asset or a new advantage is being brought into existence. The mere quantum of expenditure is not by itself decisive of the question whether it is in the nature of revenue or capital. Simply because of repair the life of building was prolonged for at least 15 years and it could not be said that the expenditure was in the nature of capital expenditure.

We further note that *Hon'ble Supreme Court* in the case of *CIT vs. Kalyanji Mavji and Co.* reported in *122 ITR 49*, has held that, cost on repairs which are not current repairs can be allowed under section 37 (1). Section 30 and 31 are not a bar in this regard.

In the present facts of the case, the Ld.AO has not identified any expenditure that has esulted in creation of a new asset. There is no basis for the to disallow adhoc 10% of the total expenditure incurred by the assessee of the building repairs.

From the above case law it is apparent that expenditure on repairs although prolonging the life and increasing durability of the asset is not necessarily of capital nature. Hence, in our considered opinion expenditure incurred by the assessee with regard to repairing/ renovating of existing make-up rooms have

to be allowed as deduction as revenue expenditure, as they cannot be treated as capital expenditure meant for bringing into existence a new asset or a new advantage, and they are laid out wholly and exclusively for the purpose of business of the assessee.

We therefore direct the Ld.AO to allow this claim of assessee.

Accordingly, this ground raised by the assessee for AY 2007-18 to 2009-10 stands allowed and revenue appeal for AY 2010-11 & 2011-12 stands dismissed.

5. Taxability of Inducement fees

This issue is raised by assessee only for **A.Y. 2009-10 in Ground nos. 28-30.**

5.1 During the year, a sum of Rs. 32,48,98,842/- termed as 'inducement fees' was received for cancellation / lapse of proposed scheme of acquisition of Axon Group Plc. The appellant had incurred expenditure of Rs. 14,93,61,022/- towards the proposed acquisition, advisory, due diligence, legal charges etc. Excess of inducement fees received over expenditure incurred amounted to Rs. 17,55,37,820/- [32,48,98,842 *less* 14,93,61,022] and the same was treated as 'capital receipt' by the assessee and consequently the said sum was not offered to tax.

During the assessment proceedings, the assessee was called upon by the Ld.AO to justify as to why the above sum of Rs.17,55,37,820/- is not chargeable to tax. The assessee, vide submissions dated 28.1.2013 explained in detail as to why the above net surplus of Rs. 17,55,37,820/- is a capital receipt and

not chargeable to tax. It was explained that expenditure incurred on proposed acquisition was also not claimed as deduction and the said expenditure has been set off against the inducement fees received.

5.2 The Ld.AO considered the net surplus of Rs. 17,55,37,820/- as revenue receipt and assessed the same to tax. The Ld.AO was of the view that the assessee has been claiming expenditure on expansion of business, mergers and acquisitions as revenue in nature for the earlier years and consequently the net surplus of Rs. 17,55,37,820/- is chargeable to tax for the year under consideration. The Ld.AO also held that, the above sum cannot be regarded as part of profits of business so as to be eligible for deduction under section 10A and 10AA.

5.3 The CIT(A) held that the gross amount of Rs. 32,48,98,842 should be considered to be in the nature of non compete fees and should be brought to tax as business income. Having held as business income, the CIT(A) also held that, the inducement fees has no connection with the software development and export activities of the assessee and therefore the said receipt cannot be said to be part of the eligible profits of a unit for claiming deduction under section 10A and 10AA.

5.4 Before this *Tribunal,* the Ld.AR submitted as under:

During the FY 2008-09, the assessee was considering acquisition of Axon Group PLC, an IT services company listed in London having expertise in SAP consultancy. Infosys had proposed a bid price of 600 pence for every Axon share. As per the agreement, it

was agreed that Axon will pay inducement fee of 1% of the consideration payable by Infosys for the Axon shares if –

1) a competing proposal is announced and subsequently completes before 31st January, 2009;
2) the Axon Directors do not recommend the Scheme or withdraw or adversely amend their recommendation and the Scheme subsequently lapses;
3) the Axon Directors fail to post the Scheme Document by 29th September, 2008 (or such later date as the Target and the Bidder may agree); or
4) Axon materially breaches its non-solicitation undertakings referred in the agreement.

5.5 He submitted that, the acquisition did not materialize and in accordance with the above clause, Axon had to make the payment of inducement fee of 1% of the consideration to Infosys.

The Ld.AR submitted that, Axon made a payment of GBP 40,55,659/- (Rs.32,48,98,842/-) towards inducement fees and assessee already had incurred expenditure of Rs. 14,93,61,022/- towards the proposed acquisition by way of due diligence, advisory and legal charges etc. Thus the receipt of inducement fees resulted in a surplus capital receipt of Rs. 17,55,37,820/-.

It was submitted that the proposed acquisition transaction was a capital transaction and not a regular business transaction. In case, the acquisition would have materialized, the entire purchase price and incidental expenses would have been considered as investment in the books of the assessee. Accordingly, the amount received as inducement fees also was also a capital receipt. The incidental expenditure related to the acquisition transaction was also not claimed as revenue

expenditure but adjusted against the inducement fees received and the net amount only was considered as capital receipt.

5.6 On the contrary, the Ld.DR submitted that the excess of expenditure incurred by assessee being Rs.14,93,61,022/- and the amount received by assessee from Axon being Rs.32,48,98,842/- is Rs.17,55,37,820/-. He submitted that this amount is in the nature of compensation received by assessee for the proposed acquisition that could not be concluded. He submitted that had this amalgamation to happen, assessee would have been enriched with a profit making apparatus that would have boosted the business structure of assessee. He thus supported the disallowance made by the Ld.AO.

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

The assessee was in the process of acquiring Axon Group Plc, an IT service company, listed in London having expertise in SAP consultancy. An agreement was entered into between the assessee and Axon, as per which Axon would have to pay 1% of the consideration payable by the assessee for acquiring Axon shares if the proposal does not materialise.

5.8 As the proposed acquisition failed, the assessee was in recipient of certain amount in connection to the cancellation/lapse of the proposed scheme of acquisition. It is submitted that the assessee had spent certain amount towards due diligence in the form of legal charges, advisory etc., of the proposed acquisition. The said expenditure was reduced from the

total amount received by the assessee, and the balance was treated by the assessee as capital receipt that was not offered to tax.

5.9 We have considered the above receipt by the assessee, based on various provisions of the Act. The expenditure incurred by the assessee towards the due diligence, legal advices and payments for other professional services are to considered as business loss for the reason that the same did not culminate into a completed transaction.

5.10 In sofar as the excess amount received by the assessee over and above the expenditure is concerned, the same cannot be held to be exempt since this excess amount was received by the assessee for failure of the proposal for acquisition. The said amount is taxable in the hands of the assessee as revenue receipt. Therefore, in our considered opinion, section 28(ii)(e) of the Act, would come into play and the income received by the assessee would have to be certainly treated as profits and gain.

5.11 The next issue is whether the amount will qualify for deduction under section 10AA of the Act. The answer to this is in negative and against assessee. In our opinion, the money received by assessee does not arise out of the profits of the undertaking. We therefore do not find any infirmity in the view taken by the Ld.CIT(A) and the same is upheld.

Accordingly this ground of assessee stands dismissed.

6. <u>Disallowance of foreign exchange fluctuation loss</u>

This issue has been raised by assessee only for A.Y. 2008-09 in Ground nos. 21 & 22.

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

When any entity enters into any transaction in foreign currency, it is exposed to exchange fluctuation risk on such transaction unless the same is hedged by the entity through hedging techniques like Forward Contracts, Currency Invoicing etc. The risk associated with such transactions may result into either Exchange Gain or Exchange Loss. The exchange fluctuations which are related to acquisition, installation, disposition of any capital asset, such fluctuations are only to be treated as Capital in nature.

6.2 The foreign exchange loss is due to the reinstatement of the accounts at the end of the financial year as well as loss incurred on account of exchange fluctuation on repayment of borrowings is similar to the interest expenditure and it is to be allowed as revenue expenditure u/s 37 of the I.T.Act, as per the accounting standard approved by the Institute of Chartered Accountants of India.

6.3 This issue is no longer res integra. *Hon'ble Supreme Court* in the case of *CIT vs. Woodward Governor India Pvt. Ltd.* reported in *(2009) 312 ITR 254* has held that, the actual payment was not a condition precedent for making adjustment in respect of foreign currency transactions at the end of the closing year.

6.4 We also draw support from the decision of *Hon'ble Mumbai Special Bench* decision in case of *DCIT vs. M/s. Bank of Bahrain and Kuwait* reported in *(2010) 41 SOT 290* wherein similar issue was under consideration.

The *Hon'ble Special Bench* observed and held as under:

> *"50. Therefore, this Accounting Standard mandates that in a situation like in the present case, since the transaction is not settled in the same accounting period, the effect of exchange difference has to be recorded on 31st March. Ld CIT D.R. has rightly pointed out that the expenses required to be charged against revenue as per accounting standard do not ipso facto imply that the same are always deductible for Income-tax purposes but at the same time its relevance does not, in any manner, gets mitigated. The Hon'ble Supreme Court in the case of Woodward Governor of India (P) Ltd.,((supra) with reference to working capital loan, which was also repayable after the end of accounting period, has held that loss occurred to the assessee, on account of fluctuation in the rate of foreign exchange, as on the date of the balance sheet, is an item of expenditure u/s.28(i) of the I.T.Act. Hon'ble Supreme Court observes as under:- "Under section 28(i), one needs to decide the profits and gains of any business which is carried on by the assessee during the previous year. Therefore, one has to take into account stock-in-trade for determination of profits. The 1961 Act makes no provision with regard to valuation of stock. But the ordinary principle of commercial accounting requires that in the profit and loss account the value of the stock-in-trade at the beginning and at the end of the year should be entered at cost or market price, whichever is the lower. This is how business profits arising during the year need to be computed. This is one more reason for reading section 37(1) with section 145. For valuing the closing stock at the end of a particular year, the value prevailing on the last date is relevant. This is because profits/loss is embedded in the closing stock. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into account, as no prudent trader would care to show increased profits before actual realization. This is the*

theory underlying the rule that closings stock is to be valued at cost or market price, whichever is the lower. As profits for income tax purposes are to be computed in accordance with ordinary principles of commercial accounting, unless such principles stand superseded or modified by legislative enactments, unrealized profits in the shape of appreciated value of goods remaining unsold at the end of the accounting year and carried over to the following year's account in a continuing business are not brought to the charge as a matter of practice, though, as stated above, loss due to fall in the price below cost is allowed even though such loss has not been realized actually."

Ld CIT D.R.'s submission is that this decision is with reference to monetary items as referred to in AS-11 and since forward foreign exchange contracts do not come within the monetary items, therefore, the said decision cannot be applied. However, we have already discussed in the concept of recognition of various events in financial statements and have noted that the assessee , in fact, has recorded net effect in its profit and loss account. Therefore, on this count, the department's plea cannot be accepted. Thus, in view of the decision of the Supreme Court in the case of Chellapali Sugar Mills (supra), and also in view of decision of the the Hon'ble Supreme Court in the case of Woodward Governor India (P)Ltd., (supra), assessee's plea deserves to be accepted.

51. Now, coming to the objection of ld CIT D.R. with reference to various decisions relied upon by ld counsel for the assessee on the ground that in the said decisions, the issue was relating to stock-in-trade but in the present case, there is no stock-in-trade. Admittedly, the assessee has not shown any closing stock of unmatured forward foreign exchange contracts as on balance sheet date and has only booked the profit and loss in that regard. There is no dispute that the foreign exchange currency held by the assessee bank is its stock-in-trade and as is evident from the hypothetical example considered earlier, the assessee had entered into forward foreign exchange contracts in order to protect its interest against the wide fluctuation in the foreign currency itself. Therefore, this contract was incidental to assessee's holding of the foreign currency as current asset. Therefore, in substance, it cannot be said that the forward contract had no trappings of the stock-in-trade. Ld Counsel has rightly relied upon the decision of the Calcutta ITAT (SB)

in the case of Shree Capital Services Limited,(supra) in this regard and, therefore, the various decisions relied upon by ld Counsel for the assessee as discussed in his submissions are applicable to the facts of the case.

52. Now coming to the argument of ld CIT (DR) with reference to the decision in the case of Indian Overseas Bank (supra), we find that the said decision was rendered with reference to taxing of notional profits and not with reference to anticipated losses, as is the case before us. The department is trying to draw analogy from the said decision but the said decision cannot be applied as the considerations are entirely different in regard to the issue relating to notional profits vis-à-vis anticipated losses. Profits are considered only when actual debt is created in favour of assessee but in case of anticipated losses, if an existing binding obligation, though dischargeable at a future date, is determinable with reasonable certainty, then the same is allowable.

53. Ld CIT D.R. has also heavily relied on the decision of the Hon'ble Bombay High Court in the case of CIT v. Kamani Metals and Alloys Ltd (supra). This decision, in our opinion, is of little help to the department inasmuch as the same has been rendered with reference to contract for purchase of raw material. The contracted price was more than the market price as the price went down and the material had not been received at the end of the accounting year. Under these facts, the Hon'ble High court held that notional loss claimed by the assessee on the balance sheet date was not allowable because there was merely the contract to purchase the material at a future date. Neither any payment was made by the assessee nor any material was received. This case, in our opinion, cannot be applied to the facts of the present case as in the present case, we are concerned about the anticipated loss booked by the assessee on account of foreign exchange rate fluctuation as on balance sheet date, which was in accordance with RBI guidelines as well as in accordance with AS-11. Moreover, a binding obligation arose the minute the contract was entered into. However, now the decision of the Hon'ble Supreme Court in the case of Woodward Governor India P. ltd (supra) covers the issue on account of variation in foreign exchange rate with reference to current assets. The facts in the case of CIT v. Kamani Metals and Alloys Ltd (supra) are more akin to such a situation where the assessee has simply ordered for purchase of material at

a particular rate but the material has not been supplied by the seller by the end of the accounting period. No liability is accounted for in respect of such ordered goods because the basic elements of contract have not been fulfilled. In the present case, we have already observed that the forward contract is incidental to the foreign currency held by the assessee as stock-in-trade and, therefore, the decision in the case of CIT v. Kamani Metals and Alloys Ltd (supra) is clearly distinguishable on facts.

54. Ld CIT D.R. has also relied on the decision in the case of Eveready Industries (supra). The view expressed in the said decision also cannot be upheld in view of the decision of the Hon'ble Supreme Court in the case of Woodward Governor India P.Ltd (supra). The facts in the case of Indian Molasses' case(supra) are entirely different. The said decision proceeded on the premise that till the date of retirement of Managing Director, the assessee company itself had dominion over the sum paid through trustees and insurance society and there was no irrecoverable liability created. Thus, the impugned amounts were treated as part of profits set apart to meet a contingency by the assessee without any corresponding liability being there as the liability was only contingent in nature. There cannot be any quarrel with the proposition that the liability in praesenti is an allowable deduction but a liability in futuro, which for the time being is only contingent, is not allowable. As already pointed out this principle is to be applied keeping in view the principles of prudence and applicable Accounting Standards. In our opinion, the complete answer has been given long back by the Hon'ble Supreme Court in the case of Bharat Earth Movers Ltd, 245 ITR 428 (SC), wherein, it was held that the provision made by the assessee for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by the employees of the company was entitled to deduction out of the gross receipts of the accounting year in which the provisions were made.

55. Ld CIT D.R. has also relied on the decision of the Hon'ble Calcutta High Court in the case of Bestobell India Ltd ((supra), which decision has been considered in detail by the Hon'ble Delhi High Court in the case of Woodward Governor India (P)Ltd (supra), wherein, it has been observed as under:-

"The revenue relied upon the decision of the Calcutta High Court in Bestobell (India) Ltd.,(1979) 117 ITR 789 in support of the submission that the increased liability on repayment of a loan borrowed in foreign exchange for business purposes as a result of exchange rate fluctuation would be a capital loss and not a trading loss. What weighed with the Calcutta High Court there appears to be that there was no outflow of funds during the year, as has been urged by the revenue before us. However, a closer scrutiny of the said decision indicates that the Calcutta High Court in this case relied upon its earlier judgement in Sutlej Cottons Mills Ltd v CIT (1971) 81 ITR 641. It will be recalled that the Hon'ble Supreme Court in Sutlej Cotton Mills Ltd v CIT(1979) 116 ITR 1 reversed the aforesaid decision of the Calcutta High Court on this point and held that such liability would be treated as a trading loss. In that view of the matter, the reliance placed by the revenue on the judgement of the Calcutta High Court in Bestobell (India Ltd., (1979) 117 ITR 789 appears misplaced."

56. The controversy stands now resolved in view of the decision of the Supreme Court in the case of Sutlej Cotton Mills Ltd., 116 ITR 1 (SC), wherein, it has been held that fluctuation on account of foreign exchange rate is an allowable deduction and is not capital in nature. The observation of the Hon'ble Supreme Court is as under:-

"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature(emphasis supplied)"

57. At the end we may further observe that when profits are being taxed by the department in respect of such unmatured forward foreign exchange contracts then there was no reason to disallow the loss as claimed by assessee in respect of same contracts on the same footing. In this regard, we may refer to the details furnished by assessee vide their letter dt. August 05, 2010 to establish that the Department has assessed the Bank in respect of the profit shown by the Bank on

restatement of outstanding forward foreign exchange contracts for A.Ys.2002-03 and 2003-04. There is no dispute on this count and, therefore, we refrain from referring the details.

58. In view of the above discussion, we allow the assessee's appeal for the following reasons:-

i) A binding obligation accrued against the assessee the minute it entered into forward foreign exchange contracts.

ii) A consistent method of accounting followed by assessee cannot be disregarded only on the ground that a better method could be adopted.

iii) The assessee has consistently followed the same method of accounting in regard to recognition of profit or loss both, in respect of forward foreign exchange contract as per the rate prevailing on March 31.

iv) A liability is said to have crystalised when a pending obligation on the balance sheet date is determinable with reasonable certainity. The considerations for accounting the income are entirely on different footing.

v) As per AS-11, when the transaction is not settled in the same accounting period as that in which it occurred, the exchange difference arises over more than one accounting period.

vi) The forward foreign exchange contracts have all the trappings of stock-
in-trade.

vii) In view of the decision of Hon'ble Supreme Court in the case of Woodward Governor India (I) P.Ltd., the assessee's claim is allowable.

viii) In the ultimate analysis, there is no revenue effect and it is only the timing of taxation of loss/profit.

59. We, accordingly, hold that where a forward contract is entered into by the assessee to sell the foreign currency at an agreed price at a future date falling beyond the last date of accounting period, the loss is incurred to the assessee on account of evaluation of the contract on the last date of the accounting period i.e. before the date of maturity of the forward contract."

6.5 We direct the Ld.AO to carry out necessary verification in respect of the loss /gain incurred by the assessee for the years under consideration whether on account of Capital asset based

on the principles laid down by *Hon'ble Mumbai Special Bench* in case of *Bank of Bahrain and Kuwait (supra).*

6.6 In the event the loss/gain is out of trading liability, no disallowance can be made. However, we make it clear that there cannot be double claim by the assessee; once in the year under consideration and on actual settlement of the bill in any subsequent year.

Accordingly, these grounds raised by the assessee stands allowed for statistical purposes.

7. <u>Reduction of export turnover u/s. 10A on account of later realization of export turnover into India.</u>

7.1 The Ld.AR submitted that this issue has been raised by assessee in the Assessment Years under consideration as under:

Assessment Year	Grounds of appeal
2007-08	15 to 17
2008-09	23 to 25
2009-10	17 to 19
2010-11	11

7.2 The Ld.AR submitted that assessee had late realization of export turnover into India during the Assessment Years under consideration. The Ld.AO denied the claim and held that the late realised export turnover cannot be reduced from the formula for computation of section 10A.

7.3 It is submitted that *Hon'ble Bombay High Court* in case of *CIT vs. Morgan Stanley Advantage Services (P) Ltd.* reported in *(2011) 13 taxmann.com 166* in support of its contention.

On the contrary, the Ld.DR placed reliance on orders passed by authorities below.

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

The assessee had not received certain export proceeds within six months from the end of the relevant assessment year. As the exports were effected prior to 31st March of the relevant Financial Year for the AYs under consideration, the export proceeds ought to have been realised by 30/09/2004 for availing deduction u/s. 10A but the same was realised much later. We note that the assessee has furnished the details wherein the authorised dealers under FEMA have not taken any adverse action for late realisation of export turnover and neither declined nor rejected the application for late realisation of such export turnover.

