IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 6256/Mum/2016 (A.Y. 2010-11)

Tech Mahindra Limited,
C/o Marriott Hotels India Pvt. Ltd.
Gateway Building, Apollo Bunder,
Mumbai-400001
PAN: AAACM3484F ..... Appellant

Vs.

DCIT-2(3),
Room No. 552, Aayakar Bhavan,
M.K. Marg, Mumbai-400020. ..... Respondent

ITA No. 6401/Mum/2016 (A.Y. 2010-11)

ACIT Circle-2(3)(1),
Room No. 552, 5th Floor, Aayakar Bhavan,
M.K. Marg, Mumbai-400020. ..... Appellant

Vs.

Tech Mahindra Limited,
C/o Marriott Hotels India Pvt. Ltd.
Gateway Building, Apollo Bunder,
Mumbai-400001
PAN: AAACM3484F ..... Respondent

Appellant/Assessee by : Sh. J.D. Mistri / Sh. Harsh Kapadia
Respondent/Revenue by : Sh. K.C. Kanojia- CIT-DR

Date of hearing : 08/09/2022
Date of pronouncement : 30/11/2022

ORDER

PER GAGAN GOYAL, A.M:

These two appeals in which one by assessee and one by Revenue are directed against the common order Commissioner of Income Tax (Appeals)-58, Mumbai [for short 'CIT(A)'] vide common orders dated 26.07.2016 for similar AY 2010-11. We shall first take up appeal of assessee as lead case. The assessee has raised the following grounds of appeal:

"Being aggrieved by the order under section 250 of the Income Tax Act, 1961 ('the Act") passed by the Commissioner of Income tax (Appeals)-58, Mumbai (hereinafter referred to as "the CIT(A)"), the appellant hereby submits the following grounds of appeal for your sympathetic consideration:

1. ***Ground No. 1- Disallowance under section 14A:***

1.1 On the facts and in the circumstances of the case and in law, the learned AO erred in disallowing and learned CIT (A) erred in confirming action of the learned AO in disallowing expenditure under Section 14A of the Act read with Rule 8D2 (i) and 8D(2)(iii) of the Income-tax Rules, 1962 (the Rules'), as expense incurred in relation to earning exempt income.

1.2 Without prejudice to the above, on the facts and in circumstances of the case and in law, the learned AO erred in disallowing and learned CIT(A) erred in confirming the action of the learned AO of not accepting the alternate contention of the Appellant, that the disallowance under section 14A of the Act should be restricted to amount of exempt income earned of Rs. 19,169,981.

1.3 Without prejudice to the above, on the facts and in circumstances of the case and in law, the learned AO erred and the learned CIT (A) erred in confirming the action of the learned AO in not reducing the investment in subsidiaries outside India, income from which is not exempt under Section 10(34) of the Act, from the total value of investments as on the first day and last day of the previous year.

2. ***Ground No. 2- Disallowance of Depreciation on intangible assets (being upfront payment of discount and exclusivity payment):***

2.1 On the facts and in the circumstances of the case and in law, the learned AO erred in disallowing and learned CIT(A) erred in confirming action of the learned AO in holding that the payment of upfront discount and exclusivity payment to British Telecommunication PLC does not result into any business or commercial right and consequentially, disallowing the Appellant's claim of depreciation under section32(1) of the Act in respect of the same.

*3.**Ground No. 3-DTA relief not allowed:***

3.1 On the facts and in the circumstances of the case and in law, learned CIT(A) erred in confirming action of the learned AO in not granting credit in respect of the taxes paid in the UK of Rs. 63,61,516/- on the income which forms a part of the total income of the Appellant offered to tax in India.

*4. **Ground No. 4- Interest under section 234B and 234C:***

4.1 On the facts and circumstances of the case and in law, the learned AO erred and learned CIT (A) further erred in upholding levy of interest under section 234B and 234C of the Act."