We note that the authorities below have not verified any documents /evidences filed by the assessee. The question is, whether the extension of time for realisation of the export proceeds by the Competent Authority under FEMA can be said to be the approval granted by the Competent Authority under section 10A(3) of the Income-tax Act, 1961. This issue has been addressed by the *Hon'ble Bombay High Court* in case of *Mogan Stanley(supra)* by observing and held as under:

> *Explanation 1 to section 10A(3) clearly provides that the expression 'competent authority' in section 10A means the RBI or such other*

authority as is authorized under any law for the time being in force for regulating payments and dealings in foreign exchange. Admittedly, RBI is the competent authority under the FEMA which regulates the payments and dealings in foreign exchange. Thus, what section 10A(3) provides is that the benefits under section 10A(1) would be available if the export proceeds are realized within the time prescribed by the competent authority under the FEMA. In the instant case, the competent authority under the FEMA, namely, the RBI has granted approval in respect of the export proceeds realised by the assessee till December, 2004. Therefore, the approval granted by RBI under the FEMA would meet the requirements of section 10A. In other words, once the competent authority under the FEMA, which regulates the payments and dealings in foreign exchange, has approved realization of the export proceeds by the assessee till December, 2004, then it would meet the requirements of section 10A(3) and, consequently, the assessee would be entitled to the benefits under section 10A(1). [Para 8]

Moreover, in the instant case, the RBI which is the competent authority under the FEMA as also under section 10A, has neither declined nor rejected the application made by the assessee seeking extension of time under section 10A. Therefore, the decision of the Tribunal in holding that the approval granted under the FEMA constitutes a deemed approval granted by the RBI under section 10A(3) cannot be faulted. [Para 9]

The RBI being the competent authority under the FEMA as also under section 10A(3) in the facts of the instant case, the Tribunal was justified in holding that the assessee was entitled to the deduction under section 10A in respect of the export proceeds realized till December, 2004 for which approval has been granted by the competent authority under FEMA, namely, the RBI.

7.5 In the event there is an approval granted by the competent authority under FEMA, the claim of assessee deserves to be allowed. We therefore, direct the Ld.AO to verify the evidences and the documents in respect of the RBI approval and to consider the claim of the assessee in accordance with law in the light of the above ratio by *Hon'ble Bombay High Court*.

Accordingly this grounds raised by the assessee for the years under consideration stands allowed for statistical purposes.

8. Reduction of rental income from profits of 10A units

8.1 The Ld.AR submitted that this issue is common for following A.Ys.

AY	Ground No.
2007-08	21 & 22
2008-09	29 & 30
2009-10	20 & 21
2010-11	12

8.2 The Ld.AR submitted that assessee had received rental income from its subsidiary companies that constituted income from incidental and ancillary activities that was subservient to carrying on the business of the assessee. The said rental income was claimed by the assessee as deduction u/s. 10A which was denied by the Ld.AO, based on the turnover of the SEZ units. The Ld.AR submitted that the rental income pertained only to STPI units and therefore it was an income that was generated out of the undertaking. It is the submission of the Ld.AR that the revenue is not doubting the origin of the rental income because the disallowance was made by the Ld.AO based on the turnover of these units. At the outset however, the Ld.AR submitted that this issue has been considered by *Coordinate Bench of this Tribunal* for A.Y. 2005-06 in assessee's own case in *IT(TP)A No. 102/Bang/2013.* This *Tribunal* vide order dated 10/11/2017 considered the issue by observing as under:

> *"30. Ground No.9.*
> *30.1 In this ground (supra), Revenue assails the order of the learned CIT (Appeals) in allowing the assessee's claim for inclusion of rental income from Infosys BPO Ltd. and BSNL, Chennai as profits of the business in computing deduction under Section 10A of the Act, when these*

incomes were not derived from the export of computer software.

30.2 In the order of assessment, the Assessing Officer held that the aforesaid rental income from Infosys BPO Limited and BSNL, Chennai cannot be regarded as income derived from the business of export of software. On appeal, before the learned CIT (Appeals), it was submitted by the assessee that inter alia, the rental income received from its subsidiary, Infosys BPO Limited, was incidental to the business carried on by the assessee as it facilitated operations, transactions, policies and procedures. In respect of the letting out of space to BSNL, in Chennai, it was for the purpose of setting up of Mini Exchange to equip the assessee's Chennai unit with telecommunication facilities. It was urged that the letting of space to Infosys BPO Limited and BSNL at Chennai were therefore incidental to the business carried on by the assessee and therefore eligible for deduction under Section 10A of the Act.

30.3.1 We have heard the rival contentions, perused and carefully considered the material on record. The issue as to whether interest income, income from sale of scrap, export incentive, rental income, etc. are eligible for deduction under Section 10A of the Act has been considered by the Hon'ble High Court of Karnataka in the case of Subex Ltd. Vs. ITO in ITA Nos.46 & 47 of 2009 dt.2.10.2014 held that rental income by virtue of sub-section (4) of Section 10 of the Act is deemed to be business of the undertaking for the purpose of extending the benefit of deduction under Section 10A of the Act. At paras 8 & 9 thereof, the Hon'ble Court, explaining the interplay of section 10A(1) and 10A(4) of the Act, has held as under :

> *8. As could be seen from the aforesaid provisions, the opening words of Section 10A of the Act assumes importance. It commences with the words "subject to the provisions of this section". The opening words of sub section 4 of the Act clearly state that "for the purposes of [sub-sections (1) and (1A], the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking". If the assessee is entitled to deduction only profit derived under Section 10A(1) of the Act, the sub section (4) would be redundant. The sub section which came into effect on 01-04-2002 by Finance Act 2001 recognizes that the profits of the business of the undertaking would be, not only the profits and gains*

from the exports of articles or things or computer, in addition to that, the undertaking may have some other profits also, which is derived from business of the undertaking.

9. In the instant case, the assessee took the premises on lease.Assessee has paid a sum of Rs.43,38,350/- as rent from April 2002 to March 2003. It is shown as 'business expenses', as against the 'expenses incurred'. The assessee has received a sum of Rs.17,27,385/- as rent receipt for the relevant period. Assessee is not the owner of the said premises. Assessee is carrying on the business of development of Software in Canada. The said premises was taken for the aforesaid business purpose. As a portion of the said premises was not used for business purpose, instead of keeping it vacant and suffering loss, it was rented out. Therefore, the said income derived from lease of the said premises constitutes "income from business". Neither it would be 'income from house property' nor 'income from other sources'. In view of the explanation used in sub Section (4) of Section 10A of the Act for the purpose of Sub section 1, the profit derived from export of articles or things or computer software shall be the amount which bears to the profits of business of the undertaking. Though the said profits are not derived from export of articles or things or computer software, by virtue of sub Section (4) it is deemed to be the profits of the business of the undertaking for the purpose of extending the benefit of exemption of payment of tax under Section 10A of the Act to a newly established undertaking in a free trade zone.

30.3.2 Similarly, the Hon'ble High Court of Karnataka in the case of Wipro Ltd. Vs. DCIT in its order reported in (2016) 382 ITR 179 before whom the substantial question of law No.16 for consideration was in respect of income from sale of scrap, export incentive, rent received, interest income and gain on exchange rate fluctuation. The Hon'ble Court held that these items were eligible for deduction under Section 10A of the Act. At para 166 thereof; the Hon'ble Court followed its own earlier order in the case of Wipro Ltd. in ITA No.507 / 2002 dt.25.8.2010, in respect of income from sale of scrap, export incentive and rent received to hold as under :

"166. This Court had occasion to consider the substantial questionof law in assessee's case itself in

ITA 507 . 2002 decided on 25.8.2010 while dealing with the income from sale of scrap, export incentive and rent received, answered the question in favour of the assessee ;and against the revenue."

At para 169 thereof the Hon'ble Court held as under :

"169. As all these questions are decided and answered in favour of the assessee in the aforesaid case, this question of law is answered in favour of the assessee and against revenue."

30.3.3 Respectfully following the decisions of the Hon'ble High Court of Karnataka in the case of Subex Ltd. Vs. ITO (supra) and Wipro Ltd. Vs. DCIT (supra), as discussed above, we are of the view that rental income received from Infosys BPO Limited and BSNL, Chennai cannot be excluded from the profits of the business of the undertaking while computing the deduction under Section 10A of the Act in the case on hand. Consequently, Ground No.9 of the revenue's appeal is dismissed."

8.3 There is nothing on record that is brought by the revenue in order to take a contrary view. Respectfully following the above view, we direct the Ld.AO to include the rental income received from the SEZ units for the purposes of computing profits u/s. 10A.

Accordingly, these grounds raised by assessee for the years under consideration stands allowed.

9. <u>Addition of SEZ book profits u/s. 115JB</u>

9.1 The next issue for A.Y. 2009-10 is addition of SEZ book profits u/s. 115JB. This issue is raised by the assessee in Ground nos. 33 & 34 for A.Y. 2009-10.

9.2 It is submitted that the Ld.AO added the 14A disallowance while computing the book profits of the assessee. The Ld.AR further submitted that the disallowance was made towards 10AA

deduction was also added to the book profits while computing 115JB.

9.3 It is submitted that no reasons have been given in the assessment order as to why additions are made. On an appeal before the Ld.CIT(A), the taxable income was determined under the normal provisions of the Act. Therefore, the CIT(A) held that the present issue relating to computation of income under the MAT provisions has become academic and the issue does not require any specific adjudication.

9.4 Before us the Ld.AR submitted that the computation of book profits under section 115JB is dealt by Expl. 1 to section 115JB. The computation of book profit starts with net profit as per Profit and loss account. He submitted that the explanation provides for certain additions and deletions in computing the book profits. Subsection 6 of section 115JB provides that the provisions of this section shall not apply to the income accrued or arising on or after the 1st day of April, 2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or Special Economic Zone, as the case may be. Subsection 6 of section 115JB was introduced by the Special Zones Act, 2005 with effect from 10.2.2006. Book profits of SEZ unit are exempt from MAT by virtue of section 115JB(6). He also relied on proviso to section 115JB(6) has withdrawn the MAT exemption in respect of profits of SEZ unit with effect from AY 2012-13 onwards. It is submitted that the said proviso is not applicable in the present case as the assessment years under consideration are A.Ys.

2007-08 to 2009-10. The Ld.AR thus submitted that the addition made by the assessing officer is bad in law.

9.5 The Ld.AR submitted that in the OGE to CIT(A) order, the Ld.AO do not make addition in respect of the difference between the deduction claimed by assessee u/s. 10AA and that allowed by the Ld.AO. The only issue that now survives for consideration is whether the disallowance u/s. 14A if any could be added for computing book profits.

On the contrary, the Ld.DR placed reliance on orders passed by authorities below.

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

9.6 This issue is no longer resintegra and the same stands settled by the decision of *Hon'ble Special Bench of Delhi Tribunal* in case of *ACIT vs. Vireet Investment (P) Ltd.,* reported in *(2017) 82 taxmann.com 415.* We accordingly direct the Ld.AO to delete the disallowance added while computing book profits.

Accordingly, this ground raised by assessee stands allowed.

10. The next issue which is common are as under:

Issue 1 : Enhancement of income by CIT(A) in respect of new source which was not at all dealt by the learned AO in the assessment order is bad in law.

Issue 2 : Reduction of 50% of overseas revenues from licensing of Finacle software from export turnover of 10A units.

10.1 The above issues have been raised by assessee in following grounds of appeal for years under consideration.

AY	Ground no.
2007-08	25, 26, 27 &

	28
2008-09	31 & 32
2009-10	22 & 23

10.2 The Ld.AR submitted that assessee was called upon during the assessment proceedings to explain how receipts from licensing of Finacle software are eligible for deduction u/s. 10A. In the details filed by the assessee, the Ld.AO noted that the Finacle software that was leased was developed way back in 1996 as BANCS 2000 which was remodelled and renamed as "Finacle". The Ld.AO noted that the license fee received by the assessee from overseas was entirely claimed as deduction u/s. 10A pertaining to Infosys STP-II at Electronic City, Bangalore. While computing the deduction u/s. 10A, the Ld.AO invoked the provisions of section 80IA(8) r.w.s. 10A(7) and only allowed 50% of the license fee received from overseas for the purposes of profits of 10A unit.

10.3 Before the Ld.CIT(A), assessee filed various details to establish the difference between the two software and that the Finacle software was totally different and the observations of the Ld.AO that it was remodel of BANCS 2000 is factually incorrect. The Ld.CIT(A) from various submissions of assessee on the technical aspects of this software, observed that assessee has been continuously upgrading its banking software products and therefore he upheld the action of the Ld.AO in attributing only 50% of total revenue towards the earning of license fee. Before the Ld.CIT(A), assessee had also claimed that Ld.AO only reduced the said amount of 50% from the profits of the 10A in respect of

reducing the same from export turnover of the unit. The Ld.CIT(A) after considering the relevant submissions of assessee directed the Ld.AO to reduce the 50% from the export turnover for computing deduction u/s. 10A of the Act. Before this *Tribunal,* the Ld.AR submitted that assessee is eligible for 100% claim of the license fee received. It was submitted that Finacle was a new generation core banking product which was successor to BANCS 2000. He submitted that this new product was actively pursued by banks with e-commerce strategy and therefore it was a product that was launched by assessee in the year 2000 which can be categorically observed from the financial reports of March 2000.

On the contrary, the Ld.DR relied on the observations of the authorities below.

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

10.4 It is an admitted fact that in a software development segment, once a software developed cannot be used in perpetually, the product has to undergo various changes in accordance with the demands of time and the business model. Product that gets outdated due to rapid change in the commercial requirement, deserves to be replaced with a new model. In the present facts of the case, the only dispute with the assessing officer is in respect of Finacle being a remodel of BANCS2000. It is not disputed that the said license fee generated out of licensing of Finacle software is eligible for

deduction u/s. 10A. Whether there is a change in the product and whether there are new features that could categorise this Finacle software to be a new product has not been verified by the Ld.AO. Such technical analysis is definitely very difficult at the revenue's end due to the lack of expertise. We therefore direct the Ld.AO to verify with the assistance of the assessee on a technical level to understand the difference in both these softwares. In the event, there is a difference in the products, assessee deserves 100% deduction on the license fee received from the overseas in respect of licensing the product. We direct the assessee to provide sufficient assistance to the Ld.AO in order to understand the product model to come to a just conclusion.

Accordingly, these grounds raised by assessee for years under consideration stands allowed for statistical purposes.

11. Deduction under section 37 for the taxes on income paid to state revenue authorities of USA and Canada.

11.1 This issue has been raised by assessee in following Assessment Years.

AY	Ground no.
2007-08	31
2008-09	37
2009-10	37

11.2 We note that the main issue of the foreign tax credit and the additional foreign tax claimed by assessee in respect of state taxes paid has been already remanded to the Ld.AO with the direction to consider in the light of the decision of *Hon'ble Karnataka High Court* in case of *Wipro Ltd. vs. DCIT* reported in *382 ITR 179.*

Accordingly, we hold this particular issue to be academic at this stage.

12. Additional foreign tax credit claim on account of assessed income and in respect of taxes reasonably expected to be paid in USA and Switzerland where audit/ assessment is under progress in relation to income of the previous year 2010-11.

12.1 This issue is raised by assessee for A.Y. 2011-12 in Ground nos. 32 to 34.

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

12.2 We note that this claim has been made by assessee in respect of taxes reasonably accepted to be paid in USA and Switzerland where audit and assessment was under progress in relation to income of previous year 2010-11.

12.3 The Ld.AO is directed to verify the same based on the documents / evidences filed by assessee. In the event, the taxes have been actually paid pertaining to the income for previous year 2010-11, in the respective countries, credit shall be granted as per section 90 of the Act.

Accordingly, this ground raised by assessee stands allowed for statistical purposes.

13. Assessee has filed an application for admission of additional ground for A.Y. 2011-12 wherein the deduction for education cess and secondary and higher secondary cess has been sought

for. As this issue has been decided by *Hon'ble Supreme Court* against assessee, we dismiss this ground raised by assessee.

Accordingly, the additional ground raised by assessee stands dismissed.

Accordingly, the appeals filed by assessee as well as revenue stands partly allowed as indicated hereinabove.

In the result, the appeals filed by the assessee and revenue stands partly allowed as indicated hereinabove.

Order pronounced in the open court on 30th November, 2022.

Sd/-	Sd/-
(CHANDRA POOJARI)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 30th November, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore

ANNEXURE – 'A'

IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBERA
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

Appeal No.	Appellant	Respondent	Assessment Year
IT(TP)A No. 718/Bang/2017	M/s. Infosys Ltd., Electronic City, Hosur Road, Bangalore – 560 100. **PAN: AAACI4798L**	The Assistant Commissioner of Income Tax, Circle – 3(1)(1), Bangalore.	2012-13

Assessee by	:	Shri Padamchand Khincha, CA
Revenue by	:	Shri K.V. Arvind & Shri Dilip, Standing Counsels for Dept.

Date of Hearing	:	15-09-2022
Date of Pronouncement	:	28 -11-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal arises out of final assessment order dated 28/02/2017 passed by the Ld.ACIT, Circle – 3(1)(1), Bangalore for A.Y. 2012-13 on following grounds of appeal:

General and Legal Grounds

1. The order passed by the learned assessing officer and the directions of Hon'ble DRP to the extent prejudicial to the appellant is bad in law and liable to be quashed.

Grounds on denial of deduction claimed under section 10AA in respect of 4 SEZ units viz., Chennai – Unit 1, Chandigarh, Mangalore - Unit 1 and Pune Unit 1

2. The learned assessing officer has erred in denying deduction claimed under section 10AA in the return of

income totally amounting to Rs. 2227,82,65,630 in respect of profits of 4 SEZ units viz., Chennai – Unit 1, Chandigarh, Mangalore - Unit 1 and Pune Unit 1.

3. The learned assessing officer has erred in denying deduction computed under section 10AA (after making certain disallowances) in the assessment order for the impugned reason that the 4 SEZ units viz., Chennai – Unit 1, Chandigarh, Mangalore - Unit 1 and Pune Unit 1have been formed by splitting up and reconstruction of the already existing business.

4. The learned assessing officer has erred in concluding that the 4 SEZ units have been formed by splitting up and reconstruction of an already existing business and hence these SEZ units are not eligible for deduction under section 10AA.

5. On the facts and in the circumstances of the case and law applicable, the 4 SEZ units viz., Chennai – Unit 1, Chandigarh, Mangalore - Unit 1 and Pune Unit 1were not formed by splitting up and reconstruction of an already existing business and consequently these SEZ units are eligible for deduction under section 10AA.

Grounds on transfer pricing adjustment

6. The learned Assessing Officer has erred in making a reference to TPO for determining arm's length price without demonstrating as to why it was necessary and expedient to do so and the Hon'ble DRP has erred in confirming the action of the learned AO.

7. The lower authorities have erred in making a transfer pricing adjustment of Rs. 84,04,827, passing the orders without demonstrating that the appellant had motive of tax evasion, not appreciating that no addition can be made under Chapter X as Transfer pricing adjustment under Chapter X is not included in the definition of 'income' u/s 2(24) or under Chapter IV of the IT Act, 1961. The orders passed by the lower authorities are therefore bad in law and liable to be quashed.

8. The learned assessing officer and transfer pricing officer have erred in making a transfer pricing adjustment of Rs 84,04,827 by adopting the average rate of interest on fixed deposits for a period exceeding 365 days calculated at 8.53% as internal CUP for the purpose of computing arm's length price (ALP) adjustment in respect of interest income charged on loan given to Infosys Technologies (China) Co Ltd.

9. On facts and in the circumstances of the case and law applicable, the impugned transfer pricing adjustment is liable to be deleted in entirety.

Grounds on disallowance under section 14A

10. The learned assessing officer has erred in computing disallowance of Rs. 3,30,96,246 under section 14A of the Income tax Act, 1961 ("Act") read with rule 8D(2)(iii) of the Income tax rules, 1962 ("Rules") and erred in making net addition of Rs. 1,58,09,987.

11. The learned assessing officer has erred in invoking rule 8D(2)(iii) for the purpose of making disallowance under section 14A without demonstrating satisfaction in terms of subsection 2 of section 14A as to why the disallowance made by the assessee under section 14A amounting to Rs. 1,72,86,259 is not correct having regard to the accounts of the assessee.

12. Without prejudice, the learned assessing officer has erred in including investment in shares of Infosys BPO Limited for the purpose of computing disallowance under section 14A read with rule 8D(2)(iii) without appreciating the fact that there was no exempt dividends from the said company and further investment in the said company was not made with a view to earn dividend income.

13. On facts and in the circumstances of the case and law applicable, the impugned computation of disallowance and the net addition is liable to be deleted in entirety.

Grounds on protective disallowance under section 40/ 40(a)(i) in respect of subscription charges paid / payable to M/s Forester Research and M/s Gartner

14. The learned assessing officer has erred in making protective disallowance of expenditure incurred on subscription charges amounting to Rs. 2,82,09,462 and Rs. 3,17,31,606 under section 40/ 40(a)(i) which was paid / payable to M/s Forrester Research and M/s Gartner respectively.

15. On facts and in the circumstances of the case and law applicable, no disallowance should be made under section 40/ 40(a)(i) in respect of the subscription charges paid / payable to M/s Forester Research and M/s Gartner respectively.

16. Without prejudice to ground 9&10 above, the protective disallowance, if any, is to be limited to the amount of subscription charges payable to M/s Forester Research and M/s Gartner as on 31st March 2012 and no disallowance is to be made in respect of subscription charges actually paid during the relevant previous year.

Grounds on disallowance under section 40(a)(ia) / 40(a)(i) in respect of software expenses

17. The learned assessing officer has erred in disallowing software expenses paid/payable to residents and non residents amounting to Rs. 30,23,602 and Rs. 14,65,417 respectively [totaling to Rs.44,88,019] under section 40(a)(ia) / 40(a)(i) for not deducting tax at source in

respect of the said payments under section 194J / 195 of the Income tax Act, 1961.

18. Without prejudice, software payments made to residents totally amounting to Rs. 30,23,602was not liable for TDS under section 40(a)(ia) in view of the 1st proviso to section 40(a)(ia) read with 1st proviso to section 40(a)(i).

19. On the facts and in the circumstances of the case and law applicable, software expenses of Rs. 30,23,602 and Rs. 14,65,417 respectively [totaling to Rs. 44,88,019]was not liable for disallowance under section 40(a)(i) / 40(a)(ia) of the Act.

20. In any case and without prejudice, disallowance under section 40(a)(ia), if any, should be restricted to Rs. 9,07,081 being 30% of Rs. 30,23,602 as the amendment to section 40(a)(ia) by the Finance (No. 2) Act, 2014 w.e.f. 1.4.2015 is beneficial in nature and hence retrospective.

21. In any case and without prejudice, the disallowance, if any, is to be limited to the amount of software expenses payable as on 31st March 2012 and no disallowance is to be made in respect of payments actually made during the relevant previous year.

Grounds on disallowance of software expenses as capital expenditure

22. The learned assessing officer has erred in disallowing software expenses of Rs 451,18,32,386as capital expenditure and erred in making net addition of Rs. 338,38,74,290. On facts and in the circumstances of the case and law applicable, the impugned disallowance of software expenses and the net addition is liable to be deleted in entirety.

23. In any case and without prejudice, the learned assessing officer has erred in allowing depreciation at 25% instead of 60%.

24. In any case and without prejudice, the learned assessing officer has erred in not allowing depreciation at 60% in respect of software expenses held as capital expenditure for the earlier years.

Grounds on disallowance of brand building expenses

25. The learned assessing officer has erred in treating brand building expenses of Rs. 81,79,53,112 as 'capital expenditure' and making net addition of Rs. 56,85,08,898. On facts and in the circumstances of the case and law applicable, brand building expenses should be fully allowed as deduction.

Grounds on disallowance of Commission paid

26. The learned assessing officer has erred in disallowing commission paid to foreign entities amounting to Rs. 23,68,35,533. On facts and in the circumstances of

the case and law applicable, commission paid should be fully allowed as deduction.

Grounds on non reduction of communication expenses from total turnover while computing deduction under section 10AA

27. The learned assessing officer has erred in not reducing the communication expenses totally amounting to Rs.2,71,11,231 from total turnover while computing deduction u/s 10AA in respect of SEZ units at Chennai (Unit 2), Trivandrum, Mysore, Hyderabad and Jaipur, for which deduction under section 10AA has been allowed. On facts and in the circumstances of the case and law applicable, communication expenses should be reduced from total turnover also in computing deduction under section 10AA for the aforesaid units.

28. The learned assessing officer has erred in concluding that communication expenses totally amounting to Rs.12,48,70,626 should not be reduced from total turnover in computing deduction under section 10AA for the other SEZ units at Chennai (Unit No 1), Chandigarh, Pune and Mangalore, for which deduction under section 10AA has not been allowed. On facts and circumstances of the case and law applicable, communication expenses should be reduced from total turnover also in computing deduction under section 10AA for the aforesaid units.

Grounds on non reduction of expenses incurred in foreign currency from total turnover while computing deduction under section 10AA

29. The learned assessing officer has erred in not reducing the expenses incurred in foreign currency totally amounting to Rs.358,08,30,087 from total turnover while computing deduction u/s 10AA in respect of the SEZ units at Chennai (Unit 2), Trivandrum, Mysore, Hyderabad and Jaipur, for which deduction under section 10AA has been allowed. On facts and in the circumstances of the case and law applicable, expenses incurred in foreign currency should be reduced from total turnover also in computing deduction under section 10AA for the aforesaid units.

30. The learned assessing officer has erred in concluding that expenses incurred in foreign currency totally amounting to Rs.1688,21,01,184 should not be reduced from total turnover in computing deduction under section 10AA for the other SEZ units at Chennai (Unit No 1), Chandigarh, Pune and Mangalore, for which deduction under section 10AA has not been allowed. On facts and circumstances of the case and law applicable, expenses incurred in foreign currency should be reduced from total turnover also in computing deduction under section 10AA for the aforesaid units.

Grounds on reduction of interest income from GLES deposit from profits of SEZ units

31. The learned assessing officer has erred in reducing interest income from GLES deposits totally amounting to Rs.2,05,18,841 from profits of SEZ units at Chennai (Unit 2), Trivandrum, Mysore, Hyderabad and Jaipur respectively, while computing deduction under section 10AA and for which deduction under section 10AA has been allowed. On facts and in the circumstances of the case and law applicable, deduction under section 10AA should be allowed in respect of interest income from GLES deposits totally amounting to Rs. 2,05,18,841 in respect of the aforesaid units.

32. The learned assessing officer has erred in concluding that interest income from GLES deposits totally amounting to Rs. 8,66,54,955should be reduced from profits of SEZ units at Chennai (Unit No 1), Chandigarh, Pune and Mangalore respectively while computing deduction under section 10AAand for which deduction under section 10AA has not been allowed. On facts and in the circumstances of the case and law applicable, interest income from GLES deposits totally amounting to Rs. 8,66,54,955 should be held as eligible for deduction under section 10AA in respect of the aforesaid SEZ units.

Grounds on reduction of interest income from loans given to employees from profits of SEZ units while computing deduction under section 10AA

33. The learned assessing officer has erred in reducing interest income from loans given to employees totally amounting to Rs.13,75,022 from profits of SEZ units at Chennai (Unit 2), Trivandrum, Mysore, Hyderabad and Jaipur respectively, while computing deduction under section 10AA and for which deduction under section 10AA has been allowed. On facts and in the circumstances of the case and law applicable, deduction under section 10AA should be allowed in respect of interest income from loans given to employees totally amounting to Rs.13,75,022.

34. The learned assessing officer has erred in concluding that interest income from loans given to employees totally amounting to Rs.58,06,978 should be reduced from profits of SEZ units at Chennai (Unit No 1), Chandigarh, Pune and Mangalore respectively while computing deduction under section 10AA and for which deduction under section 10AA has not been allowed. On facts and in the circumstances of the case and law applicable, interest income from loans given to employees totally amounting to Rs.58,06,978 should be held as eligible for deduction under section 10AA in respect of the aforesaid SEZ units.

Grounds on reduction of receipts from sale of scrap from profits of SEZ units while computing deduction under section 10AA

35. The learned assessing officer has erred in reducing receipts from sale of scrap amounting to Rs.6,54,378 from profits of SEZ unit at Trivandrum while computing deduction under section 10AA and for which deduction under section 10AA has been allowed. On facts and in the circumstances of the case and law applicable, deduction under section 10AA should be allowed in respect of receipts from sale of scrap amounting to Rs.6,54,378 relating to SEZ unit at Trivandrum.

36. The learned assessing officer has erred in concluding that receipts from sale of scrap totally amounting to Rs.63,78,336 should be reduced from profits of SEZ units at Chennai (Unit No 1), Chandigarh and Mangalore respectively while computing deduction under section 10AA and for which deduction under section 10AA has not been allowed. On facts and in the circumstances of the case and law applicable, receipts from sale of scrap totally amounting to Rs.63,78,336 should be held as eligible for deduction under section 10AA in respect of the aforesaid SEZ units.

Grounds on reduction of incentive receipts from Airlines from profits of SEZ units while computing deduction under section 10AA

37. The learned assessing officer has erred in reducing incentive receipts from Airlines totally amounting to Rs.76,176 from profits of SEZ unit at Chennai (Unit 2), Trivandrum, Mysore, Hyderabad and Jaipur respectively, while computing deduction under section 10AA and for which deduction under section 10AA has been allowed. On facts and in the circumstances of the case and law applicable, deduction under section 10AA should be allowed in respect of incentive receipts from Airlines amounting to Rs.76,176 relating to aforesaid SEZ units.

38. The learned assessing officer has erred in concluding that incentive receipts from Airlines totally amounting to Rs.3,21,709 should be reduced from profits of SEZ units at Chennai (Unit No 1), Chandigarh, Pune and Mangalore respectively while computing deduction under section 10AA and for which deduction under section 10AA has not been allowed. On facts and in the circumstances of the case and law applicable, incentive receipts from Airlines totally amounting to Rs.3,21,709 should be held as eligible for deduction under section 10AA in respect of the aforesaid SEZ units.

Grounds on reduction of income in the nature of Inter Company cessation of trading liability while computing deduction under section 10AA

39. The learned assessing officer has erred in reducing income in the nature of Inter Company cessation of trading liability totally amounting to Rs.19,97,651 from profits of SEZ unit at Chennai (Unit 2), Trivandrum, Mysore, Hyderabad and Jaipur respectively, while computing deduction under section 10AA and for which deduction under section 10AA has been allowed. On facts and in the circumstances of the case and law applicable, deduction under section 10AA should be allowed in respect of income in the nature of Inter Company cessation of trading liability totally amounting to Rs.19,97,651 relating to aforesaid SEZ units.

40. The learned assessing officer has erred in concluding that income in the nature of Inter Company cessation of trading liability totally amounting to Rs.84,36,456should be reduced from profits of SEZ units at Chennai (Unit No 1), Chandigarh, Pune and Mangalore respectively while computing deduction under section 10AA and for which deduction under section 10AA has not been allowed. On facts and in the circumstances of the case and law applicable, income in the nature of Inter Company cessation of trading liability totally amounting to Rs.84,36,456 should be held as eligible for deduction under section 10AA in respect of the aforesaid SEZ units.

Grounds on reduction of deduction u/s 10AA in respect of pure onsite revenue

41. The learned assessing officer has erred in computing and reducing a sum of Rs.1,02,27,137 from deduction computed u/s 10AAfor the reason that 1.08% (pure onsite revenue) of 50.8% (onsite revenue percentage) with a profit margin of 10.59% relating to 5 SEZs [viz., Chennai (unit 2), Trivandrum, Mysore, Hyderabad and Jaipur in respect of which deduction under section 10AA has been allowed] are not eligible for deduction under section 10AA. On facts and in the circumstances of the case and law applicable, no reduction should be made from deduction computed u/s 10AA and the sum of Rs. 1,02,27,137 should be held as eligible for deduction under section 10AA of the Act.

42. Without prejudice, similar disallowance in relation to other SEZ units viz., Chennai (Unit No 1), Chandigarh, Pune and Mangalore, if any, is also not warranted and the same should be deleted in entirety.

Grounds on disallowance of deduction u/s 80JJAA:

43. The learned assessing officer has erred in disallowing deduction u/s 80JJAA amounting to Rs.

307,52,60,884. On facts and in the circumstances of the case and law applicable, deduction u/s 80JJAA should be fully allowed as deduction.

Grounds on disallowance of Sub Contracting charges paid to Infosys Technologies China Co Ltd under section 40(a)(i) for not deducting tax at source under section 195.

44. The learned assessing officer has erred in disallowing sub contracting charges paid to Infosys Technologies (China) Co Ltd amounting to Rs.262,02,26,125 under section 40(a)(i) for the impugned reason that TDS under section 195 has not been made in respect of the said payments.

45. On facts and circumstances of the case and law applicable, as payments made to Infosys Technologies (China) Co Ltd amounting to Rs.262,02,26,125 were not chargeable to tax in India under the IT Act, 1961 and / or under the India – China DTAA, the said payments were not liable for TDS u/s 195 and consequently not liable for disallowance under section 40(a)(i).

46. Assuming without admitting that the payments made to Infosys Technologies (China) Co Ltd amounting to Rs.262,02,26,125 are liable for TDS u/s 195, deduction under section 10AA should be allowed in respect of increase in profits on account of the impugned disallowance as relatable to SEZ units.

47. Assuming without admitting that the payments made to Infosys Technologies (China) Co Ltd amounting to Rs.262,02,26,125 are liable for TDS u/s 195, as the demand raised under section 201(1)/(1A) in respect of the aforesaid payment has been fully paid in FY 2013-14, the said expenditure should be allowed as a deduction in computing the total income for AY 2014-15.

Grounds on allowability of deduction u/s 35(2AB) for a sum of Rs.249,91,38,982 in respect of Scientific Research Expenditure incurred from 1.4.2011 to 22.11.2011 amounting to Rs.124,95,69,491

48. The learned AO has erred in not allowing deduction under section 35(2AB) in respect of scientific research expenditure incurred from 1.4.2011 to 22.11.2011 amounting to Rs.124,95,69,491

49. The learned AO has erred in not appreciating that as deduction u/s 35(2AB) for scientific research expenditure incurred from 23.11.2011 to 31.3.2012 was claimed in the return of income and the same has been allowed in the draft and final assessment order, the assessee is also eligible for deduction under section 35(2AB) in respect of scientific research expenditure

incurred from 1.4.2011 to 22.11.2011 amounting to Rs.124,95,69,491.

50. On facts and circumstances of the case and law applicable, incremental deduction under section 35(2AB) amounting to Rs.249,91,38,982 [200% of Rs.124,95,69,491] should be allowed in respect of the scientific research expenditure incurred from 1.4.2011 to 22.11.2011.

TDS credit not allowed fully

51. The learned AO has erred in not allowing TDS credit to the extent of Rs.1,06,50,855 [Rs 223,20,83,172 as claimed during assessment less Rs.222,14,32,317 as allowed in the draft and final assessment order].

52. On facts and in the circumstances of the case and law applicable, TDS credit should be fully allowed to the extent of Rs.223,20,83,172 as claimed during the assessment.

TDS credit and advance tax relating to ICIL not allowed even though it was allowed in the Draft assessment order

53. The learned AO has erred in not allowing TDS credit and advance tax relating to Infosys Consulting India Ltd merged with the appellant amounting to Rs.27,73,096 and Rs.75,00,000 even though the same was allowed in the draft assessment order.

Grounds on allowability of incremental foreign tax credit which was allowed in the Draft assessment order

54. The learned assessing officer has erred in not allowing foreign tax credit to the extent of Rs.343,52,84,882 [680,43,71,180 less336,90,86,298] in the final assessment order, which in turn was allowed in the draft assessment order.

55. The learned assessing officer has erred in not allowing additional deduction for state taxes paid amounting to Rs.37,30,57,123, while computing net business income as claimed during the assessment vide letter dated 29.02.2016.

Grounds on allowability of state taxes paid outside India.

56. The learned AO has erred in

i. not allowing incremental deduction in respect of state taxes paid outside India to local authorities of foreign countries amounting to Rs.37,30,57,123

ii. disregarding the claim made by assessee before the learned AO vide letter dated 29th February 2016.

57. Without prejudice, the learned AO has erred in not allowing relief under section 91 in respect of state tax paid outside India totally amounting to Rs.141,01,15,640

as per the decision of the Jurisdictional High Court in the case of Wipro Ltd v CIT [2016] 382 ITR 179.

Interest on IT Refund granted under section 143(1) but subsequently recovered on completion of assessment proceedings is allowable as deduction

58. The learned AO has erred in not allowing deduction for interest on IT refund amounting to Rs.1,16,28,374 which was granted in the intimation passed under section 143(1) dated 04.02.2009 for AY 2007-08 but which was subsequently recovered in the order passed under section 143(3) for AY 2007-08 as part of assessed tax.

59. The learned AO has erred in not allowing deduction for interest on IT refund amounting to Rs.7,24,03,804 which was granted in the intimation passed under section 143(1) dated 27.09.2010 for AY 2008-09 but which was subsequently recovered in the order passed under section 143(3) for AY 2008-09 as part of assessed tax.

Grounds on Interest levied under section 234B and 234D

60. The learned assessing officer has erred in levying interest under section 234B and 234D. On the facts and in the circumstances of the case, interest under section 234B and 234D is not leviable. The appellant denies its liability to pay interest under section 234B and 234D.

Prayer

61. In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the DRP directions and the final assessment order passed by the learned AO be quashed or in the alternative, the aforesaid grounds and the relief prayed for there under be allowed.

The appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The appellant prays accordingly.

2. Assessee has also filed application seeking admission of additional grounds in respect of secondary and higher secondary education cess paid.

3. It is submitted that this ground has been decided against assessee by *Hon'ble Supreme Court* and accordingly, the assessee do not wish to press this issue.

Accordingly, the additional ground raised by assessee stands dismissed.

4. Brief facts of the case are as under:

4.1. For the assessment year 2012-13, assessee filed its return of income on 30/11/2012 and the return was revised on 25/03/2014 declaring an income of Rs.8543,76,14,970/-. Subsequently, the case was selected for scrutiny and the notice u/s. 143(2) was sent to the assessee asking for details.

4.2. In response to the statutory notices, representatives of assessee appeared before the Ld.AO and filed requisite details and documents as called for. As there was international transaction of assessee with its associated enterprises, the appeal was referred to the transfer pricing officer. The Ld.TPO called for economic details of the international transaction in form 3CEB.

The Ld.TPO issued notice on 05/09/2014. The assessee filed all requisite details. The Ld.TPO examined the international transactions. The Ld.TPO noted that the assessee had entered into following international transactions with its AE.

International transaction	Amount (Rs.)
Software development	17292848955
Technology consulting	1458318688
Software Services	1814565271
Business Process Outsourcing Services	18058861619
Loan Granted	28670000
Interest Received	19932396
Recovery of expenses	208911166
Reimbursement of expenses	286305672
Trade Payable	803497151
Trade Receivable	1633631029

The Ld.TPO noted that assessee aggregated all the transactions related to export of software services and had earned a profit margin of 43.07%. As this was higher than the margins of the comparables, no adjustment was proposed.

4.3. The Ld.TPO observed that assessee has made advances to its associated enterprises being Infosys China & Infosys Brazil. The assessee in response to the notice issued by the Ld.TPO submitted that the loan provided was denominated in US dollar currency and assessee had charged interest at the rate of 6% p.a. It was noticed that the assessee benchmarked the transaction by using the prevailing USD-LIBOR rate which was not acceptable to the Ld.TPO. The Ld.TPO computed the interest rate based on the BBB+ grade corporate bond at 11.76% for 1-2 years. The Ld.TPO thus vide order dated 28/12/2015 proposed an adjustment at Rs.1,71,75,081/-.

4.4. As Infosys Consulting India Ltd. was merged into Infosys Ltd., a separate order u/s. 92CA was passed based on the

international transactions between Infosys Consulting India Ltd. and the AE being Infosys Consulting Inc. The Ld.TPO has recorded as under:

> *"ICIL was incorporated in 19th August 2009 as a public limited company under the Companies Axt 1956. The company was a wholly owned subsidiary of Infosys Consulting Inc., which in turn was a 100 percent subsidiary of Infosys. However, during the year ended 315' March 2012, Infosys Consulting Inc. had been terminated and hence, ICIL became a wholly owned subsidiary of Infosys. Later ICIL got merged with Infosys Ltd."*

4.5. The Ld.TPO noted that Infosys Consulting India Ltd. had following international transaction with Infosys Consulting Inc.