2. The Revenue has raised the following grounds of appeal:

1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A)has erred in holding that consideration relating to expenditure incurred in foreign currency on telecommunication charges of Rs. 7,69,88,038/- and expenses incurred in foreign exchange in providing technical services outside India @ Rs.380,43,73,399/- respectively, for not excluding from export turnover for the purpose of computing deduction u/s. 10A/10AAdisregarding the provisions of Explanation 2(iv) of Section10A/10AA of the I.T. Act, 1961."

3. Brief facts of the case are that the assessee was incorporated as a joint venture between Mahindra &Mahindra Ltd. and BT Plc, UK under the name of Mahindra British Telecom for software development services. Subsequently it had been renamed as Tech Mahindra Ltd. The company is involved in information technology domain (mainly into telecom space) spread across a broad-spectrum including business support service, operation support service, network design and engineering, next generation network, mobility solution, security consulting and testing.

4. During the year under consideration Tech Mahindra Ltd filed its return of income on 23-09-2010 (in assessment order this date is written as 04-10-2010). The assessee had entered certain international transaction with its AEs within the meaning of sec 92B of the Act. The said transaction was duly reported by the assessee in form no 3CEB as required u/s 92E of the Act. The transactions were duly referred to the TPO u/s 92CA (3).

5. Before us assessee raised 3 substantial grounds, 1 consequential ground and 1 additional ground vides its application dated 12-03-2019. So out of all 5 grounds assessee pleaded for Ground No. 1 only and seeks our directions to the AO on Ground No. 3. Ground No. 2 and additional ground raised were not pressed before us hence rejected. Ground No. 4 is consequential in nature hence to our adjudication only Ground No. 1 & 3 are there before us pertaining to disallowance u/s. 14A made by the AO amounting to Rs 121,77,08,779/- and directions for allowing relief for Double Taxation respectively.

AO made disallowance as per Rule 8D(2)(i) amounting to Rs 62,16,00,000/-, disallowance as per Rule 8D(2)(ii) amounting to Rs 50,69,22,167/- and disallowance as per Rule 8D(2)(iii) amounting to Rs 8,91,86,612/-. Out of these 3 disallowances u/s. 14A r.w.r. 8D the Ld. CIT (A)deleted the addition made under rule 8D(2)(ii) amounting to Rs 50,69,22,167/-. Assessee approached ITAT against disallowances confirmed under rule 8D (2)(i) And 8D (2)(iii).

6. During the appeal proceedings before us we have carefully gone through the order of the AO, order of the Ld. CIT (A) along with submissions and arguments of the assessee.

7. Submissions of the assessee and order of Ld. CIT (A) is reproduced herein below for ready reference:

*"**Disallowance us, 14A***

The Id. A0 erred in disallowing expenditure of Rs.121, 77, 08,779/- u/s. 14A of the Act, alleging that said expenditure was incurred in relation to earning exempt income.

The Ld. AO erred in making disallowance u/s 14A read with Rule 8D(2)(1) of the I.T. Rules, 1962 ("the Rules) of Rs. 621,6,00,000/- as interest expenditure towards borrowing made for the purpose of investments in M/s. Satyam Computer Services Ltd.

The Id AO erred in making disallowance us. 14A read with Rule 8D (2)(ii) Of the Rules of Rs. 50, 69, 27,167/. He further erred in arriving at average value of investments as on the first day and last day of the previous year without excluding the following investments

- *Investment in Ms. Satyam Computer Services Ltd.*
- *Investment in subsidiaries held outside India income from which are not exempt u/s 10(34) of the Act.*

The Ld. AO further erred in making the above disallowance without appreciating the fact that once investment made in M/s. Satyam Computer Services Ltd. is excluded, there is reduction in total investment during the year consideration. The appellant submits that it had no borrowing as on 1st April, 2009 and therefore, all the earlier investments made were out of its equity share capital and free reserves.

The Ld. A0 erred in making disallowance u/s 14A read with Rule 8D (ii) of the Rules of Rs.8,91,86,612/-. He erred in not reducing total value of investments as on the first day and last day of the previous year by investment in subsidiaries held outside India, income from which are not exempt u/s 10(34) of the Act.