Particulars	Amount
Professional charges for rendering Software Consultancy services t Infosys Consulting Inc.	15,62,14,068
Cross charge of expenses by Infosys Consulting Inc. to ICIL	11,80,346
Cross charge of expenses by ICIL to Infosys Consulting Inc.	12,44,391
Cross charge of expenses by ICIL to Infosys Australia Pty Ltd ("Infosys Australia")	3,981
Total	15,86,42,786

The Ld.TPO noted that assessee (Infosys Consulting India Ltd.) computed the net margins at 16.41% from the income earned from software consultancy services. It used TNMM as the most appropriate method and OP/OC as PLI. This was held to be at arms length based on 9 comparables selected by the assessee.

4.6. The Ld.TPO dissatisfied with the TP study of the assessee, after calling for various details, shortlisted 5 comparables with average margin of 39.1% and computed the shortfall proposing the adjustment at Rs.3,04,53,688/-.

4.7. On receipt of the draft assessment order, the Ld.AO observed that, the assessee claimed:

1. deduction u/s. 10AA of Rs.2919.14 crores,
2. deduction u/s. 80IAB of Rs. 28.8 crores
3. deduction u/s. 80JJAA of Rs.307.52 crores.

4.7.1. The Ld.AO also noted that assessee had substantial tax free income that was earned during the year under consideration amounting to Rs.23,45,95,152/- however assessee had only shown an expense of Rs.1,72,86,259/-.

4.7.2. The Ld.AO noted that assessee had made certain payment to M/s. Forrester Research and Subscription during the year under consideration against which no TDS was deducted.

4.7.3. Assessee had also incurred an amount in respect of software expenses which was claimed as revenue expenditure at Rs.462,77,39,077/-.

4.7.4. Brand building expenses was incurred by assessee to the tune of Rs.81,79,53,112/- for the year under consideration.

4.7.5. It was noted by the Ld.TPO that assessee paid commission amounting to Rs.23,68,35,553/-;

4.7.6. Assessee had debited an expenditure of Rs.41,07,67,587/- towards repairs and building.

4.7.7. The Ld.AO also noted that assessee made payment of Rs.3,96,03,448/- to Gartner Research and Services on which TDS was not deducted. The Ld.AO disallowed all the above expenses / deductions claimed by the assessee.

4.8. On receipt of the draft assessment order, assessee filed objections before the DRP which was rejected.

4.8.1. Against the DRP directions, the Ld.AO passed the final assessment order by making addition of Rs.104,92,13,29,155/- and also disallowed the deduction amounting to Rs.566,89,96,926/- that was claimed u/s. 10AA of the Act. The other deductions claimed under 80IAB and 80JJAA was also disallowed by the Ld.AO.

Aggrieved by the order of Ld.AO, assessee is in appeal before this *Tribunal.*

5. In order to dispose of all the issues alleged, for the sake of convenience, the assessee has tabulated the issues as under:

GROUND NO	ISSUE CONTESTED IN THE APPEAL	COVERED BY
2 TO 5	Denial of deduction claimed under section 10AA in respect of 4 SEZ units viz., Chennai – Unit 1, Chandigarh, Mangalore - Unit 1 and Pune Unit 1	Assessment order for AY 2006-07 allowed deduction u/s 10AA for Chennai SEZ Unit 1 for 1st year – Hence deduction cannot be disallowed for subsequent years. CIT(A) orders for AY 2007-08 to AY 2009-10 held that the aforesaid 4 SEZ Units have not been formed by splitting up or reconstruction of the existing business. Revenue's appeal to ITAT for AY 2007-08 to AY 2009-10 does not contest the relief allowed by CIT(A). Hence, deduction u/s 10AA has been allowed in the 1st years and it cannot be disallowed for subsequent years. **Splitting up and reconstruction conditions cannot be examined subsequent to the year of formation** CIT v Tata Communications Internet Services Ltd [2012] 17 taxmann.com 241 (Del HC) Sami Labs Ltd v ACIT [2011] 334 ITR 157 **(Karnataka)** CIT v. Nippon Electronics (India) P. Ltd. reported in [1990] 181 ITR 518 **(Karnataka)** **If deduction is allowed in 1st year, it cannot be disallowed in subsequent years** CIT v Western Outdoor Interactive P. Ltd. [2012] 349 ITR 309 (Bom) Shasum Chemicals & Drugs Ltd v CIT [2016] 73 taxmann.com 293 (SC) Circular No 1 of 2013 – SOW prevails over MSA in determining the eligibility of deduction u/s 10A, 10AA
6 to 9	Transfer pricing adjustment in respect of interest receivable from Infosys China and Infosys Brazil	CIT v Cotton Naturals (I) (P) Ltd [2015] 55 taxmann.com 523 (Delhi) CIT(A) order for AY 2008-09 and AY 2009-10 deleted the identical TP addition. Revenue's

		appeal to ITAT for AY 2008-09 & AY 2009-10 does not contest the relief allowed by CIT(A). TPO for subsequent AYs has accepted the interest charged at 6%
10 to 13	Disallowance under section 14A read with rule 8D(2)(iii)	No satisfaction recorded by the AO Infosys BPM Ltd v DCIT – ITA No 493/B/2018 decision dated 23.8.2021 ITAT Bangalore deleted the 14A disallowance in the absence of satisfaction by the AO Without prejudice, ACIT v Vireet Investment (P) Ltd [2017] 82 taxmann.com 415 – only actual dividend yielded investments should be considered under rule 8D(2)(iii)
14 & 15	Protective disallowance under section 40(a)(i) in respect of subscription charges paid / payable to M/s Forester Research and M/s Gartner	Karnataka High Court in assessee's own case vide order dated 20.9.2021 in ITA No 281/2018 c/w ITA No 279/2018 deleted identical disallowance following Engineering Analysis decision of SC
16	No disallowance as there was no amount payable as on 31st March 2012	Not Pressed
17 to 21	Disallowance under section 40(a)(ia) / 40(a)(i) in respect of software expenses	Karnataka High Court in assessee's own case vide order dated 20.9.2021 in ITA No 281/2018 c/w ITA No 279/2018 deleted identical disallowance following Engineering Analysis decision of SC
22 23 24	Disallowance of software expenses as capital expenditure Without prejudice, depreciation to be allowed at 60% instead of 25% Without prejudice, depreciation should also be allowed in respect of software expenses of earlier years held as capital in nature.	ITAT order in assessee's own case for AY 2005-06 IT(TP)A No 102/Bang/2013 dated 10.11.2017 set aside the issue of allowability of software expenses to AO with a direction to verify the nature and purpose of software expenses and decide in the light of decisions in Empire Jute Co Ltd 124 ITR 1, Alembic Chemicals Works Co Ltd 177 ITR 377, IBM India Ltd 357 ITR 88 etc. CIT v Toyota Kirloskar Motor P Ltd [2012] 349 ITR 65 (Kar) dt. 23.3.2011 CIT v IBM India Ltd [2013] 357 ITR 88 dt. 10.4.2013
25	Disallowance of 'brand building expenditure'	Infosys BPO Ltd v DCIT ITA No 1367/B/2014 decision dated 27.9.2019 for AY 2007-08 – Your honour's order allowing brand building expenditure as it was incurred for existing business and not for any new business. CIT v Geoffrey Manners & Co. Ltd [2009] 315 ITR 134 (Bombay) followed United Spirits Ltd v DCIT IT(TP)A No 489/Bang/2017 decision dated 29.5.2020 – ITAT Bangalore
26	Disallowance of Commission paid	DIT(IT) v Panalfa Autoelektrik Ltd [2014] 49 taxmann.com 412 – Commission paid to foreign agents cannot be regarded as fees for technical services u/s 9(1)(vii) Device Driven (India) P Ltd v CIT [2021] 126 taxmann.com 25 (Kerala) Without prejudice, not chargeable to tax under the DTAA on account of 'make available' condition, absence of FTS Article

		etc.
27 to 30	Communication expenses and expenses incurred in foreign currency reduced from export turnover but not reduced from total turnover while computing deduction under section 10AA	CIT v HCL Technologies Ltd [2018] 93 taxmann.com 33 (SC)
31 to 40	Deduction u/s 10AA in respect of interest income from GLES deposit, interest income from loans given to employees, receipts from sale of scrap, incentive receipts from Airlines, income in the nature of Inter Company cessation of trading liability	Wipro Ltd v DCIT [2016] 382 ITR 179 (Kar) DCIT v Motorola India Electronics (P) Limited [TS-683-HC-2013(Kar)] CIT v Hewlett Packard Global Soft Ltd [2017] 87 taxmann.com 182 (Kar – FB) ITAT Bangalore in assessee's own case for AY 2005-06 and Ay 2006-07 allowed deduction u/s 10A on rental income.
41 & 42	Reduction of deduction under section 10AA in respect of pure onsite revenue	DCIT v iGate Global Solutions Ltd IT(TP)A No 286/Bang/2013 decision dated 5.8.2019 – ITAT Pune allowed deduction u/s 10A in respect of pure onsite revenue Circular No 1 of 2013 CIT v Mphasis Software and Service India Pvt. Ltd decision dated 29th July 2015 62 taxmann.com 165 (Kar HC)
43	Deduction under section 80JJAA	CIT v Texas Instruments India P Ltd [2021] 127 taxmann.com 59 (Karnataka)
44 & 45	Disallowance of Sub Contracting charges paid to Infosys Technologies China Co Ltd under section 40(a)(i) for not deducting tax at source under section 195	Held against the assessee in assessee's own case by ITAT Bangalore in IT(IT)A No 4/Bang/2014 & 1182/Bang/2014 11.4.2022 ITAT C Bench for AY 2011-12 & AY 2012-13 on the issue of liability on Infosys Ltd to deduct tax at source on such payments under section 195.
46	Deduction under section 10AA in respect of the above disallowance under section 40(a)(i)	Increase in SEZ profits on account of the above disallowance is eligible for deduction u/s 10AA CIT v M Pact Technology Services Pvt. Ltd ITA No 228/2013 dated 11.7.2018 CIT v Gem Plus Jewellery India Ltd [2011] 330 ITR 175 CBDT Circular No. 37 of 2016 dated 2.11.2016
47	Deduction in the year of payment of TDS demand	Without prejudice, demand arising from the order passed under section 201(1)&(1A) dt. 28.2.2014 for the AY 2012-13, (wherein the payments made to Infosys Technologies China Co Ltd were held as liable for TDS), was paid under protest on 20.3.2014 and 29.3.2014. [refer page 2893 of paper book 5] Consequently, in case the disallowance is upheld under section 40(a)(i), then the sum of Rs. 262,02,26,125 has to be allowed as deduction for the AY 2014-15 as the TDS has been paid during the previous year 2013-14
48 to 50	Allowability of deduction u/s 35(2AB) for a sum of Rs. 249,91,38,982 in respect of scientific research expenditure incurred from 1.4.2011 to 22.11.2011 amounting to Rs.	Wipro Ltd v CIT 382 ITR 179 (Karnataka) on Goetze India decision not applicable On merits held in favour of the assessee in CIT v Claris Lifesciences Ltd [2008] 174 Taxman 113 (Guj HC)

	124,95,69,491	CIT v Wheels India Ltd [2012] 20 taxmann.com 682 (Mad) CIT v Sandan Vikas (India) Ltd [2012] 22 taxmann.com 19 (Delhi)
51 to 53	TDS credit	AO to verify and allow
54	Foreign tax credit of Rs. 96,55,80,804	Foreign tax credit of Rs. 96,55,80,804 includes an amount of Rs. 68,14,32,706 which is under dispute before the Australian Tax Authorities. As per section 155(14A) read with rule 128(4), tax credit should be allowed in respect of disputed foreign tax once the same is settled. AO be directed to verify and allow the disputed foreign tax credit of Rs. 68,14,32,706 for the year under consideration only after the dispute is settled and in accordance with the provisions of section 155(14A) Foreign tax credit of Rs. 96,55,80,804 includes foreign tax credit of Rs. 23,63,99,423 on income which is eligible for deduction under section 10AA. Wipro Ltd v DCIT 382 ITR 179 (Kar) Foreign tax credit relating to income eligible for deduction under section 10A is also allowable under section 90 ITAT, Bangalore bench in assessee's own case for the AY 2005-06 and AY 2006-07 admitted the additional grounds of appeal and directed the AO to verify and allow foreign tax credit on the basis of the decision in the case of Wipro Ltd v DCIT 382 ITR 179 (Kar)
55 & 56	Deduction for State Taxes paid	Not Pressed
57	Relief under section 91 for state taxes paid outside India	Not Pressed
58 & 59	Interest on IT Refund granted under section 143(1) but subsequently recovered on completion of assessment proceedings is allowable as deduction	AO to verify and allow as per law.
60	Interest levied under section 234B and 234D	Consequential
Additional ground	Additional grounds of appeal filed on 28.6.2021 on deduction for education cess	Not pressed

6. Ground nos. 2 – 5 – It is submitted by the Ld.AR that the assessing officer has denied the claim of Rs.2227,82,65,630/- in respect of four SEZ units being

1) Chennai – Unit 1
2) Chandigarh
3) Mangalore – Unit 1 and
4) Pune – Unit 1

6.1. The Ld.AO disallowed deduction claimed under section 10AA in respect of the aforesaid 4 SEZ Units relying on similar disallowances made in the assessment orders passed for the earlier years. For all the 4 SEZ units, it was held by the Ld. AO that the projects undertaken by the new SEZ units were based on Master Service Agreements (MSAs) which were entered into by the assessee before the formation of the SEZs. It was therefore concluded that these SEZ units were formed by splitting up and reconstruction of the business and hence not eligible for deduction under section 10AA.

6.2. The Ld.AR submitted that for A.Ys. 2007-08 to 2009-10, the Ld.CIT(A) vide orders dated 30/04/2017 and 06/06/2017, given a categorical finding that the four SEZ unit referred to hereinabove have not been formed by splitting up or reconstruction of the existing business.

6.3. He also submitted that revenue had filed appeal before this *Tribunal* for A.Ys. 2007-08 to 2009-10 on other issues. But the categorical findings by the Ld.CIT(A) in respect of SEZ units were not contested and therefore the relief allowed has attained finality. The Ld.AR submitted that the relevant observation of Ld.CIT(A) for A.Ys. 2007-08 to 2009-10 are placed in the paper book and is tabulated as under:

Particulars	Paper book 10 - relevant Page No	Internal page no of CIT(A) order	Para No of CIT(A) order
CIT(A) order — AY 2007-08	Page 7090 to 7100 - Findings are at Page 7095 to 7100	66 to 76 Findings are at Page 71 to 76	Para 41 to 45.2 Findings are at para 42 to 45.2
CIT(A) order — AY 2008-09	Page 7197 to 7212 Findings are at Page 7203 to 7212	80 to 95 Findings are at Page 86 to 95	Para 41 to 47.2 Findings are at para 42 to 47.2

CIT(A) order — AY 2009-10	Page 7298 to 7313 Findings are at Page 7304 to 7313	77 to 92 Findings are Page 83 to 95	Para 46 to 51.2 Findings are at para 47 to 51.2

6.4. He also brought to our notice that, for A.Y. 2006-07, the assessing officer himself granted the deduction u/s. 10AA in respect of Chennai SEZ Unit-1 being the first year. Thus placing reliance on CBDT Instruction No. 3/2014 dated 14/03/2014, the Ld.AR submitted that, no appeals could be filed where the orders were passed prior to the issue of Circular No. 1/2013 dated 17/01/2013. He thus submitted that assessee is eligible for deduction u/s. 10AA and that there has been no splitting up and reconstruction of any of the unit. Referring to following decisions,

a) *Decision of Hon'ble Delhi High Court in case of CIT v Tata Communications Internet Services Ltd [2012] 17 taxmann.com 241*
b) *Decision of Hon'ble Karnataka High Court in case of Sami Labs Ltd v ACIT [2011] 334 ITR 157*
c) *Decision of Hon'ble Karnataka High Court in case of CIT v. Nippon Electronics (India) P. Ltd. reported in [1990] 181 ITR 518*

6.5. The Ld.AR submitted that, the condition of splitting up and reconstruction cannot be examined once it stands satisfied and accepted by the revenue authorities in the initial years. He also placed reliance on the decision of *Hon'ble Bombay High Court* in case of *CIT vs. Western Outdoor Interactive P. Ltd.* reported in *(2012) 349 ITR 309 (Bom).*

6.6. Referring to Circular No. 01/2013 dated 17/01/2013, the Ld.AR further submitted that the statement of work prevails over the Master Service Agreement in determining the eligibility of deduction u/s. 10A/10AA. Master Service Agreements are in the nature of an umbrella agreement outlining broad terms and conditions for the relation between customer and Infosys. The MSA's outline the general relationship between the assessee and

the client and does not describe the scope of work to be carried out. The scope of work is outlined in the SOW's. The actual work is performed as per the statement of work (work order /purchase order /task order) issued by the customer to Infosys. The SOW's describes the scope of the work, deliverables, timelines, resource mix, responsibilities of each party etc.

6.7 The Ld.AR has also brought to the notice of this *Tribunal,* the observation of the assessing officer for A.Y. 2007-08 that reads as under:

> *"6.9 It should be stated for record that assessee has taken utmost care while setting up SEZ units. There is no gross and large scale shifting of employees and business on a lock-stock barrel. The assessee is at least in a position to state the basis on which the shift of business has happened and the basis of the claim of the new SEZ units. The turnover and employee strengths of the other STPs in the same city have marginally come down. The old STPs in the same city have not been wound up overnight."*

He submitted that the assessing officer has thus verified all the relevant conditions in order to satisfy the deduction.

6.8 On the contrary, the Ld.Standing Counsel relied on the observations of the Ld.AO/DRP.

6.9. The issue and question raised by the Revenue in this appeal relates to satisfaction of conditions mentioned in clause (ii) to sub-section (4) to Section 10AA of the Act.

Sub-section 4 to Section 10AA reads as under:

> *(4) This section applies to any undertaking, being the Unit, which fulfils all the following conditions, namely:—*
>
> *(i) it has begun or begins to manufacture or produce articles or things or provide services during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone;*
>
> *(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence:*
>
> ***Provided** that this condition shall not apply in respect of any undertaking, being the Unit, which is formed as a result of the re-*

establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(iii) it is not formed by the transfer to a new business, of machinery or plant previously used for any purpose.

Explanation: The provisions of Explanations 1 and 2 to sub-section (3) of section 80-IA shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

Sub-section (4) stipulates the conditions which an undertaking as a unit must fulfill to get benefit under Section 10AA of the Act. Thus the eligibility requirements are unit specific and not assessee specific. The section 10AA of the Act referrers to the 'unit' of the assessee to be eligible and entitled to exemption. Each unit in the SEZ must meet the conditions specified in clauses (i) - (iii) of sub-section (4) to Section 10AA of the Act. In case there are multiple units in the SEZ, each unit would, on satisfaction of the conditions, be entitled to exemption.

Further the condition under section 10AA(4)(i*ii*) is that it is not formed by transfer to a new business of machinery or plant previously used for any purpose, and Explanation 1&2 under 80IA(3) would be applicable.

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

6.10 Conditions of splitting up and reconstruction as per clause (ii) of section 10AA(4) was inserted by Finance Act, 2007 with retrospective effect from February 10, 2006. The business of the SEZ unit 1 in Chennai was formed and commenced on 16.7.2005 i.e., before 10.2.2006.

6.11 The SEZ unit No. 1 at Chennai was formed and started claiming deduction under section 10AA in the FY 2005-06. Thus, AY 2006-07 was the first year of claim. The said deduction was

allowed in the assessment order passed under section 143(3) for the AY 2006-07. AY 2007-08 is the second year of claim. The tests of splitting up or the reconstruction of a business already in existence have to be applied only at the time of formation of a unit. As deduction under section 10AA was allowed for AY 2006-07, the same cannot be denied for subsequent years.

6.12. The undertaking, when it was formed, satisfied and duly fulfilled the requirements of the said clause that was applicable at the relevant time. It was a new undertaking and there is no factual finding that at the time or establishment or formation of the undertaking, business already in existence was splitted or reconstructed. It is accepted that the plant and machinery procured at the time of formation was new. Therefore in our view, the eligibility if the Chennai SEZ Unit I stands verified in the first year of the unit being set up. In our view, denial of exemption to the Chennai SEZ Unit I cannot be accepted.

6.13. However, we note that the denial of exemption related to assessment year 2007-08 on the ground of 'splitting up and reconstruction'. At this juncture we also refer to the observation of the Ld.AO for AY 2007-08, which is reproduces herein above in para 6.7. However the Ld.TPO denied the benefit.

In *Tata Communications Internet Services Ltd.* (*supra*), it was clarified by the Court with specific reference to Section 80-IA that "the bar as provided under section 80-IA(3) is to be considered only for the first year of claim for deduction under section 80-IA":

> *"20. . . . The bar as provided under section 80-IA(3) is to be considered only for the first year of claim for deduction under section 80-IA. Once the assessee is able to show that it has-used new plants and machinery which has not been 'previously used for any purpose and the new-undertaking is not formed by splitting up or reconstruction of*

business already in existence, it is entitled to the deduction under section 80-IA for subsequent years. Since the assessee had been granted claim of deduction right from the assessment year 2004-05 under section 80-IA, consequently it cannot be denied deduction for the subsequent years inasmuch as restraint of section 80-IA(3) cannot be considered for every year of claim of deduction, but can be considered only in the year of formation of the business."

6.14. Before us the Ld.AR submitted that the employees transferred to new SEZ units were less than 20% of the total number of the employees, and therefore the condition stipulated in Circular 12 & 14 of 2014 dated 18/07/2014. This criteria has not been considered by the Ld.AO.

6.15. We have referred to the observations by the Ld.CIT(A) for assessment years 2007-08 to 2009-10 wherein there is a categorical finding that these units have not been formed by splitting up or restructuring. This observation has not been challenged by the revenue in appeals filed in ITA No.1557/B/2017 for AY 2007-18, ITA No.1849/B/17 for AY:2008-09 and ITA No.1848/B/2017 for AY: 2009-10. And thus this issue has attained finality. For sake of convenience, we reproduce the relevant observation by the L.dCIT(A) has been tabulated by the Ld.AR.

We therefore direct the Ld.AO to grant the deduction claimed by the assessee in respect of the Chennai SEZ Unit I, Chandigarh nit, Mangalore Unit I and Pune Unit I.

Accordingly these grounds raised by the assessee stands allowed.

7. Ground nos.6–9 are in respect of interest receivables from Infosys China and Infosys Brazil.

7.1. During the year under consideration, the assessee received interest on loans given to Infosys China and Infosys Brazil

amounting to Rs. 1,36,70,746/- and Rs. 62,61,650/- totaling to Rs.1,99,32,396. These loans were given in the earlier years and the terms and conditions are same for all the years. Rate of interest charged by the assessee for both the loans was at 6% p.a.

7.2. The TPO vide order dated 28.12.2015 determined the arm's length interest rate @ 11.17% stating the same as yield from BBB+ grade corporate bond (investment grade bonds) for a 1 to 2 years period during the FY 2011-12. Consequently, TP adjustment was made at Rs. 1,71,75,081.

DRP altered the above basis of adjustment made by the TPO.

7.3. DRP directed the Ld.AO/TPO to compute the ALP by considering the notional loss to assessee by taking the comparable interest rate prevailing for long term fixed deposits during the previous year. Interest on FDs with various banks was upheald as Internal CUP.

7.4. Subsequently, the Ld.TPO passed a rectified order on 28.2.2017 giving effect to DRP Directions wherein average value of interest rates paid by different banks on fixed deposits made by the assessee was considered at 8.53% and consequently TP adjustment was determined at Rs. 84,04,827.

7.5. Following the DRP Directions and the TPOs rectified order, the Ld.AO made an addition of Rs. 84,04,827 and before us, the Ld.AR submitted that for A.Y:2008-09 and 2009-10, the Ld.CIT(A) deleted the proposed adjustment in respect of interest on loans given to Infosys China for A.Y. 2011-12, the DRP deleted similar adjustment in respect of interest on loans given to Infosys China and Infosys Brazil. He referred to the fact that was

recorded by the DRP at page 10 for the year under consideration. Further, for the AY 2013-14, the Ld.TPO vide order dated 23.6.2016 concluded that the interest charged to Lodestone Holding AG and Infosys Public Services, USA at 6% p.a. are at arms length price. Similarly, for the AY 2014-15, the Ld.TPO vide order dated 21.7.2017 held that interest charged to Infosys Brazil at 6% p.a is at arms length price (placed at page 7025 to 7036 of case law compilation 4 filed on 12.11.2021). For the AY 2016-17 to AY 2018-19, the Ld.TPO passed the orders under section 92CA(3) without any TP adjustments(placed at page 7037 to 7043 of case law compilation 4 filed on 12.11.2021).It is submitted that, there is no change in the facts and circumstances of the case in respect of interest received from overseas entities for all the years.

7.6. The Ld.AR thus submitted that assessee has considered the LIBOR rates and had computed 6% interest on the loans advanced to Infosys China as well as Infosys Brazil. He submitted that, for the year under consideration, highest 12 months USD LIBOR interest rate was 1.128% and therefore the interest charged by assessee is at arms length. Referring to the DRP directions for year under consideration, he submitted that the DRP passed its view on the basis of "opportunity cost", the principle which has been rejected by *Coordinate Bench of this Tribunal* in case of *Advanta India Ltd. vs. ACIT* reported in *64 taxmann.com 251.*

On the contrary, the Ld.St.Counsel relied on the observations by the Ld.AO/DRP.

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

7.7. We note that, the assessee admittedly charged 6% interest rate on the loans advanced to Infosys China and Infosys Brazil. The revenue authorities have accepted the rate charged by the assessee in the subsequent as well as preceding assessment years. We therefore do not see any reason to deviate from the same. We also note that 11.17% computed by the Ld.TPO which was subsequently rectified to 8.53%, do not have any basis, as it is based on fixed deposit interest rate by different banks. We note that principles laid down by *Hon'ble Delhi Tribunal* in case of *CIT vs. Cotton Naturals India Pvt. Ltd.* reported in *(2015) 55 taxmann.com 523* has not been followed by the Ld.TPO, We also note that the LIBOR rate of 12 month USD is much less than the rate computed by the assessee. We therefore uphold the interest rate computed at 6%.

Accordingly, these grounds raised by assessee stands allowed.

8. Ground nos.10-13: Disallowance u/s. 14A r.w.Rule 8D(2)(iii)

8.1. During the year under consideration, dividend income from mutual funds which was exempt amounted to Rs. 23,45,95,152. It is also submitted that, no dividends were received in respect of shares of Infosys BPM Ltd (formerly known as Infosys BPO Ltd). Disallowance under section 14A voluntarily made by the assessee amounted to Rs.1,72,86,259/- on the basis of 50% of salary cost of CFO and 50% of salary cost of employees handling treasury function.

8.2. The Ld.AO made the disallowance under section 14A read with rule 8D(2)(iii) totally amounting to Rs.3,30,96,246/-, considering the average value of investments made in mutual funds and shares of Infosys BPM Ltd. After reducing the amount already disallowed by the assessee amounting to Rs. 1,72,86,259, balance sum amounting to Rs.1,58,09,987 was added to income returned by the Ld.AO. The Ld.AO relied on various decisions in support of the impugned conclusion that disallowance under section 14A should be made as per Rule 8D.

8.3. The DRP confirmed the disallowance under section 14A as per Rule 8D(2)(iii) relying on certain decisions and Circular No.5/2014 dated 11.2.2014. Following the DRP directions, the ld.AO has made an addition of Rs.1,58,09,987 under section 14A read with rule 8D(2)(iii).

8.4. The Ld.AR at the outset submitted that the *Coordinate Bench of this Tribunal* in subsidiary assessee's case being *Infosys BPM Ltd. vs. DCIT* in *ITA No. 493/Bang/2018* vide order dated *23/08/2021* has deleted the disallowance made under section 14A read with Rule 8D. This was for the reason that no satisfaction was recorded by the AO as to how the disallowance made by the Assessee was incorrect. The Coordinate bench of this *Tribunal* in *assessee's own case for the AY 2006-07 in ITA No 799/B/2015* vide *order dated 10.11.2017* deleted the disallowance under section 14A as per rule 8D in the absence of satisfaction of the Ld.AO on incorrectness of the claim made by the assessee.

8.5. Without prejudice, *Special bench* of *Hon'ble Delhi Tribunal* in the case of *ACIT vs. Vireet Investment (P) Ltd.,* reported in *(2017) 82 taxmann.com 415,* among other cases has held that only those investments are to be considered for computing average value of investment under Rule 8D(2)(iii) which yielded exempt income during the year. In the present case, as submitted earlier, no dividends were declared by Infosys BPO Ltd., for the year under consideration. Thus, the investments made in the equity shares of Infosys BPO Limited should not be considered for computation of average value of investments under Rule 8D(2)(iii).

8.6 It is submitted that, if investments made in the equity shares of Infosys BPO Ltd., are excluded for computation of average value of investments under Rule 8D(2)(iii), the disallowance as per Rule 8D(2)(iii) at 0.5% of average value of mutual funds world only be Rs.1,25,027/-, which is less than the disallowance voluntarily made by the assessee amounting to Rs.1,72,86,259/- by Rs.1,71,61,232/-. Thus, the Ld.AR submitted that, if applicability of Rule 8D is to be made, the disallowance should be restricted to Rs.1,25,027/- and consequently the *suo moto* disallowance made by the assessee amounting to Rs.1,72,86,259/- should be deleted.

8.7. On the contrary, the Ld.St.Councel relied on the observations of the authorities below.

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

8.8. Admittedly, the assessee *suo moto* disallowed Rs.1,72,86,259/- u/s.14A. We note that the Ld.AO while computing disallowance under Rule 8D(2)(iii), included the

investments made in Infosys BPO Ltd., that did not yield any exempt income for year under consideration. Going by the submissions of the Ld.AR, ratio laid down in *Vireet Investment(supra)*, the disallowance then computed would be less that the disallowance voluntarily offered to tax by the assessee which is not the right course to be adopted. We therefore uphold the disallowance voluntarily made by the assessee that has been offered to tax by the assessee. We direct the Ld.AO to compute the disallowance as voluntarily offered by the assessee. Needless to say that proper opportunity of being heard mist be granted to the assessee.

Accordingly, this ground raised by the assessee stands partly allowed.

9. Ground nos. 14-21 are in respect of following two issues.

1) Disallowance u/s. 40(a)(i) in respect of subscription fee paid to M/s. Forrester Research and M/s. Gartner amounting to Rs.2,82,09,462/- and Rs.3,17,31,606/-.
2) Disallowance u/s. 40(a)(ia) / 40(a)(i) in respect of software expenses amounting to Rs.30,23,602/- and Rs.14,65,417/- respectively.

9.1. It was submitted that these expenditure were disallowed by the Ld.AO for non-deduction of TDS u/s.195 of the Act. The Ld.AO followed the decision of *Hon'ble Karnataka High Court* in case of *CIT vs. Samsung Electronics Co. Ltd.* reported in *(2011) 203 Taxman 477.* It is submitted that *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT* reported in *(2021) 432 ITR 471* as distinguished decision of *Hon'ble Karnataka High Court.* In our opinion, as the decision of *Hon'ble Supreme Court* was not available to the revenue authorities in the interest of justice, we remand these issues

back to the Ld.AO/TPO to verify these claims in accordance with the principles laid down by *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT (supra).* In the event after verifying the relevant agreements / invoices and applying the ratio laid down by the *Hon'ble Supreme Court,* no TDS is liable to the deducted, the disallowance u/s. 40(a)(i) / 40(a)(ia) deserves to be deleted. The Ld.AO is directed to carry out necessary verifications in accordance with law by granting proper opportunity of being heard to assessee.

Accordingly, ground nos. 14-15 and 17-21 stands allowed for statistical purposes.

10. The Ld.AR submitted that **Ground no. 16** is not pressed and accordingly the same is dismissed.

11. **Ground nos. 22-24 – Disallowance of software expenses as capital expenditure. Alternatively, assessee has prayed for depreciation to be granted at 60% as against 25%.**

The assessee is engaged in the business of development and export of computer software. During the year, the assessee incurred software expenses towards the usage of licensed software. Cost of software packages totally amounting to Rs.4.51,18,32,386/- was included under 'Software development expenses' in the Profit and loss account. Cost of software packages and tools was procured for internal use by the assessee for enhancing the quality of its services, for meeting the needs of software development and includes software procured from third parties for resale along with the assessee's software. The software licenses were in the nature of 'application software' and not 'system software'.

11.1. The Ld.AR submitted that, assessee vide Note 12 to letter filed on 12.1.2016 (at Page 1083, 1084 of Paper book) and Annexure N of submissions filed on 12.1.2016 (Page 1203 to 1219 of Paper book) explained in detail as to why, software expenses should not be considered as capital expenditure. The Ld.AR submitted that the assessee also submitted evidences such as PO's and invoices relating to top 100 parties which covered more than 85% of total software expenditure (Annexure O to letter filed on 12.1.2016- Pages 1220 to 1877 – Paper book) The assessee also submitted brief explanation regarding the nature of software, its utility for the organization and duration of software licenses for each one of these 100 parties.

11.2. The Ld.AO disallowed software expenses of Rs.4,51,18,32,386/- as capital expenditure and allowed depreciation on the same at 25% amounting to Rs.1,12,79,58,096/-. The net addition made after allowing depreciation amounted to Rs.3,38,38,74,290/-.

11.3. The DRP confirmed the disallowance made by the Ld.AO and also the depreciation rate of 25%. It was held that software are tools of assessee's business and hence capital in nature. It was also held that the invoices produced do not indicate that software payments are for annual maintenance or for software having life less than 2 years. Following the DRP Directions, the Ld.AO disallowed software expenses of Rs.4,51,18,32,386/- as capital expenditure and allowed depreciation on the same at 25% amounting to Rs.1,12,79,58,096/-. The net addition made after allowing depreciation amounted to Rs.3,38,38,74,290/-.

11.4 Before us, the Ld.AR submitted that the software expenses was incurred in relation to the usage of the licensed software. As a result of the outlay, the assessee secured a license to use the software. The license was available for a limited period. The license was renewable, by payment of the fees at pre-defined intervals. In many cases, the software licenses were used by the employees for software development, maintenance, testing of applications etc. The Ld.AR submitted that *Coordinate Bench of this Tribunal* in *assessee's own case for AY 2005-06 IT(TP)A No 102/Bang/2013 dated 10.11.2017* set aside the issue of allowability of software expenses to Ld.AO with a direction to verify the nature and purpose of software expenses and decide in the light of decisions in, *Empire Jute Co Ltd* reported in *124 ITR 1*, *Alembic Chemicals Works Co Ltd reported in 177 ITR 377, IBM India Ltd 357 ITR 88 etc.* The relevant extracts are under.

> 8.2.2 We, however, find that in the case on hand that the Assessing Officer has not examined the documentary evidence in respect of the software expenses, like purchase orders, etc or the description, nature or purpose of software payments claimed as revenue expenditure. We, therefore, set aside this issue to the file of the Assessing Officer with a direction to examine and consider the evidence, description, nature and purpose of software expenses and to decide the issue of software expenditure being capital or revenue in the light of the decisions of the Hon'ble Apex Court in the case of **Empire Jute Co. Ltd.** (1980) 124 ITR 1, **Alembic Chemicals Works Co. Ltd. Vs. CIT** (1989) 177 ITR 377, the Hon'ble High Court of Karnataka in the case of **CIT Vs. IBM India Ltd.** (supra) and the Hon'ble High Court of Calcutta in the case of **Indian Aluminium Co. Ltd.** (2016) Tax Corp (DT) 64980; after affording the assessee adequate opportunity of being heard in the matter. Consequently, Ground No.3.1 of the assessee's appeal is allowed for statistical purposes.

The Ld.AR submitted that, following the direction of this *Tribunal*, the Ld.AO passed the OGE to ITAT order on 3.9.2019 and allowed the software expenses as revenue expenditure.

11.5. The Ld.AR submitted that the software expenses were for software licenses in respect of application software. It was not in

the nature of system software. The Ld.AR submitted that the assessee incurred regular expenditure for renewal, upgrades and maintenance of these software licenses and if the principles enunciated in all the above judicial precedents are applied to the facts of the assessee the whole of the software expenses constituted revenue expenditure and did not in any way partake the character of capital expenditure. He submitted that the approach of the Ld.AO in classifying the software expenses as capital is contrary to law.

11.6. Without prejudice, the Ld.AR also submitted that in the event the expenditure is held to be capital in nature, depreciation on software expenses is to be allowed at 60%. The Ld.AR relied on decision of coordinate bench of this *Tribunal* in *assessee's own case for the AY 2005-06* wherein it was held that if software expenses are treated as capital expenditure, then, depreciation on the same should be allowed at 60% and not at 25%. Without prejudice, depreciation should also be allowed in respect of software expenses of earlier years held as capital in nature.

On the contrary, the Ld.St.Counsel relied on the observations of Ld.AO/DRP.

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

11.7. We note that the Ld.AO has not examined the documentary evidences in respect of this claim. We therefore set aside this issue to the Ld.AO with a direction to consider the claim of the assessee in the light of evidences / documents filed. The Ld.AO shall also verify this issue based on the principles laid down by *Hon'ble Supreme Court* in case of *Engineering Analysis (supra).*

Accordingly, these grounds raised by assessee stands partly allowed.

12. <u>Ground No.25:</u> Disallowance of 'brand building expenditure

12.1. During the relevant previous year, the assessee had incurred brand building expenses of Rs.81,79,53,112/-. The brand building expenditure were in the nature of subscription to research reports by research agencies and advisory services, participation/sponsorship in seminars, exhibitions, marketing and sales events, retainership amounts paid towards public relations agencies, annual and periodic customer and sales meets, sponsorship fees, publishing charges, travel reimbursements, photocopy charges, expenditure incurred for setting up of Booth for exhibition or display of Infosys name, expenditure on conferences, events, sales marketing expenses etc. Brand building expenses are included and shown under 'Selling and Marketing expenses' in the financial statements and claimed as revenue expenditure.

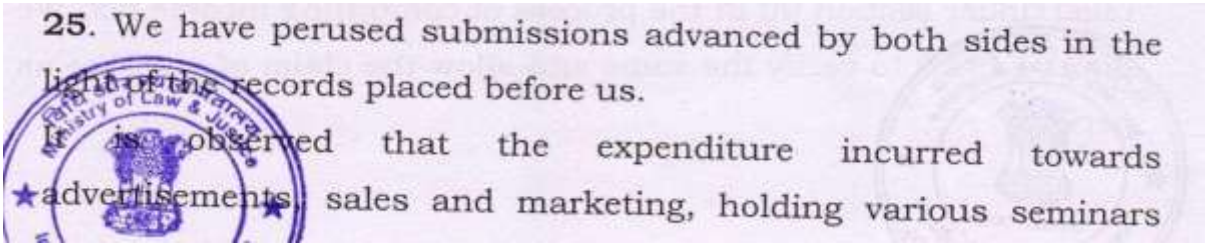
12.2. In the draft assessment order, the Ld.AO treated the brand building expenses of Rs.81,79,53,112/-, as deferred revenue expenditure, and allowed 20% of the said expenditure amounting to Rs.16,35,90,622/- and held that the balance sum of Rs.65,43,62,490/- constituting 80% of the expenditure will be amortized over the next 4 years.

12.3. The DRP directed the Ld.AO to consider the expenses of Rs.81,79,53,112/- as capital expenditure incurred for creating intangible asset in the form of 'brand', instead of deferred revenue expenditure. However, the Ld.AO was directed to grant

depreciation at 25% considering brand as an asset eligible for depreciation. Following the DRP Directions, the Ld.AO treated the brand building expenditure of Rs.81,79,53,112/- as capital expenditure. From this, disallowance of payments made to Forester research and Gartner totally amounting to Rs.5,99,41,068/- was reduced, as they were the subject matter of separate assessment and on the remaining sum of Rs.75,80,11,864/-, the Ld. AO allowed depreciation at the rate of 25% amounting to Rs.18,95,02,966/-, and made addition of Rs.56,85,08,898/-.