Without prejudice to the above the ld. AO erred in not restricting disallowance u/s. 14 of the Act to Rs.1, 91, 69,981/-, as alternatively submitted by the appellant during the course of assessment proceedings. The appellant has to submit that investment made by it in various subsidiaries are strategic

investment for which it is not required to incur any expenses to Invoke Rule 8D(iii).

8.1 During the course of assessment proceedings, it has been noted by the AO that the appellant has claimed exempt income of Rs. 1, 91, 69,981/. The assessee has not made any disallowance for earning this income. Before the AO, the appellant has contended that disallowance may be made to the extent of Rs. 1, 91, 69,981/-.

8.2 The AO has rejected the contention of the assessee. He has noted that the investment of the assessee in funds, whose income would be tax exempt, has increased from Rs. 453 Crore to Rs 3114 Crore. He has concluded that these funds have their costs and need to be managed by expert hands which require expenditure. He has also relied on the ITAT judgment in the case of Daga Capital Management Pvt. Ltd (ITA 8057/Mum/03) wherein it has been held that disallowance u/s 14A needs to be made. He has proceeded to compute 14A disallowance in accordance with Rule 8D. The appellant has borrowed funds for Satyam acquisition for which interest of Rs 62.16 Crore has been paid. This has been taken as expenditure directly relating to income which does not form part of total income under Rule 8D(1), Rs 50,69,22,167 has been computed u/s Rule 8D(ii) and Rs. 8,91,86,612 under Rule 8D(iii), the total disallowance u/s 14A amounting to Rs. 121,77,08,779/-.

8.3 The appellant has made following submissions before me;

8.3.1 The Company has made investments in various mutual funds units and securities out of its own funds i.e. through its internal accruals. It has not borrowed any funds for the purpose of making the above investments. Further, it did not incur any specific expenditure to earn aforesaid exempt incomes. The Company respectfully submits that at the highest it could be said that it has incurred indirect expenses of Rs. 19,169,981/- (as per without prejudice' working submitted during assessment proceedings) for the management of the investments in the mutual fund units and securities or for the earning dividend income from same. Hence, the question of computing disallowance of any expenses as incurred in relation to such dividend income under section 14A(1) of the Act read with Rule 8D does not arise.

8.3.2 It is submitted that the provision of section 14A(2) and (3) could be applied only if the condition prescribed in the provisions of section 14A(1) is satisfied i.e. there should be expenses incurred in relation to earning of the exempt income for

the AO to apply the provisions of sub-section (2) or (3). AO cannot apply the provisions of section 14A (2) without satisfying that there exist expenses in relation to earning of exempt income on the basis of mere presumption.

8.3.3 Further, the Company submits that in view of the clear language of section 14A (2) of the Act, Rule 8D ought to have been applied only if the AO is not satisfied with the correctness of the subject claim of the Company i.e. non-applicability of section 14A (1) of the Act, in its case and after it has established a direct nexus between expenses incurred and exempt income.

8.3.4 It is therefore respectfully submitted that deduction u/s 14A has been correctly compiled by the Appellant and the excess adjustment made by the learned AO is wholly uncalled for and may be reversed.

8.4 The submission made by the appellant has been examined. It is seen that the appellant has not computed any disallowance w/s 14A although it has claimed exempt income of Rs. 1, 91, 69,981/-. It is claimed that it has made investments in various mutual funds units and securities out of its own funds i.e. through its internal accruals. It has not borrowed any funds for the purpose of making the above investments and that it did not incur any specific expenditure to earn aforesaid exempt incomes. Before me, the appellant has claimed that Rule 8D could be applied only if the AO was not satisfied with the correctness of the claim of the company and only after he has established direct nexus between expenses incurred and exempt income. It is not in dispute that the appellant has claimed certain exempt income in its return. Further, it has not computed any disallowance with reference to this income claiming that no specific expenditure was incurred for earning these incomes. Under such circumstances, its claim that the AO should have first demonstrated that he is not satisfied by the computation of disallowance u/s 14A is not found tenable. There are clear evidences of expenditure made with reference to investment in companies whose dividend income was exempt. The AO has identified investment in Satyam to be one such investment. The appellant has neither produced any computation u/s 14A or Rule 8D to counter the AO's proposition. Merely claiming that the AO did not arrive at a satisfaction does not help the appellant. The AO can adjudicate on correctness of something which is presented to him, no computation is presented, and then there is no way the satisfaction of AO can be examined. It is seen that in his discussion in the assessment order, the AO has provided sufficient material to lead him to a belief that disallowance u/s 14A is warranted. Further, the Act mandates that once a disallowance u/s 14A is warranted and the expenses are

not separately incurred, application of Rule 8D becomes mandatory. The contention made by the appellant on this issue is not found satisfactory and is rejected.