12.4. The Ld.AR submitted that, *Coordinate Bench of this Tribunal* in *assessee's own case for the AY 2006-07 IT(TP)A No 799/B/2015 decision dated 10.11.2017*, held that, the brand building expenses is in the course of and for the purpose of assessee's business and cannot be said that the said expenditure has resulted in the acquisition of any 'asset', which finding is not borne out by the facts on record.

12.5. Further the *Coordinate Bench of this Tribunal* in assessee's subsidiary i.e., *Infosys BPO Ltd v DCIT ITA No 1367/B/2014 decision dated 27.9.2019 for AY 2007-08*, allowed the brand building expenses and held as under:



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

It is observed that the expenditure incurred towards advertisements, sales and marketing, holding various seminars

and exhibitions are in relation to ongoing business of assessee. As held by *Hon'ble Bombay High Court* in case of *CIT vs Jeoffrey Manners & Co. Ltd* reported in *(2009) 180 Taxmann 87* that corrected test to be applied in respect of expenditure incurred for making advertisement films was that when, the same was incurred in respect of an ongoing business of assessee, it is revenue. On the other hand, when expenditures incurred in respect of a brand which is to be used in a business which is yet to be commenced, it is capital expenditure. Further as held by *Hon'ble Supreme Court* in case of *Empire Jute Co. Ltd vs CIT* reported in *(1980) 3 Taxmann 69*, it is not appropriate to hold that test of enduring benefit is a conclusive test in all cases and to hold such expenditure to be always capital expenditure.

In the present facts of case, assessee incurred such expenses in the process of an ongoing business activity and therefore it was not right on behalf of authorities below to hold such expenditure to be capital in nature.

Respectfully following decisions of *Hon'ble Supreme Court* and *Hon'ble Bombay High Court* referred to herein above we direct Ld. AO to delete disallowance made.

12.6. It is submitted by the Ld.AR that the nature of expenses incurred by appellant and its subsidiary towards brand building expenses are identical. In view of the same, the aforesaid decision

squarely applies to the present case also. The Ld.AR also relied on following decisions in support of this contention:

i) Fine Jewellery (India) Ltd v JCIT [2014] 48 taxmann.com 16 (Mum-Trib)
(ii) ITO v Spice Communications Ltd [2010] 35 SOT 78 (Delhi)
(iii) CIT vs. Brilliant Tutorials Pvt. Ltd. [(2007) 292 ITR 399]
(iv) CIT v Geoffrey Manners & Co. Ltd [2009] 315 ITR 134 (Bombay)
(v) CIT v Asian Paints (India) Ltd [2016] 75 taxmann.com 152 (Bombay)
(vi) DCIT v Polygel Industries (P.) Ltd [2015] 56 taxmann.com 198 (Mumbai - Trib.)
(vii) PCIT v Seagram Manufacturing (P.) Ltd [2017] 78 taxmann.com 293 (Delhi)
(viii) CIT v Spice Distribution Ltd [2015] 374 ITR 30 (Delhi)

12.7. On the contrary, the Ld.DR relied on observations by Ld.AO.

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

We note that *Coordinate Bench* in case of the sister concerns of assessee(supra), considered identical issue on similar facts. Nothing has been brought on record by the revenue to the expenses incurred by the assessee is towards any capital asset. Respectfully following the same, we direct the disallowance to be deleted.

13. <u>Ground No.26: Disallowance of Commission paid Rs.23,68,35,533/-</u>

13.1. The Ld.AR submitted that, the assessee generates substantial part of its business from overseas clients, mainly from the North American, European and Asia Pacific markets. It is submitted that, in order to procure new business outside India, and strengthen its existing business outside India and to

meet the demands and requirements of its existing clients outside India, the assessee solicits help from agencies operating outside India. These agencies are termed Business Alliance partners (BAP), for the services rendered by these Business Alliance Partners outside India, and commission is paid to them in accordance with the terms of the agreement entered with them. The Ld.AR submitted that, no tax was deducted at source in respect of the impugned payments. It was submitted that, as stated above, the BAP render services outside India. They do not render services from India or in India. BAP are also 'non resident's under section 2(30) read with section 6 of the Act. Hence, no tax was deducted at source in respect of the commission paid to these non residents.

13.2. The Ld.AO relying on the decision of the *Hon'ble Karnataka High Court* in case of *CIT v Samsung Electronics Co Ltd.,* reported in *(2010) 320 ITR 209* held that, the assessee should have either made TDS on commission paid or should have obtained an exemption certificate from the IT Dept. It was held that, in the absence of action taken on both these counts, commission paid is liable for disallowance under section 40(a)(ia) of the IT Act.

13.3. The DRP referred to its own directions for AY 2010-11 and AY 2011-12, wherein it was held that commission paid is not liable for TDS under section 195. However, it is submitted that the DRP refused to follow the same for the reason that the view has not been accepted by the department and an appeal to ITAT has been filed on this issue. It was therefore held that there is no infirmity in the proposed disallowance by the Ld.AO. The Ld.AO disallowed the commission paid to non residents amounting to

Rs.23,68,35,533/- under section 40(a)(ia) of the Act for non deduction of tax at source.

13.4. The Ld.AR at the outset filed a list showing break up of commission paid to non residents during the year was as under:

Name of Vendor	**Vendor Country**	**Amount in INR**	**Remarks**
Almoayyed Computers	Bahrain	2,75,791	Partner Commission payment for National Bank of Bahrain internet banking project.
BAHWAN CYBERTEK LLC	Oman	4,29,990	BAP Commission
Bowin Consultancy Services	Taiwan	31,57,339	Commission/License Fees for BCI Project
CAS TRADING HOUSE PVT.LTD.	Nepal	23,16,864	BAP Commission
CELER CONSULTING S.A. de C.V	Mexico	4,38,133	Agency Commission & Other Charges
CSK Service	---	311	Misc Commission
EGABI SOLUTIONS,	Egypt	(20,73,900)	Towards License Commission
Millennium Information Technologies	Srilanka	1,04,96,289	Towards License Commission
Nihon Unisys Ltd.	Japan	72,36,445	Fee Commissioning Charges
Provision reversal of previous year	----	2,33,433	Towards Provision & Misc Commission
OCEANIC BANK INT (NIGERIA)	Nigeria	2,56,19,058	Towards License Commission
FIRST BANK OF NIGERIA PLC	Nigeria	1,43,53,056	Towards License Commission
FIRST CITY MONUMENT BANK	Nigeria	46,66,014	Towards License Commission
SPRING BANK PLC	Nigeria	1,34,86,672	Towards License Commission
FIDELITY BANK PLC	Nigeria	1,20,14,044	Towards License Commission
KAKAWA DISCOUNT HOUSE LIMITED	Nigeria	5,76,153	Towards License Commission
BPI BANK	Ghana	6,87,728	Towards License Commission
UNITED BANK FOR AFRICA PLC	Nigeria	2,97,49,999	Towards License Commission
UNION HOMES SAVINGS AND LOANS PLC	Nigeria	26,90,280	Towards License Commission
WEMA BANK PLC.	Nigeria	2,23,98,439	Towards License Commission
Segmentist Yazilim ve Danismanlik L	Turkey	40,29,941	License Fees Commission

SIMBA TECHNOLOGY LIMITED,	Kenya	86,21,565	BAP Commission
Square IT Corporation	Japan	43,23,811	Fees Commission & Subscription
Taldor	Israel	32,67,330	Commission Fees
TALDOR COMPUTER SYSTEMS (1986)LTD	Israel	15,67,500	Commission Fees ATS Project
THE TRIZETTO GROUP INC	USA	1,56,41,366	Trizetto Referral Fees & revenue share
TOTAL INFORMATION MANAGEMENT (TIM)	Philippines	1,86,46,433	BAP Commission
Trevally Financial Software	South Africa	3,15,57,928	Fees Commission
TREVALLY FINANCIAL SOFTWARE	South Africa	35,15,794	Fees Commission
WAREEF UNITED COMPANY,	Saudi Arabia	(30,88,272)	BAP Commission
TOTAL		**23,68,35,533**	

13.5. The Ld.AR relied on the decision of *Hon'ble Delhi High Court* in case of *DIT(IT) v Panalfa Autoelektrik Ltd* reported in *(2014) 49 taxmann.com 412* and submitted that, commission paid by assessee to its foreign agent for arranging of export sales and recovery of payments cannot be regarded as fee for technical services under section 9(1)(vii). He also relied on following decisions holding that export commission is not Fees for technical services under section 9(1)(vii).

(i) CIT v Faizan Shoes P Ltd [2014] 48 taxmann.com 48 (Madras)
(ii) Apsara Silks v ITO [2016] 69 taxmann.com 399 (Bangalore - Trib.)
(iii) CIT v Farida Leather Company [2016] 66 taxmann.com 321 (Madras)
(iv) DIT v Credit Lyonnais [2016] 67 taxmann.com 199 (Bombay)
(v) CIT v Grup Ism (P) Ltd [2015] 57 taxmann.com 450 (Delhi)

He thus submitted that, there was no liability to deduct tax at source under section 195 in respect of the commission paid to non residents.

13.6. The next proposition submitted by the Ld.AR is that, the taxability of commission under the DTAA must be there in order to cast liability on the assessee to deduct TDS. In support, he

relied on the decision of *Hon'ble Supreme Court* in case of *Engineering Analysis (supra).* He submitted that, the list of recipients of commission and their respective countries arethose with whom India has entered into DTAA. He submitted that with the countries mentioned except Bahrain, Ghana, Nigeria and Taiwan. The position of taxability of commission paid to BAP's under the Act and DTAA is depicted in the table below.

Vendor name	**Country**	**Taxability under the Act**	**Taxability under the Treaty**
Almoayyed Computers	Bahrain	Payment not in the nature of managerial, technical or consultancy; outside the scope of s. 9(1)(vii) due to exception; hence not taxable under the Act	No DTAA
BAHWAN CYBERTEK LLC	Oman	Same as above	Definition of FTS is similar to s. 9(1)(vii); Payment not in the nature of managerial, technical or consultancy; no PE in India; hence not taxable under the treaty
Bowin Consultancy Services	Taiwan	Same as above	No DTAA. Same as above
CAS Trading House Pvt.Ltd.	Nepal	Same as above	No FTS clause under the Treaty; No PE in India; further, other income taxable only in Nepal and not in India; hence payment not taxable under the Treaty
CELER Consulting S.A. de C.V	Mexico	Same as above	Definition of FTS is similar to s. 9(1)(vii); Payment not in the nature of managerial, technical or consultancy; no PE in India; hence not taxable under the treaty
EGABI	Egypt	Same as above	No FTS clause under

Solutions			the Treaty; No PE in India; further, other income taxable only in Nepal and not in India; hence payment not taxable under the Treaty
Millennium Information Technologies	Sri Lanka	Same as above	No FTS clause under the Treaty; No PE in India; further, other income taxable only in Srilanka and not in India; hence payment not taxable under the Treaty
(i) Nihon Unisys Ltd, (ii) Square IT Corporation	Japan	Same as above	Definition of FTS is similar to s. 9(1)(vii); Payment not in the nature of managerial, technical or consultancy; no PE in India; hence not taxable under the treaty
(i) Oceanic Bank Int (Nigeria), (ii) First Bank of Nigeria PLC, (iii) First City Monumnet Bank, (iv) Spring Bank PLC, (v) Fidelity Bank PLC, (vi) Kakawa Discount House Limited (vii) United Bank for Africa PLC (viii) Union Homes Savings and Loans PLC (ix) Wema Bank PLC.	Nigeria	Same as above	NO DTAA. Same as above
BPI Bank	Ghana	Same as above	NO DTAA. Same as above
Segmentist Yazilim ve Danismanlik L	Turkey	Same as above	Definition of FTS is similar to s. 9(1)(vii); Payment not in the nature of managerial, technical or consultancy; further services were not rendered in India; no PE in India; hence not taxable under the treaty

Simba Technology Limited,	Kenya	Same as above	Definition of FTS is similar to s. 9(1)(vii); Payment not in the nature of managerial, technical or consultancy; further services were not rendered in India; no PE in India; hence not taxable under the treaty
(i) Taldor, (ii) Taldor Computers Systems (1986) Ltd	Israel	Same as above	Payment does not 'make available' any technology, skills, process, know how etc as per the protocol to Treaty. Hence, payment not taxable under the Treaty.
The Trizetto Group Inc	USA	Same as above	Payment does not 'make available' any technology, skills, process, know how etc. Hence, payment not taxable under the Treaty.
Total Information Management (Tim)	Philippines	Same as above	No FTS clause under the Treaty; No PE in India; further, other income taxable only in Philippines and not in India; hence payment not taxable under the Treaty
Trevally Financial Software	South Africa	Same as above	Definition of FTS is similar to s. 9(1)(vii); Payment not in the nature of managerial, technical or consultancy; further services were not rendered in India; no PE in India; hence not taxable under the treaty

13.7. The Ld.AR further submitted that the commission paid to agent in USA, did not 'make available' technology, knowledge, skills, process etc. He submitted that, as per the definition of 'Fees for included services under the India – USA DTAA unless the make available clause is not satisfied, the payment cannot be treated as FTS. He relied on the decision of *coordinate bench of*

this Tribunal in case of *CIT v De Beers India Minerals P. Ltd* reported in *(2012) 346 ITR 467* for this proposition**.** Similarly, by virtue of the protocol to India – Israel Treaty read with FTS clause of India – Portugal republic Treaty, payment to Israel resident for services would not be regarded 'fees for technical services' as there was no making available of technical knowledge, experience, skill, know how etc.

12.8 The Ld.AR submitted that, as per the DTAA with Philippines, Nepal, Srilanka, Egypt Article relating to 'Fees for technical services' is absent. In the absence of the article, the payment for services rendered by the non resident in the course of his business would be regarded as 'business profits' under Article 7. And in the absence of a PE in India, such payments cannot not be held to be taxable in India. The Ld.AR submitted that the non resident BAP's provided services outside India and did not have a permanent establishment in India is an admitted fact and therefore, the same is not taxable in India. He relied on following decisions in support:

decision of Hon'ble Madras High Court in Bangkok Glass Industry Co Ltd v ACIT reported in (2013) 257 CTR 326;

Decision of Hon'ble Mumbai Tribunal in Channel Guide India Ltd v ACIT reported in (2012) TaxCorp (INTL) 50,

Decision of coordinate bench of this Tribunal in case of JCIT v WiFi Networks P Ltd ITA Nos. 189 & 190/Bang/2012 and CO Nos. 60 & 61/Bang/2012 decision dated 8.3.2013,

Decision of coordinate bench of this Tribunal in case of Exotic Fruits P Ltd v ACIT ITA Nos. 1008 to 2013/B/12 decision dated 40.10.2013,

Decision of coordinate bench of this Tribunal in case of IBM India P Ltd v DDIT (IT) ITA Nos. 489 to 498/B/13 decision dated 24.1.2014.

The Ld.AR thus submitted that, commission paid to BAP's of Philippines, Nepal, Srilanka and Egypt would not be chargeable to tax in India.

13.9 The Ld.AR submitted that in respect of commission paid to BAP's situated in Mexico, Kenya, South Africa, Japan, Turkey and Oman, the definition of the term 'Fees for technical services' as per the Treaty between India and these countries is similar to section 9(1)(vii) of the Act. As a result, commission paid to BAP's situated in Kenya, South Africa, New Zealand and Turkey are not liable for TDS u/s195 and consequently the said payments cannot be disallowed u/s 40(a)(i).

13.10. The Ld.AR in respect of commission paid to Bahrain, Taiwan, Nigeria and Ghana submitted that India has not entered DTAA. Submissions have already been made as to why commission paid to BAP's is not liable for TDS under the Income Tax Act. The commission paid to companies based in Mexico and Egypt would therefore not be chargeable to tax in India and hence outside the purview of section 195.

On the contrary, the Ld.St.Counsel relied on the observations of Ld.AO/DRP.

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

13.11 The above arguments/submissions by the Ld.AR has not been verified by the Ld.AO. We accordingly remand this issue to the Ld.AO to verify the above submissions. There is no quarrel that the benefit available to assessee as per DTAA must be granted as per the ratio of *Hon'ble Supreme Court* in case of *Engineering Analysis (supra)*. The Ld.AO shall verify and consider

the claim in accordance with law. Needless to say that proper opportunity of being heard mist be granted to the assessee.

Accordingly, these grounds raised by assessee stands allowed.

14. Ground Nos.27-30: Non reduction of communication expenses and expenses incurred in foreign currency from total turnover while computing deduction under section 10AA

14.1. The Ld.AO reduced the communication expenses and expenses incurred in foreign currency only from export turnover without reducing the same from total turnover while computing deduction under section 10AA. Following are the details of the same.

SL No	Particulars	Amount in Rs.
1	Communication expenses in respect of SEZ units at Chennai (Unit 2), Trivandrum, Mysore, Hyderabad and Jaipur, for which deduction under section 10AA has been allowed	2,71,11,231
2	Communication expenses in respect of SEZ units at Chennai (Unit No 1), Chandigarh, Pune and Mangalore, for which deduction under section 10AA has not been allowed	12,48,70,626
3	Expenses incurred in foreign currency in respect of SEZ units at Chennai (Unit 2), Trivandrum, Mysore, Hyderabad and Jaipur, for which deduction under section 10AA has been allowed	358,08,30,087
4	Expenses incurred in foreign currency in respect of SEZ units at Chennai (Unit No 1), Chandigarh, Pune and Mangalore, for which deduction under section 10AA has not been allowed	1688,21,01,184

14.2. The DRP directed the assessing officer to treat the above adjustment and the consequent reduction of deduction under section 10AA as a protective addition till the final outcome with regard to the SLP filed by the department before the *Hon'ble Supreme Court* against the decision of the *Hon'ble Karnataka*

High Court in the assessee's own case and in the case of *CIT v TATA Elxsi Ltd* reported in *349 ITR 98*.

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

14.3. This issue is no longer *resintegra. Hon'ble Supreme Court* in the case of *CIT v HCL Technologies Ltd* reported in *(2018) 93 taxmann.com 33* held that, freight, telecommunication charges, insurance charges and expenses incurred in foreign currency reduced from export turnover should also be reduced from total turnover while computing deduction under section 10A. Ratio of the said decision is squarely applicable for the purposes of section 10AA/10A and both these sections are in *pari material* with each other. The CBDT vide Circular No. 4 of 2018 dated 14/08/ 2018 cited the decision of the *Hon'ble Supreme Court* in the case of *HCL Technologies Ltd.,(supra)*, and clarified that, all charges/expenses specified in *Explanation 2(iv)* to section 10A are liable to be excluded from total turnover also for the purpose of computation of deduction under section 10A.

We thus hold that the communication expenses and expenses incurred in foreign currency reduced from the export turnover should also be reduced from the total turnover while computing deduction under section 10AA.

Accordingly, these grounds raised by assessee stands allowed.

15. Ground nos.31-40: <u>These grounds are in respect of reduction of following items from profits of SEZ units while computing deduction u/s. 10AA.</u>

a) interest income from GLES deposit

b) interest income from loans given to employees

c) receipts from sale of scrap

d) incentive receipts from Airlines

e) income in the nature of Inter Company cessation of trading liability

15.1 The Ld.AR submitted as under by way of written submissions.

> ***GLES Interest:-*** *GLES stands for Group Leave Encashment Scheme. Infosys gets actuarial valuation done on quarterly basis to know its liability toward un-encashed leave credits of its employees. Infosys makes the provision for the same based on actuarial valuation. An amount equivalent to the liability is kept as a deposit with LIC of India under GLES policy to fund this liability. Whenever there is encashment of leave credits by employees on account of retirement etc, Infosys makes the payment to its employees and withdraws an equal amount from the deposit with LIC on a regular basis. This deposit is not generic in nature. Funding to this deposit happens based upon actuarial valuation and withdrawals are permitted only for payment of leave encashment. LIC of India credits interest on such GLES deposit which is accounted as income in the profit and loss account. The LIC gives interest on such GLES deposit/premium and the same has been offered to tax under business income head as there is a nexus of GLES deposit with the business liability towards accumulated unused leave credits.*

Interest on employee loans:- *As an employee welfare measure, the assessee extends loans to its employees. There were 3 types of loans- Soft loan, salary loans and salary advance. The soft loan carried an interest of 4% p.a, whereas salary loans and salary advances were interest free. The soft loan is recovered in 12/24 months (depending on eligibility), salary advance in the same month of disbursal and salary loan in 12 months. The perquisite value for soft loans and salary loans was taxed in the hands of the employees.*

Sale of scrap, Incentive from Airlines and Inter company cessation of trading liability:- *During the year, the assessee realized certain amounts on sale of scrap. Similarly, few airline companies such as Lufthansa, Qatar Airways, Indigo, Spicejet etc provided incentive for travelling regularly. The inter company cessation of trading liability and write back of the said liability was on account of set off of receivables and payables of Infosys Technologies China Co Ltd.1.*

14.2 It was thus submitted that all the aforesaid incomes were generated in the course of business of the assessee, these incomes were treated as business income and the same formed part of the profits of the business of the SEZ units, STPI units and other units of the assessee. The income referable to SEZ units were claimed as deduction under section 10AA.