8.5 The appellant has submitted that if the loan taken for Satyam acquisition is excluded, then the free reserves of the appellant company are sufficient to meet the remaining amount invested in investments liable to tax exempt income. The company has also submitted that there are investments in foreign companies whose dividend is taxable in India and hence these investments should be excluded while computing the disallowance w/Rule 8D (2)(i) The up of the appellant has been examined. It has been held in the case of HDFC Bank Ltd. [2016] 67 taxmann.com 42 (Bombay) wherein the Bombay High Court has held that,

> *15. It is clear that for the first time in the case of HDFC Bank Ltd. (supra) that this Court took a view that the presumption which has been laid down in Reliance Utilities & Power Ltd. (supra) with regard to investment in tax free securities coming out of assessee's own funds in case the same are in excess of the investments made in the securities (notwithstanding the fact that the assessee concerned may also have taken some funds on interest) applies, when applying Section 144 of the Act. Thus, the decision of this Court in HDFC Bank Ltd. (supra) for the first time on 23rd July, 2014 has settled the issue by holding that the test of presumption as held by this Court in Reliance Utilities and Power Ltd. (supra) while considering Section 36(1)(ii) of the Act would apply while considering the application of Section 144 of the Act. The aforesaid decision of this Court in HDFC Bank Ltd. (supra) on the above issue has also been accepted by the Revenue inasmuch as even though they have filed an appeal to the Supreme Court against that order on the other issue therein viz broken period interest, no appeal has been preferred by the Revenue on the issue of Invoking the principles laid down in Reliance Utilities & Power Ltd (supra) in its application to Section 14A of the Act. Therefore, the issue which arose for consideration before the Tribunal, had not been decided by this Court in Godrej & Boyce Mfg. Co. Lid (supra). It arose and was so decided for the first time by this Court in HDFC Bank Ltd. (supra). Thus, there is no conflict as sought to be made out by the impugned order. Thus, the impugned order has proceeded on a fundamentally erroneous basis as the ratio decindi of the order in Godrej & Boyce Mfg. Co. Ltd. (supra) had nothing to do with the text of presumption canvassed by the petitioner before the Tribunal on the basis of the ratio of the decision of this Court in HDFC Bank Ltd (supra).*

8.6 The AO is directed to examine the claim of the appellant with respect to availability of reserves as contemplated in the above High Court judgment. If the reserves are higher than the investment made, no disallowance would be called for under Rule 8D (2)(ii).

8.7 In respect of the disallowance computed under Rule 8D (2)(i) And Rule 8D (2)(iii), it is seen that these disallowances have been correctly made by the AO. There is no mandate in the section to limit the disallowance to the extent of income earned.

8.8 The AO is directed to re-compute the disallowance u/s 14A in light of the above directions:"

8. We have perused the order of AO and Ld. CIT (A) and observed that assessee's contention about not incurring any specific expenditure to earn aforesaid exempt income and the claim of the assessee that investment in subsidiaries held outside India, income from which are not exempted hence, same should not be considered for the purposes of Rule 8D. In the light of above we found that without bringing any cause and finding or material on record to apply Rule 8D(2)(i)/8D(2)(iii). AO mechanically applied the formula as prescribed u/s. 14A r.w.r 8D. These facts as observed are in addition to the settled legal position as pronounced by Hon'ble apex court and various high courts that disallowance u/s. 14A can't exceed the amount of exempted income earned by the assessee.