15.3. It is submitted that the Ld.AO excluded the aforesaid income from the profits of SEZ units in computing deduction under section 10AA for the reason that the, aforesaid incomes are

only attributable to the business but are not derived from the activity of software development and export.

15.4. The DRP directed the Ld.AO to consider reduction of deduction with reference to GLES interest, interest on employees loans and receipt on sale of scrap, on a protective basis, for the reason that the decision of *Hon'ble Karnataka High Court* in case of *Wipro Ltd v DCIT* reported in *(2016) 382 ITR 179*, which allowed deduction under section 10A in respect of interest income and sale of scrap, has not been accepted by the department and a SLP has been filed before *Hon'ble Supreme Court*.

15.5. In respect of incentive from airlines, it was held that the Ld.AO was not justified in not considering the said income as part of profits of SEZ units in computation of deduction under section 10AA. In other words, incentive from airlines was held to be eligible for deduction under section 10AA by the DRP.

15.6. However, income in the nature of inter company cessation of trading liability was not considered as profits of SEZ units by the DRP in view of section 10AA(9) of the IT Act, 1961. The Ld.AR submitted that the Ld.AO reduced all the 4 items of income from SEZ profits for computation of deduction under section 10AA even though DRP held that incentive income from airlines is eligible for deduction under section 10AA.

15.7. It was also submitted that a protective addition is not permissible merely because the decision of the *Hon'ble Jurisdictional High Court* is not accepted and an SLP is pending before *Hon'ble Supreme Court*. The Ld.AR submitted that, it is a settled legal principle that unless the decision of the *Hon'ble Jurisdictional High Court* is stayed by *Hon'ble Supreme Court*, the

same would be binding till it is reversed by the *Hon'ble Supreme Court*. Hence, it was submitted that, the direction of the ld. DRP to make a protective addition is bad in law and liable to be quashed. Interest income from GLES deposit, employee loans and rec eipts from sale of scrap should be held as eligible for deduction under section 10AA.

15.8. On the contrary the Ld.St.Counsel relied on the observations of the authorities below.

We have perused the submission advanced by both sides in light of records placed before us.

15.9. Amount of income that that qualifies for the deduction under section 10AA is the profits that arises out of the business undertaking, and not from any other income earned by the assessee *de horse* the business of the undertaking. If the income earned by the assessee is held to be falling under the head, Income from other sources, the same will not qualify for the deduction section 10 AA of the Act.

15.10. From the above sources that have yielded income to the assessee for the year under consideration, except for income from sale of scrap, no other income could be said to have arisen out of the business undertaking. Further in respect of cessation of trading liability, we direct the Ld.AO to verify if the trade receivables were offered to tax by the assessee in any of the preceding assessment years. If the amount has been offered to tax in any of the preceding assessment years, as a sequitur, would obviously for part of the qualifying amount for the purposes of deduction under section 10AA of the Act.

15.11. In respect of interest income from GLES deposit, interest income from loans given to employees and incentive receipts from Airlines, in our opinion cannot be held to be profits that arises out of the business undertaking and therefore we hold the same not eligible for purposes of deduction under section 10AA of the Act.

Accordingly these grounds raised by the assessee stands partly allowed.

16. Ground nos. 41 & 42 - <u>Reduction of deduction under section 10AA in respect of pure onsite revenue</u>

16.1 It was submitted that a software development project typically goes through the stages of requirement analysis, prototyping, design, pilots, programming, testing and installation and maintenance. A software development activity proceeds over various stages. It can assume various forms. Infosys was at all times during the year engaged in the creation and development of computer programs. The software development in the year under consideration happened partly in India and partly outside India. A part of the software development project was carried outside India as per the requirements of the project and also due to various other reasons e.g. to integrate the work done by the company with the work done by another, testing, business compulsions, absence of adequate telecommunication links etc.

16.2. It was submitted that the total number of employees as on 31-03-2012 was 1,24,789. The average number of employees which were deputed to overseas location at the year end was 30,322. Thus, around 24.3% of assessee's employees were deputed onsite for various durations during the year. Considering

the fact that over 97% of the assessee's revenue is from export, the presence of employees' onsite is not material. Few employees and support staff of the assessee are also stationed abroad at marketing offices and branches located in overseas jurisdictions. Majority of employees are sent onsite on deputation for a limited period as per the requirement of software development project being carried out from offshore locations in India.

16.3. Thus, it was submitted that, the presence of the employees outside the country was in the course of developing and creating software programs as also for the purpose of marketing the product and skill sets of the company. The Ld.AR submitted that various details in respect of the claim were filed during the assessment proceedings vide letter dated 02/03/2016 which is paced at pages 2039 to 2054 of paper book 4. The Ld.AR also submitted that assessee had submitted the master service agreements and statement of work along with invoices in respect of the developments carried out by assessee before the Ld.AO vide letter dated 04/03/2016 which is placed at page 2549 to 2856 of paper book 5. He submitted that at page 39, para 5.7, the Ld.AO in the assessment order stated that the assessee company has furnished very voluminous data including the copy of several SOWs during the assessment proceedings. It is stated that going through all the SOWs is practically not possible. The Ld.Ar submitted that, Ld.AO merely relied on the earlier assessment orders for making addition. The Ld.Ar thus Submitted that addition was made without properly considering the factual details on record and by relying on the earlier years' assessment orders. The DRP thought directed the Ld.AO to

consider reduction of deduction under section 10AA in respect of profits from onsite development of computer software, on a protective basis, for the reason that the decision of *Hon'ble Karnataka High Court* in case of *CIT v Mphasis Software and Service India Pvt. Ltd* reported in *(2015) 62 taxmann.com 165* that allowed the deduction under section 10A in respect of onsite development of computer software. However it was also noted that the revenue has not been accepted by the department and a SLP has been filed before *Hon'ble Supreme Court*.

16.4. The Ld.AO while passing the final assessment order, reduced sum of Rs.1,02,27,137 from deduction computed u/s 10AA for the reason that 1.08% (pure onsite revenue) of 50.8% (onsite revenue percentage) with a profit margin of 10.59% relating to 5 SEZs [viz., Chennai (unit 2), Trivandrum, Mysore, Hyderabad and Jaipur in respect of which deduction under section 10AA has been allowed] are not eligible for deduction under section 10AA. Disallowance in relation to other SEZ units viz., Chennai (Unit No 1), Chandigarh, Pune and Mangalore, has not been quantified as the entire deduction claimed under section 10AA in respect of these units has been denied by the ld. AO.

16.5. Before us, the Ld.AR submitted that the DRP directed the Ld.AO to consider reduction of deduction under section 10AA in respect of profits from onsite development of computer software, on a protective basis, for the reason that, the decision of the *Hon'ble Karnataka High Court in CIT v Mphasis Software and Service India Pvt. Ltd(supra).*

16.6. Referring to *Explanation 2* to section 10AA, the Ld.AR submitted that, the explanation clarifies that the profits and gains derived from on-site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India. He referred to the relevant observations of *Hon'ble Karnataka High Court* in case of *CIT v Mphasis Software and Service India Pvt. Ltd(supra)* that observed as under:

> *"According to the learned counsel for the revenue, the production or manufacture should be in any free trade zone and if the same is not done in the free trade zone, the assessee would not get benefit of such manufacture or production. The benefit is site specific and not project specific. According to him, only such production or manufacture which is carried at the site of the assessee's unit in the free trade zone would alone be eligible for the benefit under section 10A and not such production or manufacture which has been carried outside or by a third party. A mere reading of subsection (2) would not be sufficient. The entire section has to be read in conjunction with Explanation 3, which clarifies that profits and gains derived from 'on-site' development of software outside India shall also be deemed to be profits and gains derived from the export of software outside India, and same would also be entitled to such benefit. If the interpretation, as contended by the revenue is accepted, the very purpose of inserting Explanation 3 to section 10A of the Act would be lost."*

He also placed reliance on the CBDT Circular No. 01/2013 dated 17/01/2013 which is placed at pages 5156-5159 of paper book.

16.7. The Ld.AR submitted that, the Circular further clarifies regarding the software developed abroad at a client's place being eligible for benefits under the respective provisions, as it amount to 'deemed export' and tax benefits would not be denied merely on this ground. The Ld.AR thus, submitted that the deduction

claimed under section 10A and 10AA cannot be denied in respect of profits from onsite development of computer software.

16.8. He further stated that as per Circular since the benefits under these provisions can be availed of only by the units or undertakings set up under specified schemes in India, it is necessary that there must exist a direct and intimate nexus or connection of development of software done abroad with the eligible units set up in India and such development of software should be pursuant to a contract between the client and the eligible unit. The Ld.AR submitted that, there is no denial of nexus or connection of work performed onsite with the eligible units set up in India. He referred to the decision of *Hon'ble Pune Tribunal* in case of *DCIT v iGate Global Solutions Ltd IT(TP)A No 286/Bang/2013 vide order dated 5.8.2019*, wherein it is held that, the profit from onsite development of computer software and deputation of technical manpower for the purposes of export of computer software qualify for deduction under section 10A. It was also held that, income from deputation of technical manpower and onsite software services rendered abroad will have to be regarded as `profits of the business of the undertaking' and hence eligible for deduction under section 10A.

16.9. The Ld.AR at the outset submitted that assessing officer denied the claim of assessee, without verifying the details filed by holding that it is voluminous data.

16.10. On the contrary, the Ld.Standing Counsel relied on the orders passed by authorities below.

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

16.11. At the outset, we note that the denial of the exemptions claimed is purely due to the reason that the Ld.AO did not verify the details furnished by assessee. There is no doubt expressed by the Ld.AO regarding the nexus or any shortfall of evidence or materials in support of the assessee's claim as argued by the Ld.AR, the disallowance made on *adhoc* basis, without any justification and the reasoning for such disallowance is absolutely uncalled for. However in the interest of justice, the Ld.AR suggested the issue may be remanded to the Ld.AO for due verification. We direct the Ld.AO to verify the details filed and to consider the claim of assessee in accordance with law. Needless to say that proper opportunity of being heard is to be granted to the assessee.

Accordingly, these grounds raised by assessee stands allowed for statistical purposes.

17. Ground no. 43 - Deduction under section 80JJAA being disallowed.

17.1. The Ld.AR submitted that copy of the Audit report under section 80JJAA, being Form No. 10DA was submitted to the Ld.AO vide submission dated 28.5.2014. The Ld.AO thereafter called upon assessee to justify the allowability of deduction under section 80JJAA. The assessee explained in detail as to why deduction under section 80JJAA should be allowed along with supporting case laws. It was also submitted that the DRP in its directions for AY 2011-12 allowed deduction claimed under section 80JJAA subject to verification of deduction of only those payments made to 'workmen' who are not employed in

supervisory capacity. The Ld.AR submitted that, various details were filed before the Ld.AO explaining as to how:

(i) salary and wages are synonymous

(ii) employees of Infosys are workman under section 80JJAA

(iii) amendment to section 80JJAA by the Finance Act, 2013 w.e.f 1.4.2014 cannot be regarded as retro-active.

17.2. The Ld.AO however held that, the assessee is not eligible for deduction under section 80JJAA for the following reasons:

1. *The assessee is not an industrial undertaking and is engaged in the business of development of computer software and export thereon. The activities of IT company cannot be considered as manufacturing or production. The intent of section 80JJAA has been clarified by the amended provisions which provides that the deduction is available to an Indian company deriving profit from manufacture of goods in a factory.*
2. *The assessee does not produce any articles or things.*
3. *The assessee does not pay 'wages' to its employees; but pays salary to its regularly employed engineers. Salary does not come within the definition of 'wages'.*
4. *The assessee does not employ any workman within the definition of Industrial Disputes Act, 1947. The definition of workman provided therein does not include software professionals.*
5. *Section 10B uses the phrase 'articles or things or computer software' and therefore 'articles or things' do not include 'computer software'.*

17.3. The DRP held that the assessee is not engaged in manufacture or production of article or thing and therefore not eligible for deduction under section 80JJAA. It was held that manufacture or production of article or thing cannot be equated with software development.

The Ld.AR submitted that the decision of coordinate bench of this *Tribunal* in the case of *DCIT v OnMobile Global Ltd* reported in *(2014) 31 ITR (Trib) 348* which allowed the deduction under section 80JJAA for a Company engaged in providing IT enabled

services (Computer software), has not been accepted by the revenue and appeal has been filed before *Hon'ble Karnataka High Court*. The DRP for these reason, up he;d the addition proposed by the Ld.AO in the draft assessment order. Following the DRP directions, the Ld. AO disallowed the deduction claimed under section 80JJAA.

17.4. The Ld.AR submitted that, the assessee is engaged in the business of development, designing and manufacture of computer software. He elide on the decision of *Coordinate Bench of this Tribunal* in case of *DCIT v OnMobile Global Ltd and vice versa reported in [2014] 31 ITR (Trib) 348* that allowed the deduction under section 80JJAA for a company which was engaged in the business of software services, i.e., business of providing mobile value added services and products such as caller and ring back tones, dynamic voice mail, missed call alert service and other interactive media solutions like tele-voting, interactive programming by observing as under:

Relevant observations of the ITAT are as under.

> *"Held, that as the assessee was engaged in the development and manufacture of software, the assessee was covered within the definition of industrial undertaking. The definition of "industrial undertaking" as stipulated in section 10(15) and section 72A of the Act extended to undertakings that were engaged, inter alia, in the manufacture of computer software or recording of programmes on discs, tapes, perforated media or other information devices. The assessee was one such undertaking. The assessee had claimed deduction of only those payments made to "workmen" who were not employed in supervisory capacity. Therefore, the assessee was entitled to the deduction under section 80JJAA of the Act."*

17.5 He submitted that, the question as to whether the software industry can be regarded as an 'industrial undertaking' was

considered by the *Hon'ble Karnataka High Court* in the case of *CIT v Texas Instruments India P Ltd* reported in *[2021] 127 taxmann.com 59*. The *Hon'ble Karnataka High Court* held as under.

> *16.6 In our considered view, the concept of the workman has undergone a drastic change and is no longer restricted to a blue collared person but even extends to white-collared person. A couple of decades ago, an industry would have meant only a factory, but today industry includes software and hardware industry, popularly known as the Information technology industry. Thus the undertaking of the Assessee being an industrial undertaking, the persons employed by the Assessee on this count also would satisfy the requirement of a workman under section 2(s) of the ID Act.*

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

17.6 We note that identical issue was considered by the *Coordinate Bench of this Tribunal* in case of *SAP Labs India Pvt. Ltd.* in *IT(TP)A Nos. 623, 566/Bang/2016* for *Assessment Year 2011-12 by order dated 29/11/2021* by observing as under:

> *"13. As far as corporate tax grounds are concerned, Grd.No.6 to 6.4 is with regard to deduction u/s.80JJA of the Act and these grounds read thus:*
> *6. While doing so, the learned DRP/AO erred in:*
> *6.1. Not appreciating the fact that deduction under section 8oJJAA of the Act is Assessee specific and not undertaking / unit specific. [corresponding to ground no. 6.1]*
> *6.2. Invoking the provisions of section 8oA(4) in the context of deduction under section 8oJJAA for 10A units [corresponding to ground no. 6.2]*
> *6.3. Not appreciating the fact that the amendment made in the Finance Act 2013, restricting the deduction to an Indian Company deriving profits from the manufacture of goods in a factory, is applicable with effect from April 1, 2014 and is prospective in nature. [corresponding to ground no. 6.3]*
> *6.4. Considering the orders for earlier years while disallowing the deduction u/s 80JJAA of the Act without*

considering the fact that each year should be considered separately. [corresponding to ground no. 6.4]

14. As far as the aforesaid ground of appeal are concerned, the assessee claimed deduction under section 80JJAA of the Act a sum of Rs.4,26,67,792/-. The AO denied the claim of the assessee for deduction on 2 grounds namely: (1) that persons working in software units cannot be regarded as workmen as contemplated by the provisions of section 80JJAA of the Act. (2) Deduction under section 80JJAA cannot be allowed in respect of additional wages paid to employees who are working in 10A units because under the provisions of 80A(4) of the Act, the assessee cannot enjoy benefits both under sections 10A and 80JJAA of the Act in respect of the same income. On objections by the assessee before the DRP, the DRP rejected the claim of the assessee. The DRP also took the view that, the assessee has not given Form 10DA for each 10A unit separately. The AO in the order giving effect to the order of the DRP on this aspect has observed as follows:

"7.5 Apart from the above, I would like to highlight the fact that as per the provisions of section 80JJAA, deduction is allowable taking each unit as a basis rather than the assessee as an undertaking. Accordingly, the assessee is required to compute deduction u/s 80JJAA in respect of each eligible unit separately. While doing so, all the conditions stipulated would be applied taking each unit as the reference point, i.e The additional wages are required to be restricted by excluding the additional wages payable to 100 workmen in respect of each unit.

There should be increase in workmen in each year to the extent of minimum 10% of the existing workmen at each unit level.

It is required to be seen that the workmen employed for less than 300 days during the previous year under reference to be excluded from the computation of additional wages payable.

In the instant case, the assessee has not considered each unit as a basis for the purpose of fulfillment of conditions enumerated above as per working given in Form 10DA. In a sense, the assessee has considered total number of employees/workmen working in all the units put together as basis in order to reckon 10% increase in workforce during the year under reference, inclusion of only 100 employees in respect of all the units for the purpose of quantifying the additional wages paid instead of considering 100 employees for inclusion in each and every unit.

7.6 In view of the above, I am of the opinion that in the absence of furnishing unit wise certificate in respect of fulfillment of conditions stipulated u/s 80JJAA, the assessee is rot eligible to claim deduction u/s 80JJAA. On this specific ground itself, I have no hesitation to deny the deduction u/s 80JJAA for the current year also."

15. The learned Counsel for the assessee has accepted the decision of the DRP in so far as ground No.6.1 is concerned and is willing to give the details as per each unit. The deduction can therefore be considered for each 10A unit separately. The assessee is directed to furnish the necessary details in this regard and the AO may examine the same in accordance with law. As far as ground 6.2 is concerned, it was agreed by the parties that in assessee's own case for Assessment Year 2007-08 in IT(TP)A No.1006/Bang/2011 by order dated 30.06.2016, this Tribunal rejected the claim of the assessee by observing as follows:

"25. However coming to the second limb of the reasoning given by the lower authorities, which is section 80A(4), the said section is reproduced hereunder :

"(4) Notwithstanding anything to the contrary contained in Section 10A of section 10AA or section 10B or section 10BA or in any provisions of this Chapter under the heading 'C.-Deductions in respect of certain incomes", where, in the case of an assessee, any amount of profits and gains of an undertaking or unit of enterprise or eligible business is claimed and allowed as a deduction under any of those provisions for any assessment year, deduction in respect of, and to the extent of, such profits and gains shall not be allowed under any other provisions of this Act for such assessment year and shall in no case exceed the profits and gains of such undertaking or unit or enterprise or eligible business, as the case may be."

However coming to the second limb of the reasoning given by the lower authorities, which is section 80A(4), the said section is reproduced hereunder :

As per the assessee even if deduction under section 10A of the Act is allowed for these units, a further deduction u/s.80JJA of the Act, is also allowable. Argument of the assessee's counsel is that the limitation put in by Section 80A(4) of the Act, would apply only to profit linked deductions. There can be no dispute that deduction under Section 10A of the Act, is profit linked. In so far as deduction u/s.80JJA is concerned, a look at sub-section (1) of the said section is required, which is reproduced below :

80JJAA(1) : Where the gross total income of an assessee, being an Indian company, includes any profits and gains derived from any industrial undertaking engaged in the

manufacture of production of article or thing, there shall, subject to the conditions specified in sub-section (2)m be allowed a deduction of an amount equal to thirty per cent of additional wages paid to the new regular workmen employed by the assessee in the previous year for three assessment years including the assessment year relevant to the previous year in which such employment is provided.