9. Based on above discussions and legal position settled without any hesitation we are inclined to hold that disallowance u/s. 14A can't exceeded the exempt income earned by the assessee. To strengthen our view, we find support from the various judicial pronouncements as under:

[2018] 99 taxmann.com 286 (SC) Principal Commissioner of Income Tax, Patiala v. State Bank of Patiala

[2022] 138 taxmann.com 199 (Cal.) Principal Commissioner of Income-tax v. Reliance Chemotex Industries Ltd.

[2022] 141 taxmann.com 275 (Del.) Principal Commissioner of Income-tax v. TV Today Network Ltd.

10. In addition to above, we are reproducing the relevant extract i.e. para-8 of the assessment order as under:

> *"8. Disallowance under Section 14A: The assessee claimed an exempt income of Rs. 1,91,69,981/-. The assessee has not made disallowance for earning the exempt income. The assessee was asked as to why disallowance should not be made as per Rule 8D. Through the letter dated 27.12.2013 and 25 February, 2014, the assessee has submitted its contentions and stated that disallowance may be made to the extent of Rs 1,91,69,981/-."*

In addition to above, through Ground No. 1.2 (Main Ground No.1) also assessee took a contention as mentioned (supra) offering disallowance under section 14A of the Act to the extent of exempt income earned of Rs. 1,91,69,981/- and this fact has not been rebutted by assessee during the arguments.

11. In view of the above and as the assessee itself offered suo-moto disallowance to the extent of exempt income earned, we allow the ground raised by the assessee and disallowance u/s 14A restricted to Rs 1,91,69,981/-. We direct the AO to restrict the addition to Suo moto disallowance offered by the assessee amounting to Rs. 1,91,69,981/. **In the result Ground No. 1 raised by the assessee is allowed protanto.**

12. As far as ground no.3 is concerned, the Ld. AR submits that the assessee has filed rectification petition dated 02.06.2014 under section 154 of the Act before the AO, the same has not been decided till date. The AO is directed to

decide the aforesaid petition of the assessee within six months from the date of this order. Ground No.3 of appeal is thus allowed for statistical purpose.

13. **In the result, appeal filed by the assessee is partly allowed for statistical purposes.**

ITA No. 6401/Mum/2016 (A.Y. 2010-11)

14. This is an appeal by the department of the same A.Y. emanating out of the same order of Ld. CIT (A) discussed and mentioned above. Revenue has raised only one ground pertaining to not excluding telecommunication charges of Rs. 7,69,88,038/- and technical services charge amounting to Rs. 380,43,73,399/- incurred in foreign currency outside India for the purposes of computing deduction u/s 10A/ 10AA.

15. During the assessment proceedings assessee had claimed deduction u/s 10AA and 10A on its SEZ units at Hinjewadi, Chennai and Noida in support of its claim assessee filed form No. 56F to claim benefits of sec. 10A and 10AA. As per Form No. 56F export turnover has been taken by the assessee without reducing the cost of freight expenditure and telecommunication charges as defined in explanation-2 to sec. 10A. Accordingly the assessee was asked to explain as to why expenditure incurred in foreign currency outside India should not be reduced from the export turnover and deduction u/s. 10A and 10AA be recalculated. Assessee filed its submissions with appropriate explanations and relevant case laws in its favour. It is here pertinent to mention that the same issue in assessees own case has been decided in the favour of assessee by Mumbai ITAT vide ITA No 3657/Mum/2007, ITA No. 3099/Mum/2008 for AY 2002-03 and 2003-04 respectively.

16. We have carefully examined the submissions of the assessee before the authorities below and findings of the Ld. CIT (A). It is an established fact that the assessee did not include both the expenses in total turnover and export turnover. In this regard we are relying on the decision of Hon'ble Bombay High court in the case of "Sudarshan Chemicals Industries Ltd. (245 ITR 769)."

17. Relevant portion of AO's order is reproduced here-in-below as ready reference and for better appreciation of the matter:

> 6. **Export of software & Deduction U/s. 10A/10AA**:
>
> During the year, assessee has claimed deduction u/s 10AA for SEZ Units e.g. Hinjewadi SEZ, Chennai MWC SEZ, Noida SEZ (iPolicy Division). It is seen from the details of the working of deduction claimed u/s 10A as furnished in Form No. 56F that the export turnover has been taken by the without reducing the cost of freight expenditure and telecommunication charges as defined in Explanation 2 to Section 104. Accordingly the assessee was asked to explain as to why expenditure incurred in foreign currency with regard to freight and telecommunication expenses should not be reduced from the export turnover and deduction u/s 10A/ 10AA recalculated. In reply the assessee contended as follows:
>
> *"In our case the expenditure incurred in foreign currency was never part of either Total turnover or Export turnover and therefore no adjustment of such expenditure is warranted either in Export Turnover or in the Total turnover. Without prejudice to this, Section 10A/10AA contains only the definition of export turnover and specifically provides that it does not include freight, telecommunication charges or insurance attributable to the delivery of articles or things or computer software outside India. It is respectfully submitted that the mere fact that Sec. 10A/ 10AA does not define total turnover it should be interpreted in the manner in which you have suggested. It is a settled rule of interpretation that when a statute does not define a particular word or expression it should be given a meaning which is given to that word or expression in ordinary commercial parlance or its definition in similar enactments (Ship Scrap Traders 251 ITR 806(Bom)].*

Turnover as you will rightly appreciate refers to the value of goods sold or services rendered. This is more so in the context where one has to compare export turnover with total turnover. In the present context export turnover has, in so many words been defined to mean turnover of articles or goods or computer software and collections by way of insurance, freight, telecommunication charges have been specifically left out These collections have been left out because in ordinary commercial parlance such collections do not have an element of turnover. The entire objective of computing the profits w/s 10A/10AA is to find out profits which could be said to have been derived from export of articles or things of computer software. The section prescribes for the methodology of arriving at such profits. Where the export of such articles or things or computer software Le export turnover is less than the total turnover the section requires that only the fraction of export turnover upon total turnover would determine the eligible profits.

In the context of a similar exercise to be undertaken for the purpose of sec. 80-HHC, the Bombay High Court in the case of Sudarshan Chemical Industries Ltd. 1245 ITR 769) has held that both the numerator and the denominator i.e. export turnover and total turnover should consist of figures which are comparable. In that case the Court held that since the figure of export turnover could not include excise duty and sales tax total turnover should also not include excise duty and sales tax as otherwise the ratio and hence the result would be unnecessarily distorted and it would become unworkable. Various courts across the country have taken a similar view.

By the same logic, in the present case if export turnover is not to include freight, telecommunication charges and insurance, total turnover also should not include the said receipts as otherwise the result would be unnecessarily and unintentionally distorted We also rely on the decisions of the Gem Plus Jewellery India Limited (194 Taxman 192) High Court of Bombay and Dell International Services India Pvt. Ltd - Karnataka High Court. It is therefore respectfully submitted that deduction u/s 10A/10AA has been correctly computed.

6.1 The contentions of the assessee are considered. However the same is not acceptable. This issue was considered in detail in the case of the assessee for the A.Y 2006-2007 and the disallowance made therein was upheld by the DRP for the earlier year AY 2006-07 & AY 2008-09 in the directions dated 06 09 2010 & 07.09.2012 In view of the above, the allowable exemption u/s 10A/10AA shall

have to be adjusted to the extent of expenses incurred in foreign exchange and telecommunication charges.

Therefore, the total allowable exemption shall now stand at Rs. 9,59,54,12,832/- as against the amount of exemption claimed by assessee u/s 10A at Rs. 100,2,98,54,895/-

Therefore, the total allowable exemption is Rs. 5, 32, 17, 84,537/-. The exemption has increased due to fact that Rs. 122,19,01,296/- depreciation on intangible asset is disallowed and added to the profit of the units, as the total of exemption claimed by assessee u/s 10AA is Rs. 4,61,92,01,430/-.

18. Relevant portion of Ld. CIT (A)'s order is also reproduced here-in-below as ready reference and for better appreciation of the matter:

"7.1 The issue relates to the action of the AO in computing the Export Turnover of the appellant under section 10A/10AA by reducing the consideration in respect of exports, to the extent of the expenditure incurred in foreign currency on telecommunication charges of Rs. 7,69,88,038/- and expenses incurred in foreign exchange in providing technical services outside India @ Rs 380,43,73,399/-.

7.2.1 The expenditure incurred in foreign currency was never part of either Total turnover or Export turnover and therefore no adjustment of such expenditure is warranted either in Export Turnover or in the Total turnover. Copy of form 56F (copy enclosed) clearly demonstrated in the certificate does not include expenditure in foreign currency from both turnover

As per the Act, "Export turnover" means the consideration in respect of export of article or things or computer software received in, or brought into, India by the assessee in convertible foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India.

From the above but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things which means the aforesaid expenditure should first be included in the export turnover, if not, then there is no need of any reduction.

Based on the above, there is no need of adjustment of expenditure in foreign currency in either of the turnovers as the same is not forming part of the turnovers at all.

7.2.2 It is submitted that the mere fact that Section 10A & 10AA does not define total turnover does not in any way call for adjustment only from Export turnover.

7.2.3 In the assessee's own case, this issue has been decided in its favour by the Mumbai Tribunal while deciding the appeals for AY 2002-03 and AY 2003-04 (ITA NO 3637/MUM/2007/ AY 2002-03 & ITA NO 3099 MUM/2008 /AY 2003-04 (copies enclosed). The tribunal was adjudicating appeals arising out of orders passed u/s 263. The Tribunal held that no adjustment of expenditure in foreign currency was needed either from the Export turnover and Total turnover. It may also be noted that for AY 2004-2005, AY 2005-2006 and AY 2007- 08 the CIT (A)-15 have also considered this matter favourably and granted relief.

7.2.4 It may also be mentioned that this issue is also covered in favour of the assessee by the decision of the Special Beach of the Tribunal in the case of decision of the Special bench, Chennai-ITO Co. Ward VI(I) v/s Sak Soft Limited (ITA NO 691 & 1953/MDS /07/ AY 2002-03 & 2003-04 and decisions of the Gem Plus Jewellery India Limited (194 Taxman 192) High Court of Bombay and recent decision of "Dell International Services India Pvt. Ltd. vs. Commissioner of Income Tax (ITA No. 451/2008) Karnataka High Court, dated 30 August 2011.

7.3 The submission of the appellant is considered. It is seen that the issue has been decided in favour of the appellant in various preceding assessment years. Respectfully following the decision of ITAT in the appellant's own case as well as the decision of CIT (A) in AY 2007- 07, the ground is decided in favour of the appellant. Since the main ground is decided in favour of the appellant."

19. Keeping in view the above facts and findings of the authorities below, we also observed that when object of formula in section 10A for computation of deduction is to arrive at profit from export business, expenses excluded from export turnover have to be excluded from total turnover also; otherwise, any other interpretation makes formula unworkable and absurd and hence, such deduction shall be allowed from total turnover in same proportion as well.

Accordingly, the formula for computation of the deduction under section 10A would be as follows:

Export Profit = total Profit of the Business

X

Export turnover as defined in Explanation 2 (IV) of section 10A

Export turnover as defined in Explanation 2(IV) of section 10A + domestic sale proceeds

20. In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under section 10A allowed only in export. turnover but not from the total turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the assessee which could have never been the intention of the legislature. Even in common parlance, when the object of the formula in section 10A for computation of deduction is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also, otherwise, any other interpretation makes the formula unworkable and absurd and, hence, such deduction shall be allowed from the total turnover in same proportion as well.

21. On the issue of expenses on technical services provided outside, the same principle of interpretation is to be followed as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total

turnover. In the result we are not inclined to interfere in the order of Ld. CIT (A) and directed the AO to give effect of our findings in computation of statutory total income. **Ground raised by the Revenue is dismissed.**

22. In the result appeal of the Revenue is dismissed.

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

Sd/-	Sd/-
(VIKAS AWASTHY)	(GAGAN GOYAL)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 30/11/2022

SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) /The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy. /Asstt. Registrar)
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