A reading of the above sub-section would clearly show that the deduction is given on profits and gains derived from industrial undertaking engaged in manufacture of production of article or thing. It is only for quantification of the amount that 30% is applied. In our opinion the deduction is very much linked to the profits of the undertaking. We are therefore unable to accept this line of argument taken by the counsel. In the result, we hold that assessee is not eligible for deduction u/s.80JJAA of the Act, in respect of its units 2 , 3 and 4. However, denial of such claim in respect of unit-1, where it was not claiming any deduction, in our opinion is incorrect. We, therefore set aside the orders of authorities below for the limited purpose of quantifying the eligible deduction u/s.80JJA in respect of Unit-1. In the result, ground no.6 is treated as partly allowed for statistical purpose."

16. As far as ground No.6.3 is concerned, the issue has been decided in Assessment Year 2007-08 in the order referred to above and this Tribunal held that the employees engaged in software industry cannot be regarded as workmen for the purpose of section 80JJAA of the Act. The following were the relevant observations of the Tribunal:

"24. We have perused the orders and considered the rival contentions. The claim of assessee with regard to additional wages paid to new workman was denied for a reason that engineers who were newly employed by the assessee were not considered as workers by the lower authorities. However, in a similar situation in the case of Texas Instruments India P. Ltd, (supra), it was held by the coordinate bench at para 6 and 7 of its order, as under :

6. We have heard the rival submissions and carefully perused the records. Considering the factual position after referring to the various documents filed by the assessee, the learned CIT(A) held as under :

"According to the AO if an employee or workman is getting a salary of more than Rs. 1,600 per month he is not covered by the definition of workman. However as per cl. (iv) of s. 2(s) of the Industrial. Disputes Act a worker, employed in supervisory capacity and getting a salary of more than Rs. 1,600 per month only be excluded from the

definition of workman. In appellant's case the software engineers in respect of whom deduction under s. 80JJAA has been claimed have not been employed in a supervisory capacity even though they may be getting a salary of more than Rs. 1,600 per month. As the software engineers were not employed in supervisory capacity they cannot be excluded from the definition of workman. Further as per the notification of the Karnataka Government, the appellant company engaged in the development of software is covered by the Industrial Disputes Act. As such, I am of the considered opinion that the appellant has satisfied all the conditions for claiming relief under s. 80JJAA. However, I find that the appellant has claimed deduction of Rs. 2,55,81,220 with reference to the additional wages of Rs. 8,52,70,736 which included the wages of Rs. 4,87,64,029 in respect of the new workmen employed during the year ended 31st March, 2000 relevant to the asst. yr. 2000-01. As there was no claim for relief under s. 80JJAA for the asst. yr. 2000-01, the relief in respect of the workers employed in asst. yr. 2000-01 cannot be considered for relief under s. 80JJAA in the asst. yr. 2001-02. As such the appellant will be entitled for relief under s. 80JJAA of Rs. 1,09,52,012 being 30 per cent of the additional wages of Rs. 3,65,06,707 (Rs. 8,52,70,736 Rs. 4,87,64,029) in respect of the new workmen employed during the previous year relevant to the asst. yr. 2001-02. Similarly, for asst. yr. 2002-03 the appellant has claimed deduction of Rs. 4,78,05,176 being 30 per cent of the wages of Rs. 1,59,30,588 which also included the wages of Rs. 4,38,68,182 pertaining to the new workers employed in the previous year 1999- 2000. For the reasons mentioned above the appellant is not entitled for relief under s. 80JJAA in respect of the wages pertaining to the workers employed in the previous year 1999-2000. As such the appellant would be eligible for relief of Rs. 3,46,44,722 being 30 per cent of the additional wages of Rs.11,54,82,406 (Rs.15,93,50,588 Rs.4,38,68,182) in respect of the workmen employed in previous years 2000-01 and 2001-02. The learned Authorised Representatives of the appellant vide order-sheet noting dt. 24th Aug., 2004 agreed that the relief under s. 80JJAA in respect of the employees who joined in the previous year relevant to the asst. yr. 2001-02 onwards only may be considered and in respect of the employees who joined in earlier years the appellant is not pressing for relief under s. 80JJAA. In the circumstances, the AO is directed to allow the relief under s. 80JJAA of Rs. 1,09,52,012 and Rs. 3,46,44,722 for asst. yrs. 2001-02 and 2002-03 respectively."

7. As stated earlier the assessee had filed the details of the software engineers employed during the years under consideration containing the names of the employees, designation and date of joining. Further, in the same list the details of total number of employees joined during both the assessment years, number of employees without supervisory roles, workmen joined, number of supervisors joined and workmen joined and relieved during the years under consideration. A cursory perusal of this list shows that the assessee had claimed deduction in respect of employees, who had joined as engineers in their respective field such as systems engineer, test engineer, software design engineer, IC design engineer, lead engineer etc. A cursory perusal of those lists establishes that the assessee had claimed deduction in respect of the engineers employed not in the category of supervisory control. All these details were filed before the AO during assessment proceedings. These facts were not properly considered by the AO. Further, from the order of the CIT(A), it is seen that he had taken note of the notification issued by the Government of Karnataka and concluded that as per the notification issued, the assessee company engaged in the development of software is covered by the Industrial Disputes Act, 1947. Further it is not the case of the Revenue that the assessee did not fulfil the conditions extracted elsewhere in this order. Considering all those factual matters we do not find any infirmity in the order of CIT(A) according relief to the assessee. In fact he had clarified the relevant portions related to Industrial Disputes Act, 1947 and IT Act while granting relief to the asssessee which are extracted at pp. 5 and 6 of this order. After carefully considering the same, we are inclined to accept the reasons shown by the learned CIT(A). The learned CIT-Departmental Representative could not assail the finding reached by the learned CIT(A) by bringing in any valid materials. The order of the CIT(A) is confirmed. It is ordered accordingly.

There is no case for the Revenue that assessee had failed to file details of software engineers employed by it. In our opinion software engineers newly employed by it fell within the meaning of the word 'workmen'."

17. We are of the view that ground Nos.6 and 6.4 should be decided in the light of the directions given above by the AO afresh after affording opportunity of being heard to the assessee."

17.7. The facts and circumstances under which the disallowance is made in the year under consideration is similar with the case

referred above. Respectfully following the above view, we direct the Ld.AO to consider the claim in accordance with the observations and principles laid down by this *Tribunal* in herein above. Needless to say that proper opportunity of being heard is to be granted to the assessee.

Accordingly, this ground raised by assessee stands allowed for statistical purposes.

18. Ground nos. 44-45 - Disallowance of Sub Contracting charges paid to Infosys Technologies China Co Ltd under section 40(a)(i) for not deducting tax at source under section 195

18.1. The Ld.AR very fairly submitted that an order u/s. 201(1)&(1A) dated 28.2.2014 was passed by the Ld.AO for the year under consideration holding the assessee to be an 'assessee in default' under section 201(1) of the Act, for non deduction of TDS and levied interest under section 201(1A) of the Act. Against this order the assessee appealed before the Ld.CIT(A) who confirmed the action of the Ld.AO. Assessee had preferred appeal before this *Tribunal*. He submitted that pursuant to the order dated 28/03/22 passed by this *Tribunal,* assessee did not have any merit on this issue.

The Ld.AR though have submitted various arguments, does not have any merit. Accordingly we dismiss this ground raised by the assessee.

Accordingly, these grounds raised by assessee stands dismissed.

19. Ground nos. 46 & 47- Deduction under section 10AA in respect of disallowance under section 40(a)(i) and Deduction in the year of payment of TDS demand.

19.1. The Ld.AR submitted that as the *Tribunal* has already held assessee to be an assessee in default for non-deduction of TDS on sub-contracting charges paid to Infosys China u/s. 201(1)/1(A) by order dated 28/03/2022. In Ground no 44 to 45 we have upheld the disallowance u/s.40(a)(ia)in the paragraphs herein above. The Ld.AR seeks deduction of the said amount u/s. 10AA as a consequence of the disallowance. He relied on the decision of *Hon'ble Bombay High Court* in case of *CIT v Gem Plus Jewellery India Ltd* reported in *(2011) 330 ITR 175* and *CBDT Circular No. 37 of 2016 dated 2.11.2016* in support of this contention.

The Ld.St.Counsel relied on the orders passed by authorities below.

19.2. We note that the submissions of assessee deserves to be considered and the claim has to be considered in accordance with law. In our opinion there is no statutory provision to that effect having been made, as a consequence of the disallowance, claim of deduction of such disallowance under section 10A/AA must follow. Needless to say that proper opportunity of being heard is to be granted to the assessee.

Accordingly, these grounds raised by assessee stands allowed for statistical purposes.

As we have already directed the Ld.AO to consider the claim of assessee for the year under consideration, the alternative ground raised by assessee in **Ground no. 47** need not be adjudicated.

20. Ground nos. 48 to 50 Allowability of deduction u/s 35(2AB) for a sum of Rs.2,49,91,38,982/- in respect of scientific research expenditure incurred from 1.4.2011 to 22.11.2011 amounting to Rs.1,24,95,69,491/-.

20.1. During the year under consideration, the assessee incurred expenditure of Rs.75,22,14,103/- during the period 23/11/2011 to 31//03/2012 on account of Research and Development activities in its centres approved u/s 35(2AB) of the IT Act, 1961. The assessee thus claimed weighted deduction of 200% amounting to Rs. 150,44,28,206 u/s 35(2AB) of the IT Act, 1961 in its Return of Income. As the in house R&D facilities were approved for the purposes of section 35(2AB) from 23.11.2011, scientific research expenditure incurred from 23.11.2011 to 31.3.2012 was considered for the purpose of claiming deduction under section 35(2AB) in the return of income. The claim as per return of income amounting to Rs.1,50,44,28,206 at 200% of scientific research expenditure incurred from 23.11.2011 to 31.3.2012 has been allowed in the assessment order after verification of all evidences.

20.2. The Ld.AO did not allow the deduction as the same was filed during the assessment proceedings. The DRP upheld the action of the Ld.AO in the final assessment proceedings, the Ld.AO did not allow the additional deduction as per the

directions. Before us, the Ld.AR submitted that assessee requests to consider the scientific research expenditure incurred from 01/04/2011 to 22/11/2011 as the same was approved for the purposes of 35(2AB) from 23/11/2011 on the same premise. It has been submitted that in the following cases, deduction u/s. 35(2AB) was allowed for the entire year's expenditure even though the approval of inhouse R&D facility was from a later date.

(i) *Claris Lifesciences Ltd v ACIT [2008] 112 ITD 307 (Ahd) approved by the Gujarat High Court in CIT v Claris Lifesciences Ltd [2008] 174 Taxman 113*
(ii) *CIT v Wheels India Ltd [2012] 20 taxmann.com 682 (Mad)*
(iii) *CIT v Sandan Vikas (India) Ltd [2012] 22 taxmann.com 19 (Delhi)*

In our opinion, this claim deserves to be verified by the Ld.AO based on various evidences and documents filed by assessee having regards to the decisions relied upon by assessee hereinabove. Needless to say that proper opportunity of being heard is to be granted to the assessee.

Accordingly, these grounds raised by assessee stands allowed for statistical purposes.

21. Ground nos.51– 52: TDS credit not allowed to the extent of Rs. 1,06,50,855.

21.1 The Ld.AR submitted that TDS credit was not allowed to the extent of Rs.1,06,50,855/- was not allowed by the Ld.AO. He has filed the evidences in support of this claim. In lieu of the above, we direct the Ld.AO to verify the above claim of assessee in accordance with law. Needless to say that proper opportunity of being heard is to be granted to the assessee.

Accordingly, these grounds raised by assessee stands allowed for statistical purposes.

22. Ground no.53: <u>TDS credit and advance tax relating to ICIL not allowed even though it was allowed in the Draft assessment order</u>

22.1. It is submitted that the Ld.AO erred in not allowing TDS credit and advance tax relating to Infosys Consulting India Ltd which was merged with the assessee, amounting to Rs.27,73,096/- and Rs.75,00,000/- even though the same was allowed in the draft assessment order at page 52. The action of the Ld.AO in denying the aforesaid TDS credit and advance tax in the final assessment order is contrary to the scheme of section 144C, invalid, bad in law and liable to be quashed. The Ld.AO be therefore directed to allow TDS credit and advance tax relating to Infosys Consulting India Ltd which was merged with the assessee, amounting to Rs.27,73,096/- and Rs.75,00,000/- respectively.

22.2. We direct the Ld.AO to verify the claim of assessee in accordance with law. Needless to say that proper opportunity of being heard is to be granted to the assessee.

Accordingly, this ground raised by assessee stands allowed for statistical purposes.

23. Ground no.54 is in respect of **allowability of incremental foreign tax credit which was allowed in the draft assessment order.**

23.1. It is submitted that Foreign tax credit was claimed in the revised return of income amounted to Rs. 336,90,86,298.. During the assessment, vide letter dated 29.2.2016 filed with the Ld.AO on 4.3.2016, the assessee requested the Ld.AO to allow foreign tax credit of Rs.6,80,43,71,180/- as against the claim of

Rs.3,36,90,86,298/- as made in the revised return of income. The increase in the claim was, in view of the decision of the *Hon'ble Karnataka High Court* in the case of *Wipro Ltd v DCIT* reported in *382 ITR 179,* which held that Foreign tax credit relating to income eligible for deduction under section 10A is also allowable under section 90. It is submitted that, along with the said letter, the assessee filed the copy of the aforesaid decision and the evidences for payment of tax in foreign countries.

23.2 The Ld.AO after verification of all details and evidences allowed the claim of foreign tax credit at Rs. 680,43,71,180 in the draft assessment order.

23.3 The Ld.Ar submitted that, as the foreign tax credit was allowed in the draft assessment order, there was no occasion for the assessee to file objections before the DRP in this regard. However, the details of foreign tax credit, letters, evidences regarding tax paid in foreign countries were all filed with the DRP as paper books. The DRP after noticing that foreign tax credit was allowed at Rs.6,80,43,71,180/- as against the claim of Rs.3,36,90,86,298/- made in the revised return of income, directed the Ld.AO to verify and rectify the mistake in computation, if any, while giving effect to the DRP directions. In the final assessment order, the Ld.AO held that as the claim of the assessee has to be allowed based on the return of income filed, the additional credit allowed in the draft assessment order is not allowed in the final assessment order. The Ld.AO was of the view that as the additional claim did not form part of the original return of income, the assessing officer could not have allowed such additional claim. The Ld.AO relied on the decision

of *Hon'ble Supreme Court* in the case of *Goetze India Ltd v CIT* reported in *(2006) 157 Taxman 1*.

23.4. Before us the Ld.AR submitted that the DRP was not correct in directing the AO to verify and rectify the mistake in computation of foreign tax credit, if any, as allowed by the Ld.AO in the draft assessment order. This is because, the Ld.AO allowed the foreign tax credit after verification of all details and evidences on record. These details and evidences were also on record before the DRP. Hence, the direction of the DRP to Ld.AO to verify and rectify the mistake in computation of Foreign tax credit, if any, is invalid, bad in law and liable to be quashed.

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

23.5 We note that the DRP has relied on the decision of *Hon'ble Supreme Court* in case of *Goetze India Ltd. vs. CIT (supra).* There is no denial of the claim made by the assessee for any want of evidence or on a mistaken claim. The Ld.AO has already verified the foreign tax credit claimed by assessee during the draft assessment proceedings. This issue was not a subject matter of objections filed before the DRP and the DRP *suo moto* cannot consider an issue which is not filed by assessee. The DRP is only directed to consider those objections raised by assessee and to pass necessary directions to the Ld.AO. This act of *suo moto* considering an issue which was allowed by the Ld.AO in the draft assessment proceedings is not in accordance with law.

We also note that *Honble Supreme Court* in case of *Goetz India Ltd.,*(supra) has also held as under:

> *"4. The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs.*

23.6 Respectfully following the above, we direct the Ld.AO to consider the assessee's claim and grant credit of foreign taxes paid for the year under consideration that has been verified during the draft assessment proceedings. Needless to say that proper opportunity of being heard must ne granted to the assessee

Accordingly, this ground raised by assessee stands allowed.

24. Ground nos.55-57 - <u>Deduction in respect of state taxes paid outside India [Ground No. 55 and 56] and Relief under section 91 in respect of state taxes paid outside India [Ground No. 57]</u>

24.1 The Ld.AR submitted that due to revision in the claim of state taxes paid outside India, the assessee is not eligible for the higher claim of Rs.37,30,57,123/- made during the assessment. Hence, the Ld.AR submitted that Ground nos.55, 56 and Ground no. 57 on alternate claim for deduction for state taxes paid u/s. 91 are not pressed and the same was withdrawn vide submissions filed on 18/05/2022 as under:

> *"2.1 Withdrawal of the Ground on deduction for State Taxes paid [Ground No 55 & 56] It is submitted that due to revision in the claim of state taxes paid outside India, the appellant is not eligible for the higher claim of Rs.37,30,57,123 made during the assessment. Hence, Ground No 55, 56 and Ground No 57 on*

alternate claim for deduction for state taxes paid under section 91 is not pressed."

Accordingly, Ground nos. 55-57 are dismissed as not pressed.

25. Ground nos.58-59:<u>Interest on IT Refund granted under section 143(1) but subsequently recovered on completion of assessment proceedings is allowable as deduction</u>

25.1 It is submitted that the interest on IT refund has been offered to tax which was subsequently recovered upon completion of assessment proceedings. The Ld.AO disallowed the claim by holding that the same was not offered to tax that pertain to A.Ys. 2007-08 and 2008-09. Before us the Ld.AR submitted as under:

"21.5 <u>Legal contentions:-</u> During the AY 2009-10, Income Tax refund was granted vide intimation under section 143(1) for the AY 2007-08 dated 4th February 2009. Interest pertaining to refund granted was offered to tax under the head Income from other sources while filing return of Income for the AY 2009-10. Subsequently 50% of the refund granted was recovered from demand while passing assessment order u/s 143(3) for the AY 2007-08. 50% of the interest amounting to INR 1,16,28,374 which was offered to tax during the AY 2009-10 and subsequently recovered in AY 2012-13 should be allowed as a deduction in the AY 2012-13 as it was already offered to Tax during the AY 2009-10.

21.6 Similarly, During the AY 2011-12, Income Tax refund was granted vide intimation under section 143(1) for the AY 2008-09 dated 27th September 2010. Interest pertaining to refund granted was offered to tax under the head Income from other sources while filing return of Income for the AY 2011-12. Subsequently refund granted was recovered from demand while passing assessment order u/s 143(3) for the AY 2008-09. Interest amounting to INR 7,24,03,804 which was offered to tax during the AY 2011-12 and subsequently recovered in AY 2012-13 was requested to be allowed as a deduction in the AY 2012-13 as it was already offered to Tax during the AY 2011-12.

21.7 The finding of the DRP and the assessing officer that relief should be allowed only if it is found that the interest income offered during the assessment year is withdrawn subsequently, does not take into consideration the recovery of IT refund interest made during the year under consideration. The trigger for claim of recovery of IT refund interest arise on recovery of IT refund interest during the previous year. It cannot be made based on the IT refund interest offered to tax during

the year under consideration, for which recovery may happen subsequently."

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

25.2. In our opinion, this issue needs to be verified by the Ld.AO. The Ld.AO is directed to verify based on the necessary evidences filed by assessee. The issue then is to be considered in accordance with law. Needless to say that proper opportunity of being heard must be granted to assessee.

Accordingly these grounds raised by assessee stands allowed for statistical purposes.

26. Ground no. 60 is consequential in nature and do not require any adjudication.

27. The assessee has filed an application dated 28/06/2021 raising an additional ground of appeal in respect of deduction for Education Cess. This issue is no longer resintegra and is against assessee. The assessee therefore do not press this ground for adjudication.

Accordingly, this application for admission of additional ground is dismissed at the threshold.

In the result, the appeal filed by the assessee stands partly allowed.

Order pronounced in the open court on 28th November, 2022.

Sd/-	Sd/-
(CHANDRA POOJARI)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 28th November, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore