

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND  
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

IT(TP)A No.735/Bang/2018
Assessment Year: 2013-14

M/s. Infosys Ltd. Electronic City Hosur Road Bangalore 560 100  <b>PAN NO : AAACI4798L</b>	<b>Vs.</b>	ACIT Circle-3(1)(1) Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

ITA No.809/Bang/2018
Assessment Year: 2013-14

Deputy Commissioner of Income-tax Circle-3(1)(1) Bangalore	<b>Vs.</b>	M/s. Infosys Ltd. Electronic City Hosur Road Bangalore 560 100
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Padam Chand Khincha, A.R.
<b>Respondent by</b>	:	Sri Sreenivas T. Bidari, D.R.

Date of Hearing	:	02.01.2023
Date of Pronouncement	:	09.01.2023

**ORDER**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

These are cross appeals directed against order of CIT(A) dated 21.12.2017 for the assessment year 2013-14.

**IT(TP)A No.735/Bang/2018 (AY 2013-14):**

2. The assessee has raised following grounds of appeal:
  1. *The order passed by the learned CIT(A) 12, Bangalore to the extent prejudicial to the appellant is bad in law and liable to be quashed.*
  2. *Disallowance under section 14A:- The learned CIT(A) 12, Bangalore has erred in confirming the action of the learned AO in computing the disallowance under section 14A read with rule 8D(2)(iii) at Rs. 8,02,96,882 and making a disallowance of Rs. 7,65,80,751. On facts and circumstances of the case and law applicable, computation of disallowance under section 14A read with rule 8D(2)(iii) and the impugned addition is bad in law and liable to be deleted.*
  3. *Disallowance of subscription charges paid to Forester Research and Gartner:- The learned CIT(A) has erred in confirming the action of the learned AO in making disallowance of expenditure incurred on subscription charges amounting to Rs. 3,18,52,696 and Rs. 1,08,79,768 under section 40(a)(i) which was paid / payable to M/s Forrester Research and M/s Gartner respectively.*
  4. *On facts and in the circumstances of the case and law applicable, no disallowance should be made under section 40(a)(i) in respect of the subscription charges paid / payable to M/s Forester Research and M/s Gartner respectively.*
  5. *Disallowance of software expenses of Rs. 1,45,000 for not making TDS:- The learned CIT(A) has erred in confirming the action of the learned AO in disallowing software expenses of Rs. 1,45,000 under section 40(a)(ia) for not making TDS under section 194J.*
  6. *On facts and circumstances of the case and law applicable, disallowance confirmed under section 40(a)(ia) to the extent of Rs. 1,45,000 is bad in law and liable to be quashed.*
  7. *Without prejudice, the learned CIT(A) has erred in not restricting the impugned disallowance, if any, to Rs.43,500 being 30% of Rs. 1,45,000 as the amendment to section 40(a)(ia) by the Finance Act, 2014 w.e.f. 1.4.2015 is retrospective in nature.*
  8. *Disallowance of software expenses as capital expenditure:- The learned CIT(A) has erred in concluding that software expenses where life of software is more than 2 years is capital expenditure. On facts and circumstances of the case and law applicable, software expenses*

*where life of software is more than 2 years should also be held as revenue expenditure.*

9. *Brand building expenditure:-* *The learned CIT(A) has erred in not allowing aliquot portion of brand building expenditure relating to earlier years. On facts and circumstances of the case and law applicable, an aliquot portion of brand building expenditure should also be allowed for the year under consideration.*
10. *Deduction under section 80JJAA:-* *The learned CIT(A) has erred in confirming the action of the learned assessing officer in disallowing deduction claimed under section 80JJAA amounting to Rs. 445,35,11,127. On facts and circumstances of the case and law applicable, impugned disallowance should be deleted in entirety and deduction under section 80JJAA should be allowed as claimed in the return of income.*
11. *Disallowance of payments made to overseas subsidiaries under section 40(a)(i)*— *The learned CIT(A) has erred in confirming the action of the learned assessing officer in disallowing payments made to overseas subsidiaries totally amounting to Rs. 269,31,41,150 under section 40(a)(i) for not deducting tax at source in respect of the said payments. On facts and circumstances of the case and law applicable, impugned disallowance under section 40(a)(i) should be deleted in entirety.*
12. *Levy of interest under section 234B :-* *The learned CIT(A) has erred in confirming the action of the learned assessing officer in levying interest under section 234B of the Act. On facts and circumstances of the case and law applicable, interest under section 234B is not leviable. The appellant denies its liability to pay interest under section 234B.*
13. *Prayer :-* *In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the learned CIT(A) to the extent prejudicial to the appellant be quashed or in the alternative, the aforesaid grounds and relief prayed for thereunder be allowed.*

*The appellant prays accordingly.”*

3. The first ground in assessee's appeal is general in nature which does not require any adjudication.

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3.1 The second ground in this appeal is regarding disallowance of expenditure in relation to income not includible in total income u/s 14A of the Income-tax Act,1961 ['the Act' for short].

4. Facts of the case are that the assessee is an Indian Company engaged in development and export of computer software. For the year under consideration, original return of income was filed on 30.11.2013 declaring total income of Rs. 8501,13,54,830. A revised return of income was filed on 31.3.2015 declaring total income of Rs. 8456,46,03,950. Notice under section 143(2) was issued and served. Various details, information, clarifications and documents were called for during the assessment and the same was submitted and explained. Reference was made to TPO for verification of computation of ALP of international transactions. The learned TPO vide order passed under section 92CA dated 23.6.2016 did not suggest or make any adjustment under section 92CA in respect of the international transactions. The assessment was completed and the assessment order under section 143(3) was passed on 29.12.2016. Aggrieved by the variations made in the assessment order, the assessee preferred an appeal before the Hon'ble Commissioner of Income Tax (Appeals) – 12, Bangalore. The learned CIT(A) passed the order on 21.12.2017. Aggrieved by the order passed by the learned CIT(A), the assessee has filed this appeal.

4.1 The ld. A.R. submitted that during the year, exempt income comprising off dividends from mutual funds and interest on tax free bonds amounted to Rs. 218,82,49,544. These dividends were directly credited to bank accounts of the appellant and / or reinvested as the case may be. No expenditure was incurred to earn the above exempt income. Nevertheless, the appellant quantified 5% of salary cost of CFO, 50% of salary cost of employees handling treasury functions

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and 10% of salary cost of CFC amounting to Rs. 8,06,938, Rs. 24,38,481 and Rs. 4,70,713 respectively totaling to Rs. 37,16,131 as the expenditure relatable to exempt income and the same was disallowed voluntarily in the return of income.

4.2. The AO in his order observed that the assessee company has had substantial amount of dividend investments made. For Asst. Year 2015-14, the assessee company had declared tax exempt dividend income of Rs. 217,87,07,775. However, assessee has shown an expense of Rs. 37,16,131 pertaining to the exempt income. The assessee company had substantial investment in the share of its subsidiary, M/s. Infosys BPO Ltd. The assessee has been a debt free company and there is no interest paid for the year. Considering the tax exempt income received from mutual funds, as well as investments in the share capital of Indian subsidiary, the assessee company was asked to explain the basis of amounts reduced from the dividend income as per section 14A of the Income Tax Act.

4.3 The AO further observed that the assessee's computation for disallowance u/s 14A is not in accordance with the provisions contained in Rule 8D of Income Tax Rules. The crux of section 14A, which is now obligatory in nature reads as under:-

*" (2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed<sup>70</sup> if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.*

*(3) The provision of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act."*

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4.4 The AO further stated in his order that on plain reading of the aforesaid provisions, it is evident that the following conditions are required to be satisfied before invoking the provisions of section 14A of the Act:

- The assessee should have incurred the expenditure.
- Such expenditure should be in relation to income: and
- Such income does not form part of the total income under this Act.

4.5 Based on the above, it can be said that the provisions of section 14A of the Act would be attracted only if all the aforesaid conditions are cumulatively satisfied. The provisions of section 14A of the Act can be invoked where the assessee has not incurred any expenditure in relation to exempt income.

4.6 In this regard, the AO referred the decision of Hon'ble High Court of Delhi in the case Maxopp investments Ltd Vs. CIT (TS-668-HC-2011(HC)), which has upheld the decision of the Hon'ble High Court of Mumbai in the case of Godrej and Boyce Company Ltd. In this case, the Hon'ble High Court has held that 14A disallowance is attracted even in cases where Assessee Company has made strategic investments in the group companies as well as subsidiary companies. Considering the above, the AO has seen that the assessee company is liable for disallowance u/s. 14A of the Income Tax Act.

4.7 The AO further observed that it also is essential to draw reference to case of Dhanuka & Sons Vs. CIT (339 ITR 319 (Cal) ) wherein the Hon'ble High Court held that when the assessee is not able to show that the investment in shares are out of internal accounts or non-interest bearing funds, disallowance u/s.14A

can be made. Reliance was also placed by the AO on the cases of Cheminvest Ltd. Vs. ITO (ITAT-SB-Del) 121 ITD 318 and Pradeep Kar Vs. ACIT (Kar) 319 ITR 416, wherein it was held that expenditure in relation to exempted income is to be disallowed u/s.14A even when no exempted income is earned during the year. Further, in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. Deputy Commissioner of Income tax, (2010) 234 CTR 1 (Born), High Court of Bombay has held that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to such income which does not form part of the total income under the Act. This was by virtue of the provisions of S.14A(1) and the provisions of Rule 8D of the IT Rules, which was notified w.e.f. 24.03.2008 and shall apply with effect from A.Y. 2008-09.

4.8 As the computation for the disallowance u/s 14A of the Act is not satisfactory, the assessee company was asked the applicability of Rule 8D of the Income Tax Rules and to furnish the details of the working as per Rule 8D of the Income Tax Rules. The company furnished the same vide letter dated 12/01/2016. On verification of the details filed by the company, the disallowance u/s 14A was by the AO computed as below:

<i>Investments</i>	<i>Opening Balance</i>	<i>Closing Balance</i>	<i>Average</i>	<i>0.5% of Average</i>
<i>Mutual Funds</i>	5,00,10,629	1580,49,24,490	792,74,67,560	3,96,37,338
<i>Tax Free Bonds</i>	-	307,53,30,134	153,76,65,067	76,88,325
<i>Infosys BPO</i>	659,42,43,797	659,42,43,797	659,42,43,797	3,29,71,219
<b>Total</b>				<b>8,02,96,882</b>
<i>Total amount to be disallowed</i>				<b>8,02,96,882</b>

<i>Less: amount already disallowed in Return</i>				<b>37,16,131</b>
<b><i>Balance amount to be disallowed</i></b>				<b>7,65,80,751</b>

4.9 In view of the above details, a sum of Rs.7,65,80,751/- was disallowed and added back to the returned income of the assessee by the AO.

5. Aggrieved by the above order of the AO, the went in appeal before the Id CIT(A) stating that the assessing officer has erred in computing the disallowance under section 14A read with rule 8D(2)(iii) at Rs. 8,02,96,882/- and erred in making a disallowance of Rs. 7,65,80,751/-. The AO dealt with this issue at page 3 to 5 of the assessment order. He noted that the company had declared tax exempt dividend income of Rs.217.87 crores but only Rs 37.16 lakhs was shown as an expense pertaining to this exempt income. Mentioning that the assessee company had substantial investment in the shares of its subsidiary Infosys BPO Limited, he invoked the provisions of section 14A and computed the total disallowance at Rs. 8,02,96,882/-. Since Rs. 37,16,131/- was already disallowed by the assessee itself in the return, the balance amount i.e. Rs. 7,65,80,751/- was disallowed and added back.

5.1 The assessee's main arguments are as follows:

- Exempt income comprising of dividends from mutual funds and interest on tax free bonds amounted to Rs. 218,82,49,5441-. These dividends were directly credited to bank accounts of the appellant and / or reinvested, as the

case may be. No expenditure was incurred to earn the above exempt income

- Nevertheless, the appellant quantified 5% of salary cost of CFO, 50% of salary cost of employees handling treasury functions and 10% of salary cost of CFC amounting to Rs. 8,06,938, Rs. 24,38,481 and Rs. 4,70,713 respectively totaling to Rs. 37,16,131, as the expenditure relating to exempt income and the same was disallowed voluntarily in the return of income.
- The appellant does not have any dedicated team or department to monitor, maintain or advise on investments. This job is handled by very few persons in the finance team, who partially devote their time to this aspect. The investment decisions are approved by the SW- Finance. Further, no expenditure was directly or indirectly incurred to earn the exempt income.
- If the assessing officer does not demonstrate that the claim of the assessee, in respect of expenditure incurred in relation to exempt income, is incorrect, no disallowance can be made under section 14A. This was the view held in CIT v Hero Cycles Ltd (2010) :323 ITR 0518 (P&H) and Godrej & Boyce Mfg. Co. Ltd v LICIT (2010) 328 ITR 81 (Born).
- The Supreme Court in CIT v Walfort Share and Stock brokers P. Ltd [2010] 326 1•1•R 1 has held that for attracting section 14A, there has to be a proximate cause for disallowance, which is in relationship with the tax exempt income. In the present case, there being no expenditure incurred for earning dividend and no proximate cause in relationship with the tax free dividend, no disallowance under section 14A is warranted.
- The High Court of Punjab and Haryana in the case of PCIT v State Bank of Pahala 120171 391 ITR 218 held that only expenditure incurred to earn exempt income should be disallowed and expenditure incurred to protect, preserve,

maintain and utilize the tax free investment should not be disallowed under section 14A.

- Infosys Ltd is a fully owned subsidiary of the appellant. Investment in shares of the said company was made for venturing into BPO business through a separate legal entity. The said investment was not made with a view to earn dividend income. The Karnataka High Court in CCI Ltd v JCIT r20121.250 CTR 291,,(Kar) held that notional amount cannot be disallowed under section 14A in the absence of an expenditure incurred in relation to an exempt income.
- The ITAT Delhi Special bench in the case of ACIT v Vireet Investment (P) Ltd 120171 82 [taxmann.com](http://taxmann.com) 415 also 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 explained earlier, no dividends were declared by Infosys BPO Ltd for the year under consideration.
- Investment in shares of subsidiary companies should not be considered while computing disallowance as per rule 8D of Income tax Rules.
- The CBDT vide its Notification No 43 / 2016 / F No 370142/7 / 2016-TPL dated 2.6.2016 amended sub rule (2) of rule 81) which provides for computation of expenditure in relation to income which does not form part of total income. The amended rule was applicable when the assessment order was passed under section 143(3) on 29.12.2016.
- The proviso to new rule 8D seeks to restrict the amount of disallowance u/s 14A read with rule 81) ,to the total expenditure claimed by assessee in this regard.

- Thus, in view of the proviso to amended rule 8D(2), the disallowance under section 14A should be restricted to Rs. 37,16,131 being 5% of salary cost of CFO, 50% of salary cost of employees handling treasury functions and 10% of salary cost of CFC as voluntarily disallowed by the appellant under section 14A.

5.2 The Id CIT(A) in his order stated that the argument of the assessee that the investment in shares of the subsidiary company Infosys BPO Limited are not to be considered for computing the disallowance u/s 14A, the same being for strategic investment, is not acceptable. Similar issue was before **Hon'ble Karnataka High Court in** the case of **United Breweries Limited** (ITA 419/2009 dated "1.05.2016). The question of law before the Hon'ble High court was "Whether in law, the provisions of section 14A of the Act are applicable to the expenses incurred by the assessee towards interest and others on the loan borrowed for advances made to the subsidiaries in the course of business for its expansion?" The Hon'ble court after considering the following findings of the Hon'ble Tribunal held that no question of law arises:

*"11; The revenue is in appeal and we have considered the rival contentions. IN our view, the recent judgment of the Special Bench in Bombay in ITO v. Daga Capital Management Pvt. Ltd.(2009) 312 ITR (AT) 1, is applicable to the facts of the present case. In this order, it has been held that section 14A is applicable even where the motive in acquiring the shares was to obtain controlling interest in the companies. The finding of the Commissioner of Income-tax (Appeals) cannot, therefore, be upheld as it is contrary to the decision of the Special Bench. We, accordingly, uphold in principle the applicability of section 14A. However, it is for the Assessing Officer to ascertain from the facts of the Case as to how much interest bearing borrowings was utilized to acquire shares in the companies. It is also necessary to see as to whether any interest bearing borrowed funds were used in making the advances and expenditure in the case of Castle Breweries.*

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*This factual exercise has to be carried out by the Assessing Officer after giving due opportunity to the assessee of being heard. The Assessing Officer may make the disallowance of interest u/s.14A only if it is found that interest bearing borrowed funds were used to acquire shares in the companies or for making advances to Castle Breweries. We, therefore, restore this issue to the file of the Assessing Officer with the above directions. The ground is treated as partly allowed."*

5.3 Further, the Id CIT(A) observed that the disallowance u/s 14A of the Act nowhere mandates that the exempt income should have been earned during the year. This was made clear by the CBDT in its Circular No. 5/2014 dated 11.02.2014. In this circular, it is mentioned that:

*"Thus, legislative intent is to allow only that expenditure which is relatable to earning of income and it therefore follows that the expenses, which are relatable to earning of exempt income have to be considered for<sup>4</sup> disallowance, irrespective of the fact whether any such income has been earned during the financial year or not.*

4. *The above position is further clarified by the usage of term 'includible' in the Heading to section 14A of the Act and also the Heading to "Rule 8D of IT Rules 1962 which indicates that it is not necessary that exempt income should necessarily be included in a particular year's income, for disallowance to be triggered. Also, section 14A of the Act does not have the words "income? of the year" but "income under the Act". This also indicates that for invoking disallowance under section 14A, it is not material that assessee should have earned such exempt income during the financial year under consideration."*

5.4 In case of Punjab tractors Ltd, the Hon'ble P&H High Court held as under:

*47. If the Assessing Officer justifiably is not satisfied with the correctness of the assessee's claim regarding the expenditure, he must resort to Rule 81) entirely for the determination of the*

*expenditure incurred with respect to the exempt income for the purpose of section 14A.*

*For instance, if the assessee claims that he has not incurred any interest expenditure but he incurred administrative expenses or vice-versa and the Assessing Officer disagrees with either claim, Rule 8D cannot be applied only in respect of any particular clause of sub-rule (2) of Rule 8D. He must then determine the amount of expenditure incurred in relation to exempt income entirely in accordance with Rule 8D.*

In view of the above discussion, the Id CIT(A) upheld the order of the AO on this point and this ground was dismissed by Id. CIT(A).

6. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

**“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](http://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. Council 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 than 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 must be granted to the assessee.*

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

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6.1. Keeping in view of the above, on the similar lines, this issue is remanded to the ld. AO to compute the disallowance by excluding the investment made in Infosys BPO Ltd. that did not yield any exempt income for the year following the ruling of the Special Bench of the Tribunal in Vireet Investment reported in (2017) 82 taxmann.com 415. Accordingly, this ground of appeal is partly allowed.

7. Ground Nos.3 & 4 in assessee's appeal are regarding disallowance of subscription charges paid to Forrester research at Rs.3,18,52,696/- and Gartner at Rs.1,08,79,768/-.

8. Facts of the case are that during the year, the assessee incurred expenditure on subscription charges amounting to Rs. 3,18,52,696 and Rs. 1,08,79,768 which was paid to two non-resident entities viz., Forester research and Gartner. The aforesaid payments were made without deduction of tax at source under section 195 of the Act.

9. During the course of assessment, the assessee stated that it has made payments of **Rs. 3,34,07,038** to M/s. Forester Research as subscription during the current year. This issue has been a disputed issue for several years. This amount has been disallowed in previous years as the assessee had not made TDS on the said payment. When this issue was raised, the company made its submission vide letter dated 20.10.2016 mentioning that out of Rs.3,34,07,038/- the TDS has been made for an amount of Rs. 8,58,570, TDS was not applicable to an amount of Rs.6,95,772 as the payment was towards professional services which are not taxable as per tax treaty between India and USA, and foil the balance amount of Rs.3,18,52,696 no TDS has been made. On consideration of the assessee's submission, an amount of

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Rs. 3,18,52,696 paid as subscription to research reports to Forester Inc is disallowed as the assessee has not made TDS thereon. It is also seen that in a recent decision, the Karnataka High Court has upheld a similar disallowance of payments made to M/s. Gartner Research Services holding the same to be payments in the nature of royalty. **This amount of 3,18,52,696 is disallowed u/s. 40 of the Income Tax Act.** This amount is included in brand building expenses. However, the payment of 3,18,52,696 is separately and protectively disallowed on the merits of what is stated above.

9.1. It is seen that the assessee company had made a payment of Rs.5,45,63,088 towards Gartner Research and Services, out of this amount, TDS **was** done an amount of Rs.4,36,83,320 and the assessee company had not deducted taxes on an amount of Rs.1,08,79,768. In a recent case of **M/s. Wipro Ltd, (TS-701-HC-2011)** the Hon'ble High Court of Karnataka had held that the payments made to Gartner are not eligible to be deducted as the assessee company has not made TDS thereon. The Hon'ble High Court had held that this expenditure was in the nature of royalty and the assessee ought to have made TDS thereon. The assessee company had furnished the details of TDS compliance and stated that for an amount of Rs. 1,08,79,768/- TDS was not deducted.

9.2 On consideration of the assessee's contention, it is seen that this issue has already been considered by the Hon'ble High court of Karnataka and ruled against the assessee. This amount of **Rs. 1,08,79,768** is disallowed by the AO u/s. 40 (a)(ia) of the Income Tax Act.

10. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

**“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.”**

10.1 Keeping in view of the above, on the similar lines, this issue is remanded to the ld. AO to verify the claim as per the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT reported in (2021) 432 ITR 471. Accordingly, these grounds of appeal are allowed for statistical purposes.

11. The next grounds in this appeal in ground nos.5 to 7 are regarding disallowance of software expenses of Rs.1,45,000/- u/s 40(a)(ia) of the Act for not making TDS under section 194J of the Act.

12. Facts of the case are that during the year under consideration, the assessee had incurred a sum of Rs. 585,30,20,535 towards purchase of software. Out of the said sum, the assessee had initially not deducted tax at source on a sum of Rs. 4,67,690/-

13. The AO in his order observed that the assessee has incurred substantial amounts of software expenses for the year. These software expenses have been claimed as revenue expenses.

*"The details of the expenditure on which tax is deducted and not deducted in detailed below:*

<i>Sl.No</i>	<i>Tax deducted/ Not deducted</i>	<i>Amount in INR</i>
<i>1</i>	<i>Tax deducted</i>	<i>336,32,93,129</i>
<i>2</i>	<i>Tax not deducted</i>	<i>4,67,690</i>
<i>3</i>	<i>Purchase by overseas branch office</i>	<i>46,02,51,534</i>
<i>4</i>	<i>TDS not applicable</i>	<i>202,90,08,182</i>
	<b><i>Total</i></b>	<b><i>585,30,20,535</i></b>

13.1. The AO further observed that the assessee company was asked as to why TDS was not deducted on the software expenses. Further, the assessee was asked to explain why the said software expenses were not capitalized as software is one of the capital items on which depreciation is allowed at 25%. The company made its submission regarding the non-compliance of TDS, the assessee company stated that the assessee has deducted tax at source from the payments made to the vendors wherever the provisions of chapter XVII of the Act are applicable. Regarding the capital vs revenue issue, the assessee has argued that payments made

towards software and revenue expenditure would not partake the character of capital expenditure under any circumstance.

13.2 The AO in his order further observed that the software expenses on which TDS was not made, was held as liable for disallowance u/s. 40(a)(ia) of the Act in view of the provisions of S. 195/194J of the Act. This has also been upheld by the Hon'ble Karnataka High Court in the case of **M/s. Samsung Electronics Ltd.** Further, the purchases made by the overseas branch was claimed as expenses by the assessee. The assessee company was liable to deduct TDS at the time of reimbursement of the same expenses; however, it was not done by the assessee company. There is a plethora of judicial pronouncements supporting the fact that TDS compliance is mandatory even if the expenditure is incurred by the way of reimbursement. Where the cost of services was charged and recovered by way of reimbursement, even without any profit element TDS will be applicable as ruled in the case of M/s Arthur Andersen & Co by the Mumbai tribunal reported in 94 TTJ 736 (Mum). Accordingly, the amount of Rs.4,67,690 is held as attracted for disallowance u/s. 40 of the Act.

14. The assessee is aggrieved that the assessing officer has erred in disallowing software expenses of Rs. 4,67,690 under section 40 for not deducting tax at source in respect of the said payments. The AO noted that the assessee had incurred an amount of Rs 4,67,690/- as software expenses on which no tax was deducted at source. Placing reliance on the decision of Hon'ble Karnataka High Court in the case of Samsung Electronics, he disallowed the same u/s 40(a) of the Act.

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14.1 The main arguments of the assessee are that out of the total payments of Rs. 4,67,690/-, the assessee had deducted the tax at source and paid it in respect of a sum of Rs. 3,22,690 and in respect of the balance sum of Rs. 1,45,000 on which TDS was not made, M/s. Ample Technologies (P) Ltd has confirmed that the revenue from Infosys Ltd has been taken into account for determination of its total income. Thus, in view of the above, entire disallowance of Rs. 4,67,690 should be deleted.

14.2. In support of the same, the assessee furnished copies of MS certificates for admission as additional evidence. It also enclosed a letter from Ample Technologies Pvt. Ltd. to substantiate its claim that revenue from Infosys has been taken into account (by M/s. Ample Technologies) for determination of its total income. The assessee referred to explanation to section 191 to state that the payer (i.e. the assessee) cannot be regarded as assessee in default. Reliance was placed on the decision of Hon'ble Allahabad High Court in the case Jagran Prakashan (345 ITR 288) to state that "onus is on the revenue to demonstrate the taxes have not been recovered from the person who had the primarily liability to pay tax and it is only when primary liability is not discharged that vicarious recovery liability can be invoked."

15. The Id. CIT(A) has carefully considered the order of the assessing officer, the arguments made by the assessee and the case laws relied upon. The additional evidence was forwarded to the assessing officer. In his remand report dated 18.12.2017 he has verified and confirmed that "tax has been deducted on Rs 322690/-". The disallowance to this extent was therefore deleted by the Id. CIT(A).

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15.1 Regarding the claim of allowability of the balance sum Rs 145000/-, the Id. CIT(A) observed that the same is not acceptable. The assessee has raised the contention that it is the duty of the Revenue to demonstrate that the person concerned has not paid the amount directly. It relied on the decision of Hon'ble Allahabad High Court in case of Jagran Prakash (supra).

15.2 The Id. CIT(A) however observed that this decision was rendered on 23.05.2012. W.e.f. 01.07.2012, a proviso has been added to Section 201, whereby the assessee shall not be deemed to be assessee in default if certain conditions are fulfilled including the payment of tax on the income under consideration by the payee and the person i.e. the deductor furnishes a certificate to this effect from an accountant in the prescribed form. Thus, the Id CIT(A) opined that the onus lies squarely on the deductor to prove that the payee has paid taxes on such income. The burden cannot be shifted to the Revenue by merely claiming that the taxes have been paid by the payee. In so far the claim of the assessee that Ample Technologies has included this amount in the total income, submission of a letter from the payee does not meet the requirement of proviso to section 201(1). The relevant part of the section is reproduced hereafter:

***Provided** that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—*

*(i) has furnished his return of income under Section 139;*

*(ii) has taken into account such sum for computing income in such returns of income; and*

*(iii) has Paid the tax due on the income declared by him in such return of income,*

***and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed':***

*This proviso clearly mandates that the onus is on the payer to furnish a certificate from an accountant in the prescribed form and only on fulfilment of the cumulative conditions (i) to (iii), the assessee will not be deemed as assessee in default.*

In view of the above, this ground was partly allowed by the Id. CIT(A).

16. We have heard the rival submissions and perused the materials available on record. This issue is remanded to the Id. AO to verify the claim as per the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT reported in (2021) 432 ITR 471. Accordingly, these grounds of appeal are allowed for statistical purposes.

17. The next ground of appeal in ground No.8 is with regard to disallowance of software expenses as revenue expenditure at Rs.15,06,78,646/-.

18. Facts of the case are that the assessee is engaged in the business of development and export of computer software. During the year under consideration, the assessee had incurred a sum of Rs. 585,30,20,535 towards purchase of 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. The assessee secured limited right of use of the software. It did not secure the source code. It was prevented from modifying or duplicating the software. It could not decompile or disassemble the software. No derivative works could be created. The assessee was permitted to use the software for

its business, in a limited manner. The impugned expenditure did not result in acquisition of any asset by the assessee.

19. The AO in his order observed that the assessee had admitted that TDS was liable on software expenditure to the extent of Rs. 585,25,52,845. This has been on account of assessee's argument that assessee has purchased the 'right to use' and 'license to use' the software license that it had purchased. It has also been held in the earlier years that the software purchases were in the nature of capital expenditures. The assessee is liable to have treated this as a capital expenditure and claimed depreciation at the rate of 25%. Instead, the assessee had claimed the same as revenue expenditure under the argument that it only bought the 'right to use' and did not purchase the software itself. If that were the argument of the assessee, then it would amount to a royalty payment as attracted under the definition of royalty u/s. 9 (1)(vi) of the Income Tax Act. This has been elaborately discussed and pointed out in the earlier orders for Asst. Year 06-07. It was also held that under the same logic, assessee is eligible for deduction at the rate of 25% applicable for intangible assets like knowhow, patents, copyrights etc. By following similar principle, it was held by the AO that this amount of Rs.585,25,52,845/- (Rs.46,02,51,534 + Rs. 336,32,93,129 + Rs.202,90,08,182) is a capital expenditure on which depreciation is eligible to be given at the rate of 25 % amounting to Rs.146,31,38,211/-. The balance amount of Rs.438,94,14,633/- was held as attracted for disallowance.

20. The assessee is aggrieved before the ld. CIT(A) that the assessing officer 'has erred in treating software expenses of Rs. 585,25,52,845/- comprising of tax deducted expenses of

Rs.336,32,93,129/-, purchase by overseas branch office of Rs. 46,02,51,534 and software expenses on which TDS was not applicable amounting to Rs. 202,90,08,182/-, as a capital expenditure eligible for 25 percent depreciation amounting to Rs. 146,31,38,211/- and erred in making a net disallowance of Rs. 438,94,14,633/-. The assessee contended that the software expense should be held as revenue expenditure and without prejudice, depreciation should be allowed on the disallowance made for earlier years.

20.1 During the year under consideration, the assessee had incurred an amount of Rs 583.23 crores on software expenditure on which tax was not deducted at source. The AO held that as per the appellant's own contention it has only purchased the "right to use" of the software that it had not purchased the software itself. The AO treated the same as expenditure on acquisition on intangible asset eligible for depreciation at the rate of 25 percent amounting to Rs 146,31,38,211/-. The balance amount of Rs 438,94,14,633/- was disallowed.

20.2 The main arguments of the assessee before the ld. CIT(A) are as under:

- software expenses was incurred in relation to the usage of the licensed software. As a result of the outlay, the appellant 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.
- The renewal of these software licenses had to be done yearly in order to get versions, updates, patches or to bug fixes. Some of these software licenses are used internally for business sustenance and running of inhouse systems/ applications.

- Some software licenses were in the nature of security software used for firewall requirements, software used for optimizing software development by coders, for mechanical design and analysis, for Maintenance of Mainframe tools, testing, application tools used for internal Mainframe environment, for automation of essential business processes, validation, and conversion and completing with multi-channel report generation, software in relation to integrated Marketing providing solutions to enhance marketing performance
- The appellant was permitted to use the software for its business, in a limited manner.
- The 'ownership test' was therefore not satisfied. The expenditure did not result in enduring benefit or advantage in the capital field.
- The utility of purchased software becomes obsolete due to technological changes, advancements, invention and innovation. Recurring expenditure in the form of renewal premium, maintenance, technical support, upgradation etc is incurred in respect of purchased software.
- In the present case, the software expenses were for software licenses in respect of application software. It was not in the nature of system software. The appellant had to incur regular expenditure for renewal, upgrades and maintenance of these software licenses.
- Without prejudice, depreciation on software expenses held as capital expenditure is to be allowed at 60% and not at 25%. As per New Appendix I to Income tax rules, 1962 which provides the table of rates at which depreciation is admissible, computers including computer software is eligible for depreciation at the rate of 60%.

20.3 Assessee also placed reliance before the Id. CIT(A) on the decision of Hon'ble Karnataka High Court in the case of IBM India Ltd. (357 ITR 88) and Toyota Kirloskar Motor Ltd (349 ITR 65) and claimed that expenditure be regarded as revenue expenditure when the same is incurred on application software and not system software.

21. The Id. CIT(A) has considered the order of the assessing officer, the arguments made by the assessee and the case laws relied upon. He observed from the assessment order that the assessing officer has not examined the nature of software purchased and the period of validity of such software. In case of IBM India Ltd the Hon'ble Karnataka High Court held as under:

*"The amount is paid for application of software WO not system software, The application software enables the assessee to carry out his business operation efficiently and smoothly. However, such software itself does not work on standalone boats. The same has to be fitted to a computer system to work. Such software enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself Thus for payment of such application software, though there is enduring benefit, it does not result into acquisition; of any capital asset. The same merely enhances the productivity or efficiency and hence can be treated as revenue expenditure. In fact, this court had an occasion to consider whether the software expenses are allowable as revenue expenses or not and held when the life, of a computer or software is less than two years and as such, the right to sue it for a limited period, the fee paid for acquisition of the said right is allowable as revenue expenditure"*

21.1 The Hon'ble Court therefore held that the right to use the software is for a limited period where the life of software is less than two years in such cases the expenditure will be allowable as revenue expenditure. Considering the above decision of the Hon'ble Karnataka High Court, this ground of the assessee was allowed by

the Id. CIT(A) for statistical purposes with the direction to the AO to treat the expenditure as revenue expenditure wherever the life of the software is less than two years. The Id CIT(A) further observed that wherever the life is more than two years, the expenditure cannot be allowed on revenue account and is to be held as capital in nature on which depreciation at the prescribed rate is to be allowed. For statistical purposes this ground was allowed by the Id. CIT(A).

22. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

**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."***

22.1 Keeping in view of the above, we remit the issue to the file of AO for re-examination on similar lines. This ground of appeal is partly allowed for statistical purposes.

23. The next ground in this appeal is ground No.9 with regard to disallowance of brand building expenses at Rs.64,13,83,193/-.

23.1 Facts of the case are that during the year, the assessee incurred an amount of Rs. 84,44,61,455/- on account of brand building expenditure. 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.

24. The AO observed that the assessee company had incurred expenses towards brand building to the tune of Rs. 84,44,61,455. As in earlier years the assessee was asked to explain the allowability of the same. In response to the same, the assessee vide letter dated 20.10.2016 had filed a submission as under:

*"Infosys generates around 98% of its income from overseas clients mainly from the North American, European and Asia Pacific markets. The US for instance is the largest IT spender in the world and is a significant market for the company. We compete for projects with major overseas competitors like Accenture, Bearing point, Cap Gemini etc in addition to the major Indian competitors. In order to create visibility among clients and to retain and sharpen our competitive edge, we incur certain expenses as business development expenses and such expenditure has been termed as "brand building expense" in our books. In fact, these expenses are incurred for the purpose of reaching out to our potential clients and making the potential clients aware of our products and services. Thus, the expenses are incurred for the purpose of business and not just for creating the brand image of Infosys.*

*The various types of business expenses which are booked under the expenditure head "Brand Building" are as below:*

✓ **Subscription** to research reports by research agencies and advisory services. These research reports contain cutting edge information on developments on the technology front, growth opportunities, markets that are significantly expanding, trends and direction in global, region specific, industry specific IT spending and new services and opportunities shaping the market in which we operate.

✓ **Participation/sponsorship** in seminars and exhibitions, marketing and sales events. Such sponsorships and participation is with a view of attaining high impact visibility among CIOs (Chief

*Information Officers) and decision makers in global companies that could lead to significant project wins for the company.*

*Annual and periodic Customer and Sales meets for our international client based in the North American, European and Asia Pacific clusters. This is part of our ongoing branding activity of maintaining relations with our clients, and their key decision making executives.*

**Brand building expense constitute expenditure from accounting perspective**

*Section 145 of the Income-tax Act, 1961("the Act") states that income chargeable under the head 'profits and gains of business or profession' is to be computed in accordance with the method of accounting regularly employed by the assessee which in our case is the accrual system of accounting. The accounts drawn up under this system has to be in conformity with the provisions of the Companies Act, 1956; the generally accepted accounting principles and the accounting standards issued by Institute of Chartered Accountants of India ("ICAO).*

*Accounting Standards-26 on 'Intangible Assets' states that the expenditure is to be recognized as an intangible asset only if (i) the asset resulting from the expenditure is clearly identifiable; (ii) the future economic benefits flow to the enterprise from use of the asset; and (iii) these economic benefits are within the control of the enterprise.*

***Para 17 of the Accounting Standard states as follows:***

*"An enterprise may have a portfolio of customers or a market share and expect that due to its efforts in building customer relationships and loyalty, the customers will continue to trade with the enterprise. However, in the absence of legal rights to protect, or other ways to control the relationships with customers or the loyalty of the customers Ca the enterprise, the enterprise usually has insufficient control over the economic benefits from customer relationships and loyalty to consider that such items meet the definition of intangible assets: Brand building does not result in any identifiable asset, by nature does not give any legal rights to control customer relationships and does not result in any control of future economic benefits. Hence, Brand building expenditure does not satisfy the very definition of Intangible Asset as given by the accounting standard and hence the conditions of Accounting Standard 26 have not been fulfilled in order to qualify brand building expenditure as an intangible asset.*

**Allowability of brand building expenses**

*Claim of brand building expenses as a deduction is to be examined under the head "Profits and gains of business or profession". This head of income is*

*housed in sections 28 to 44DB. Under section 28(i) the profits and gains of any business or profession carried on by the assessee at any time during the previous year is chargeable to tax. As per section 29, the income referred to in section 28 should be computed in accordance with the provisions contained in sections 30 to 43D. Sections 30 to 36 confer specific deductions. Section 37 deals with expenditure which is general in nature and not covered within sections 30 to 36.*

*The allowability of brand building expense would have to be examined under section 37 - the residuary section. To examine eligibility of brand building expenses under section 37, the character of expenditure needs to be examined. If the expenditure is regarded as capital in nature, section 37 would prohibit its deduction. It is expenditure on revenue account that qualifies for deduction.*

*Brand building expenses, by nature, **do not result in any identifiable asset** in the capital field. The **future economic benefit** from such expenses **cannot be measured with certainty** at the time of incurring such expenditure. In a highly competitive and dynamic market environment, such expenses **may or may not result in any new business** for the company. Moreover, brand building expenses are **recurring** in nature and have to be incurred every year in order to maintain the visibility in the market place and to ward off competition from our competitors. Brand building expenses thus did not constitute capital expenditure. This is confirmed by the ratio of the Supreme Court ruling in *Alembic Chemical Works Co. Ltd. v. CIT* [1989] 177 ITR 377 (SC) stating that expenditure is capital in nature, if the expenditure results in an identifiable asset in the capital field. In the case of brand building, there is no identifiable asset in the capital field and hence does not constitute capital expenditure.*

*In **CIT v Citi Financial Consumer Finance Ltd(2011) 335 ITR 29**, Delhi High Court observed - "the expenditure on publicity and advertisement is to be treated as revenue in nature allowable fully in the year in which it was incurred. Concededly, there is no advantage which has accrued to the assessee in the capital field. The expenditure was incurred to facilitate the assessee's trading operations. No fixed capital was created by this expenditure. We may also add here that in the Income-Tax laws, there is no concept of deferred **revenue expenditure**. **Once** the assessee claims the deduction for whole amount of such expenditure, even in the year in which it is incurred, and the expenditure fulfills the test laid down under Section 37 of the Act, it has to be allowed. Only in exceptional cases, the nature mentioned in *Madras Industrial Corporation* (supra), the expenditure can be allowed to be spread*

over, that too, **when the assessee chooses to do so**"(emphasis supplied)

***In ITO v Spice Communications Ltd. (2010) 35 SOT 78 (Del-ITAT)*** the assessee was in the business of providing cellular mobile services. The assessee had incurred expenditure towards advertisement and sales promotion in course of carrying on its business activities. The Assessing Officer has allowed 90 per cent of the expenses as revenue expenditure and allocated 10 per cent towards capital by observing that 10 per cent of expenses have been incurred towards brand building. In this context, the tribunal observed as under:

*"Since by incurring expenditure on advertisement and sales promotion, the assessee has not acquired any fixed capital asset, but these expenditures were incurred for earning better profits, and for facilitating assessee's operation of providing cellular mobile services, there exist direct nexus between the advertisement and sales promotion expenses and the carrying out of the business activity of the assessee. We, therefore, do not find any justification in interfering with the order of the CIT(A) in deleting the disallowance of 10 per cent of expenses towards advertisements and sales promotion incurred by the assessee for smooth functioning and carrying on assessee's 'business effectively, proficiently and profitability"*

***In Fine Jewellery (India) Ltd v ACIT (2014) 8 TaxCorp (A.T.) 37139 (Mum-ITAT)*** the Mumbai tribunal ruled -

*"....Just because an expenditure is debited in books as toward brand building, which it purportedly is, and a statutory recognition has since been accorded to such intangible assets, as a 'brand, would not by itself imply that an advantage in the capital field, or of enduring value to the business, has arisen to the assessee upon incurring the expenditure. Rather, the business being competitive, and prudence and conservatism being fundamental accounting assumptions, capitalization of such expenses, or ascribing lasting/abiding value to such expenses, could only be done on sound footings and cogent basis...."*

**4.** *In view of the foregoing, we find no basis to hold that the impugned expenditure, incurred in the regular course of its business by the assessee, has translated or manifested in, or resulted in the acquisition of a capital asset or in a profit making apparatus by the assessee, or of it being in the nature of capital expenditure, i.e., per se. The same, therefore, has been rightly*

*treated by it as revenue expenditure, admissible u/s.37(1) of the Act. We decide accordingly."*

**Brand building expenses to be in the year of incurrence & not in a deferred manner**

*The concept of deferred revenue expenditure is essentially an accounting concept It is alien to the Income-tax Act. Income-tax statute recognizes only capital or revenue expenditure. Deferred revenue expenditure denotes expenditure for which a payment has been made or a liability has been incurred, which is essentially revenue in nature but which for various reasons (like quantum and period of expected future benefit etc.) is written-off over a period of time. Though the nature of such expenditure is 'revenue', yet the benefits there from are 'presumed' to arise over a period of time (stretching sometimes over several accounting years).*

*The concept was enunciated by the Supreme Court in the case of Madras Industrial Investment Services 225 ITR 802. The case related to discount on debentures. The Supreme Court held that the discount had to be amortized over the life of the debentures, in view of the continuing relationship between the debentures and discount vis a vis the company.*

*To classify expenditure as deferred revenue expenses the benefits derived there from should be ephemeral and transitory in nature in as much as these are incurred as a part of a continuous process. In the case of brand building expenses, such continuing relationship is absent. The ratio of the Supreme Court decision therefore would not be applicable to expenses on brand building. As a result, no portion of expenditure is required to be capitalized or amortized or treated as deferred revenue expenditure.*

**Amount of Brand Building Expenditure for the current year i.e. AY 2013-**

*During the year under assessment an amount of Rs.84,44,61,455 was debited to Profit and Loss account on account of Brand Building Expenditure. In our computation of taxable income, this was claimed as an allowable expenditure for respective STP/SEZ units as follows:*

<b>10AA SEZ units-50%</b>	<b>10AA SEZ units-100%</b>	<b>Other taxable units</b>	<b>Total</b>
19,51,84,829	9,21,39,929	55,71,36,697	84,44,61,455

24.1 The submissions made by the assessee were considered by the ld. AO. The ld. AO observed that this issue has been duly examined in the earlier years also. It has been already held that the expenditure incurred is giving a benefit over a period of time and that it cannot be allocated entirely in one year as brand building expenditure. It has been held in assessment order for A.Y. 2006-07 that 1/5th of the expenditure should be allowed and the balance 80% should be allowed in the next 4 years in equal proportions.

24.2 Considering the submissions made by the assessee as above, an amount of Rs. 16,03,45,798 was allowed by the AO in this year and the balance amount of Rs. 64,13,83,193 was held as attracted for amortization over the next four years. This does not include the non-TDS portion of the payments made to Gartner (Rs.1,08,79,768) and Forrester (Rs.3,18,52,696) which are disallowed on protective basis in other part of this order.

24.3 Also, as per the direction of DRP in earlier years, an amount of Rs.23,32,95,533 was allowed by the ld. AO towards 20% of the earlier years brand bldg. expenses disallowed, as under:-

[Addition Rs.40,80,87,660]

<i>Relating to AY</i>	<i>Other Brand Building (Excluding disallowed u/s 40)</i>	<i>1/5th of the same</i>	
<i>AY 2011-12</i>	<i>63,75,11,543</i>	<i>12,75,02,309</i>	<i>3rd</i>
<i>AY 2010-11</i>	<i>47,93,55,425</i>	<i>9,58,71,085</i>	<i>4<sup>th</sup></i>
<i>AY 2009-10</i>	<i>4,96,10,695</i>	<i>99,22,139</i>	<i>5<sup>th</sup></i>
	<b><i>Total</i></b>	<b><i>1 23,32,95,533</i></b>	

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25. The assessee is aggrieved before the Id. CIT(A) that the assessing officer has erred in treating brand building expenses of Rs.80,17,28,991 as deferred revenue expenditure, (erred) in allowing only one fifth of the said expenditure amounting to Rs. 16,03,45,798 and erred in holding that the remaining four fifth of the expenditure amounting to Rs. 64,13,83,193 is allowable as amortization over the next four years.

25.1 The Id. CIT(A) observed that the assessee has incurred an expenditure of Rs 84,44,61,455/- on brand building. The AO held that such expenditure is giving a benefit over a period of time and cannot be allocated entirely in one year. Based on the findings in the assessment year for AY 06.07, he allowed 1/5<sup>th</sup> of the expenditure during the year and the balance (Rs 64,13,83,193/-) was treated as allowable, amortized over the next 4 years. Further, he gave the benefit of Rs 23,32,95,533/- towards 20 percent of the earlier years brand building expenditure disallowed in earlier years. Thus, a net disallowance of Rs.40,80,87,660/- was made.

25.2 The main arguments of the assessee before the Id. CIT(A) are as under:

- 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

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exhibition or display of Infosys name, expenditure on conferences, events, sales marketing expenses etc.

- the expenditure under the head 'brand building expenditure' was regular business expenditure incurred in the course of business
- It did not result in acquisition or creation of any asset or brand
- The benefits on account of incurring the impugned expenditure, if any, were in revenue field and not on capital account.
- In the present case, there is no continuing relationship in respect of the brand building expenses as envisaged by the Supreme court.

25.3 The Id. CIT(A) has carefully considered the order of the assessing officer, the arguments made by the assessee and the case laws relied upon. This issue was also before the ITAT in Assessee's own case for AY 2005-06 (ITA No. 1O2/Bang/2013 order dated 10.11.2017), wherein it was held as under:

*"We have heard the rival contentions, perused and carefully considered the material on record. From a perusal of the break up of brand building expenditure (placed at page 710 of paper book) it is seen that the) are incurred in respect of subscription charges, sponsorship fees, retainer charges, publishing charges, marketing fees, consulting fees, global meets, trade show fees, exhibition stall space, etc. In our view, this expenditure incurred is in the course of and for the purpose. of assessee's business and it cannot be said that the said expenditure has resulted in the acquisition of any 'intangible asset' eligible for depreciation @ 25% as held by the learned CIT (Appeals); which finding is not home out by the facts on record.*

15.2.3. *On a perusal of the orders of the authorities below, it appears to us that the Assessing Officer and learned CIT (Appeals) in coming to their views have merely gone by the nomenclature 'brand building expenditure' without actually*

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*examining the nature of each expenditure under the above head. In view of the above, we restore this issue of 'brand building expenditure' back to the file of the Assessing Officer to verify the nature and description of expenditure included under the head 'brand building' and decide the issue of allowability of brand building expenditure as revenue expenditure in the light of our observations and after affording the assessee adequate opportunity of being heard and to file details / submissions in this regard, which shall be duly considered. Consequently, grounds 8.1 and 8.2 of the assessee's appeal are treated as allowed for statistical purposes."*

25.4 Following the decision of this Tribunal, this ground was allowed for statistical purposes by the Id. CIT(A) with the direction to the AO to consider and verify the nature of the expenditure included under the head brand building.

26. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

***12. Ground No.25: 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

ITA Nos.1333 & 1367(B)/2014

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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](http://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](http://taxmann.com) 152 (Bombay)*
- (vi) DCIT v Polygel Industries (P.) Ltd [2015] 56 [taxmann.com](http://taxmann.com) 198 (Mumbai - Trib.)*
- (vii) PCIT v Seagram Manufacturing (P.) Ltd [2017] 78 [taxmann.com](http://taxmann.com) 293 (Delhi)*
- (viii) CIT v Spice Distribution Ltd [2015] 374 ITR 30 (Delhi)*

*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.”*

26.1 Keeping in view of the above, on the similar lines, the addition is deleted and accordingly, this ground of appeal is allowed.

27. The next ground of appeal in ground No.10 is regarding disallowance of deduction u/s 80JJAA of the Act at Rs.445,35,11,127/-.

28. Facts of the case are that during the year under consideration, the assessee claimed a deduction under section 80JJAA of the Act amounting to Rs. 445,35,11,127/-. The claim comprised of three components being the first year claim for AY 2013-14; second year

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claim for AY 2012-13 and the third year claim for AY 2011-12. The assessee quantified and claimed the deduction under section 80JJAA in respect of each industrial undertaking. Annexure 1 to Form 10DA substantiates the same wherein deduction was claimed in respect of those industrial undertakings for which the eligibility conditions under section 80JJAA were satisfied.

28.1 From the computation filed by the assessee company the AO has observed that the company has claimed deduction u/s 80JJAA to the tune of Rs. 445,35,11,127/-.

The provision of sec. 80JJAA is noted as under :

*"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 or production of article or thing, there shall, subject to the conditions specified in sub-section (2), 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".*

28.2 From the above the AO observed that the deduction u/s. 80JJAA were applicable only to industrial undertakings which are engaged in the manufacture or production of article or thing. The deduction was to be quantified with respect to additional wages paid to new regular workmen who had been employed in the previous three years. The definitions of additional wages, regular workman and workman have also been given in the Act.

*(1) "additional wages" means the wages paid to the new regular workmen in excess of one hundred workmen employed during the previous year :*

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*Provided that in the case of an existing undertaking, the additional wages shall be nil if the increase in the number of regular workmen employed during the year is less than ten per cent of existing number of workmen employed in such undertaking as on the last day of the preceding year;*

(ii) "regular workman", does not include—

- (a) a casual workman; or
- (b) a workman employed through contract labour; or
- (c) any other workman employed for a period of less than three hundred days during the previous year;

(iii) "workman" shall have the meaning assigned to it in clause (s) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947)]”

28.3 In view of the above, the assessee company was asked by the AO to substantiate its claim, the company furnished its submission vide letter dated 30.09.2016. In support of eligibility of its claim the company has stated as below:

The deduction U/s 80JJAA is available if the following conditions are fulfilled

- (i) The eligible assessee should be Indian Company
- (ii) The gross total income of the assessee should include profits and gains derived from an industrial undertaking engaged in the manufacture of or production of an article or thing

The eligible undertaking should employ at least 100 workmen. Further , the additional employees should be in excess of 10% of the workforce as on the last day of the immediately preceding previous year -

- (iv) The regular workman
  - a. not be a casual workman

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- b. not worker employed through contract labour
  - c. be employed for at least 300 days
- (v) An Audit report should be furnished for the claim of deduction under section 80JJAA.

28.4 The submissions of the assessee are considered, provisions of section 80JJAA as it stood for the relevant assessment year is extracted hereunder:

*Where the gross total income of an assessee being an Indian company, includes any profits and gains derived from an **industrial undertaking engaged in the manufacture Or production of article or thing**, there shall be subject to the conditions specified in sub section (2) be allowed a deduction of an amount equal to thirty percent of additional wages paid to the new workmen employed by the assessee in previous year for three assessment years including any assessment year relevant to the previous year in which such employment is provided.”*

*(Emphasis supplied)*

28.5 The AO in his order stated that it is evident from the above that the section is applicable to only to those assessee's who are manufacturing or producing an article or thing. In the instant case the assessee is a service provider and not a manufacturer. Secondly, wherever the Parliament intended to confer the benefit to a person who is in the business of production of computer software the same has been expressly stated as in the provisions of section 10A, 10B, Explanation in section 10AA, section 80HHE etc. Accordingly, there is an express omission of the term of computer software clearly.

28.6 The assessee has during assessment has made the claim based on the following contentions

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- a) Assessee is an Indian company
- b) Section 10(15) and 33B of Income tax Act define the term "industrial undertaking"
- c) The Industrial Disputes Act, 1947 defines the term "industrial undertaking"
- d) Manufacture involves deployment of men and material to convert raw material into a commodity of distinct commercial nature, character and use
- e) Production when juxtaposed with manufacture would take in bringing into existence new goods by a process which may or may not amount to manufacture and includes all by products, intermediates and residuals
- f) Thing refers to real or immovable, personal or movable, comprehending goods and chattels: and mixed, partaking of the characteristics of the two former as a title deed, a term for years
- g) "New Workman" means freshly recruited personnel
- h) Workman cannot be defined by merely considering the wages fact that Industrial Amendment Standing Order Act, Karnataka, 1946 has excluded professionals is irrelevant for the purposes of section 80JJAA
- j) "Regular Workman" excludes only seasonal industries
- k) Any employee employed after 5<sup>th</sup> of June would not be working for 300 days and the statute cannot expect a person to perform an impossible thing
- l) Quantum of wages paid to the new workmen determines the quantum of deduction
  - m) Use of term wages does not exclude salaries
  - n) Additional wages paid to new regular workmen will include such wages paid to all new regular workmen

- o) Reliance is placed on a plethora of case laws

28.7 The contentions of the assessee have been carefully considered by the AO. From the provisions of section 10(15) and section 33B of the Act that the provisions defining the term "industrial undertaking" read as under:

10(15) Explanation 1

For the purposes of this sub-clause, the expression "industrial undertakings means any undertaking which is engaged in.....

Section 33B Explanation

In this section, "industrial undertaking" means any undertaking which is mainly engaged in.....

28.8 A perusal of the above by the AO revealed that while the former restricts the applicability of the definition only to references made in section 10(15)(iv) of the Act, the latter restricts the meaning to the section. The definitions are not omnibus in nature as the plain language of the statute restricts the meaning to the specified context does not permit their usage anywhere else. For example in the instances wherein the scope was to be extended, the Parliament has chosen to clearly mention with references as is normally made to the provisions of section 801 in the provisions of section 10A etc. Thus, the attempt of the assessee to extrapolate the meaning from a specifically restricted proviso is untenable. The AO also mentioned that wherever the Parliament had contemplated the benefit to be extended to the software sector, specific reference has been made as in section 10A or 10B where the words used are "**export** of articles or things or computer software" or in section 10AA where the words are "to manufacture or produce articles or things or

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provide any services" followed by Explanation 1 which specifically mentions "computer software" as an addendum to rendering services. This when read with the meaning for the term computer programmes as defined in section 10BB reveals that there is an expansion of the term only for the purposes of section 10B and not for any other section. Thus, it becomes clear that the Parliament has always envisaged this sector to be one of rendering services and not a manufacturer. In fact, in the provisions of section 10BB also the term used is only "undertaking" and not "industrial undertaking". Further, the fact that the Parliament has also chosen to bring this sector under the ambit of the provisions of the Service tax also reveals the intent to hold it only in the service sector and not one of manufacturer. Thus, on this ground also the claim of the assessee found to be untenable.

28.9 The next contention is that it fulfills the criteria laid out under the Industrial Disputes Act, 1947. The assessee also admits that by the Standing Order issued by the Government of Karnataka the software sector has been excluded, but terms it to be irrelevant. Firstly, the Act distinguishes an undertaking manufacturing or producing an article or thing and another which is in the business of software. This stand has also been further strengthened by the fact that the State Government has also excluded it from the manufacturing sector. This being the case its claim to being a manufacturer becomes untenable.

28.10 The assessee has in its submissions stated that

- a) Manufacture involves deployment of men and material to convert raw material into a commodity of distinct commercial nature, character and use

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- b) Production when juxtaposed with manufacture would take in bringing into existence new goods by a process which may or may not amount to manufacture and includes all by products, intermediates and residuals
- c) Thing refers to real or immovable, personal or movable, comprehending goods and chattels: and mixed, partaking of the characteristics of the two former as a title deed, a term for years

28.11 The AO observed that it is clear that the definition of, manufacture requires two aspects to be fulfilled namely deployment of men and material and secondly to convert a raw material into a distinct commodity. Admittedly, this is not the case with the assessee. In the case of production it only brings under it ambit all byproducts, intermediates and residuals and brings in a process which ought to bring into existence new goods. The case of the assessee is not that it has brought into existence any fresh goods. In fact, the software developed are defined as intellectual property rights which are not goods. 'vase of any other service being rendered the same falls directly under the ambit of the term services and hence it does not meet its own definition of production. The definition provided by the Hon'ble Apex Court relied upon by the assessee for the term "Things" would also show that a total intangible would not qualify for a word coming under the ambit or the term "thing" when read with the phrase "manufacture or produce".

28.12 The AO further observed that the Parliament amending the provisions to specifically restrict it to industries covered under the Factories Act and the Explanatory notes to the amendment make it clear that the Parliament never intended to extend such benefits to

white collared job creation. In addition to the above the provision were also examined the light of the term new regular workmen. Considering the explanatory note to the introduction or the provisions of section 80JJAA to give impetus to creation of new employment opportunities the details of fresher who were employed during the year were also called for and examined. The details furnished are exacted here under.

Undertaking/Unit	Freshers	Employees with previous experience of more than a year	No. of new regular workmen entitled for deduction
Bangalore SEZ	25	121	146
Chennai SEZ-2	369	1279	1648
Hyderabad SEZ-1	508	887	1395
Hyderabad SEZ-2	431	689	1120
Jaipur SEZ,	114	109	223
Mysore SEZ	338	225	563
Mysore SEZ -2	331	53	384
Pune SEZ -2	195	519	714
Mangalore SEZ-2	48	54	102
<b>Grand Total</b>	<b>2359</b>	<b>3936</b>	<b>6295</b>

28.13 The AO observed from the above that most of the persons recruited were persons with previous experience there by providing avenues for attrition in other entities rather than new employment opportunity. Therefore, in essence the purpose of the giving the benefit u/s.80JJAA was in itself being defeated.

28.14 Further as per provisions of Sec 80JJAA, the term

*"additional wages" means the wages paid to the new regular workmen in excess of one hundred workmen employed during the previous year.*

*Provided that in the case of an existing undertaking, the additional wages shall be nil if the increase in the number of regular workmen employed during the year is less than ten per cent of existing number of workmen employed in such undertaking as on last day of the previous year"*

28.15 Hence the provision is applicable if there is an increase of workmen to extent of 10% over and above the workmen employed as on last day of the previous year. As per the details submitted the number of employees as on 31.03.2012 was 1,13,879 and the number of employees as on 31.03.2013 was 1,13,694, hence instead increase in number of employees, there is actual decrease in the number of employees employed during the financial year 2012-13. Here also in essence the purpose of the giving the benefit u/s 80JJAA was in itself being defeated. For the reasons stated above the contention of the assessee company was not acceptable to the AO. Accordingly, the deduction claimed u/s 80JJAA of Rs. 445,35,11,127 was disallowed by the ld. AO.

29. The assessee is aggrieved and went in appeal before the ld. CIT(A) that the assessing officer has erred in disallowing deduction claimed under section 80JJAA amounting to Rs. 445,35,11,127/-. The assessing officer held that section 80JJAA is applicable only to those assesses who are manufacturing or producing an article or thing whereas the assessee is a service provider and not a manufacturer; that wherever the Parliament intended to confer the benefit to person who is in the business of production of computer software the same has been expressly

stated as in the provision of section 10A , 10B, explanation in section 10AA, section 80HHE etc.

29.1 The assessee contended before the Id. CIT(A) as follows :

- that section 80JJA was introduced to encourage employers to generate more employment opportunities;
- that the term "industrial undertaking" is wide and exhaustive and covers any undertaking engaged in any systematic activity;
- that the terms "articles" or "things" are wide in nature and include "computer software".
- That production or manufacture of computer software results in production or manufacture of "articles" or "things":
- That the jurisdictional ITAT in DCIT vs OnMobile Global Ltd. [2014] 31 ITR (Trib) 248 (Bangalore) allowed deduction under section 80JJA for a company which was engaged in the business of software services.

30. The Id. CIT(A) has observed the order of the assessing officer, the arguments made by the assessee and the case laws relied upon. A plain reading of the section shows that it is applicable to undertaking engaged in the manufacture or production of an article or thing whereas the assessee is engaged in the business of software development. The section mentions only "article" or "thing" whereas section 10A and 10B specifically mention "articles" or "things or computer software". If "article" or "thing" included computer software, there was no need to separately mention computer software in section 10A and 10B. In the case of 'Onmobile Global' (Supra), the issue was whether telecom services can be termed as IT

enabled services. Deduction u/s.80JJAA of the Act was allowed on the basis of the following facts, specific to that assessee:-

- "i) The business of the assessee falls within the definition of the term "industrial undertaking";*
- ii) The assessee is engaged in providing Information Technology enabled services (computer software);*
- iii) The assessee has claimed deduction of only those payments made to 'workmen' who are not employed in supervisory capacity."*

30.1 There is no finding in this case as to whether production of computer software amounts to production of article or thing. In view of the above, the Id. CIT(A) upheld the order of the AO and this ground was dismissed accordingly.

31. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

***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 held 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*

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*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](http://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 80JJAA of the Act is Assessee specific and not undertaking / unit specific. [corresponding to ground no. 6.1]*

*6.2. Invoking the provisions of section 80A(4) in the context of deduction under section 80JJAA 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.*

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*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 not 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 or production of article or thing, there shall, subject to*

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*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. 200102 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*

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*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 assessee 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.***

31.1. Keeping in view of the above, on the similar lines, this ground is remitted to AO and the ground of appeal is allowed for statistical purposes.

32. The next ground of appeal in ground No.11 is with regard to disallowance of payments made to overseas subsidiaries u/s 40(a)(ia) of the Act at Rs.269,31,41,150/-.

33. Facts of the case are that during the previous year 2012-13 relevant to AY 2013-14, the assessee made various payments totaling to Rs. 269,31,41,150/- to its associated enterprises outside India. The details of such payments are as under:

<i>SL NO</i>	<i>NAME OF OVERSEAS SUBSIDIARY</i>	<i>COUNTRY</i>	<i>AMOUNT PAID</i>
<i>1</i>	<i>Infosys Technologies China Co Ltd</i>	<i>China</i>	<i>237,85,11,947</i>
<i>2</i>	<i>Infosys Technologies S de R L de C V</i>	<i>Mexico</i>	<i>12,47,38,961</i>
<i>3</i>	<i>Infosys Tecnologia DO Brasil LTDA</i>	<i>Brazil</i>	<i>2,31,28,399</i>
<i>4</i>	<i>Infosys BPO Poland Sp Zoo</i>	<i>Poland</i>	<i>7,77,96,047</i>
<i>5</i>	<i>Infosys BPO s.r.o</i>	<i>Czech Republic</i>	<i>8,89,65,805</i>

33.1. The aforementioned payments were made without deduction of tax at source under section 195. Vide order passed under section 201(1)/(1A) dt. 22.1.2015, the Id. DCIT (IT), Circle 1(1), Bangalore treated the assessee as an 'assessee in default' for not deducting tax at source under section 195 in respect of the aforesaid payments. The appeal against the said order is pending before the CIT(A) 12, Bangalore.

33.2. During the course of the assessment proceedings, the AO observed that the assessee company submitted the details of proceedings completed by the DCIT [International Taxation], Circle - 1(1) , Bengaluru, that in the case of the assessee for the F.Y.2012-13 , the proceedings u/s 201(1) & 201(1A) of the Income Tax Act, 1961 was completed, wherein payments of Rs. 269,31,41,150 made by the assessee to M/s Infosys China Pvt. Ltd towards 'sub - contract charges' was considered as 'Fee for Technical Services' both under the Act and also under the DTAA. Consequently, these payments attract the TDS provisions of the

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section 40(a)(i). Hence, these payments amounting to Rs. 269,31,41,150 were disallowed by the Id AO.

34. The assessee is aggrieved and went in appeal before the Id. CIT(A) stating the assessing officer has erred in disallowing payments made to overseas subsidiaries totally amounting to Rs. 269,31,41,150/- under section 40(a)(i) for not deducting tax at source in respect of the said payments. The AO noted that in proceedings u/s201(1) the DCIT(Intl. Taxn) had held that the assessee to be assessee in default for this payment made to Infosys China Pvt. Ltd, treating the same as FTS. The Id. CIT(A) observed that there is no infirmity in the disallowance made by the AO and he upheld the same this ground was dismissed.

35. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

*“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.”***

35.1. Keeping in view of the above, this ground of appeal is dismissed.

36. In the result, the appeal filed by the assessee in IT(TP)A No.735/Bang/2018 for the A.Y. 2013-14 is partly allowed for statistical purpose.

**ITA 809/Bang/2018 (2013-14):**

37. Now we take up the revenue's appeal. The revenue has raised following grounds of appeal:-

- “1.The order of the Id.CIT(A) is opposed to law and facts of the case.*
- 2. The Id.CIT(A) erred in following the ratio laid down by the Hon'ble High Court in the case of M/s. Tata Elxsi Ltd. (ITA No.70/2009) as the SLP filed against this decision before the Hon'ble Supreme Court has not been adjudicated upon.*
- 3. The Id.CIT(A) erred in holding that the expenses reduced from the Export Turnover must also be reduced from the Total Turnover as total turnover has not been defined in the Act and also since there is no provision under Sec. 10A which provides for exclusion of such expenses from Total Turnover.*
- 4. The CIT(A) erred in following the decision of the Hon'ble High Court in the case of M/s Wipro Ltd Vs QCIT, since this judgement has been challenged before the Apex Court and not reached finality.*
- 5. The CIT(A) erred in following the decision of the Hon'ble High Court in the case of M/s Mphasis Software and Services India Pvt Ltd since this judgement has been challenged before the Apex Court and not reached finality.*
- 6.The Ld CIT(A) erred in directing the AO to verify the nature of expenditure under the head brand building when the Ld. CIT(A) has no power to set aside the issue for verification to the AO.*
- 7.The Ld. CIT(A) erred in allowing the issue on commission when the assessee is liable to deduct TDS on commission paid to non resident company recipients.*
- 8. The appellant craves leave to add, alter, amend and / or delete. any of the grounds mentioned above.”*

38. Ground No.1 & 8 are general in nature. Ground Nos.2 & 3 are with regard to expenses reduced from export turnover which should not be reduced from total turnover.

39. The ld. A.R. for the assessee submitted that the learned AO has reduced the communication expenses and expenses incurred in foreign currency amounting to Rs. 2,71,11,231 and Rs. 2892,26,09,251 relating to all 14 SEZ units only from export turnover without a corresponding reduction from the total turnover while computing deduction under section 10AA of the Act. The learned CIT(A) has held in favour of the assessee by relying on the decision of the Karnataka High Court in CIT v Tata Elxsi Ltd 349 ITR 178.

40. We have heard the rival submissions and perused the materials available on record. This issue is allowed in favour of assessee following the decision of Hon'ble Supreme Court in the case of CIT Vs. HCL Technologies Ltd. reported in (2018) 93 taxmann.com 33, wherein 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.

40.1. Keeping in view of the above order of the Hon'ble Supreme Court we dismiss this ground of appeal of the revenue.

41. In Ground No.4 the revenue alleged that the ld. CIT(A) erred in following the decision of Hon'ble High Court in case of Wipro Ltd. Vs. Deputy Commissioner of Income-tax.

42. The ld. A.R. submitted that the above ground does not explicitly state the issue pertaining to which the Revenue has challenged the findings of the CIT(A). The learned CIT(A) had relied on the aforesaid decision of the Karnataka High Court in M/s Wipro Ltd v DCIT (2016) 382 ITR 179 (Kar) in deciding two distinct issues. The first issue being claim of deduction under section 10AA in respect of income from sale of scrap, incentives from airlines, interest from GLES deposits and interest from employee loans. The CIT(A) granted relief to the assessee on this issue by following the decision of the Karnataka High Court in Wipro's case (supra). The second issue pertained to claim of foreign tax credit under section 90 in relation to income which is exempt under section 10AA. The CIT(A) granted relief to the assessee on this issue by following the decision of the Karnataka High Court in Wipro's case (supra). As mentioned above, the ground raised by the Revenue does not state the issue which is challenged. The ground therefore is vague in nature. In view of the same, the ld. A.R. argued that this ground is liable to be dismissed for the said reason.

42.1 Without prejudice to the above, the assessee submitted that the following assuming that the Revenue has challenged both the above discussed issues wherein the CIT(A) had granted relief to the

assessee by following the decision of the Karnataka High Court in Wipro's case (supra).

42.2 First issue – Eligibility of incomes being interest income from GLES deposits and employee loans; sale of scrap; and incentives from airlines, for a deduction under section 10AA

Facts of the issue:

**Interest on GLES Deposit:** During the year under consideration, the assessee earned Rs. 50,06,79,519 as interest from GLES deposits. The assessee had offered the same for tax under the head 'Profits and gains from business or profession'.

42.3 GLES stands for Group Leave Encashment Scheme. Assessee gets actuarial valuation done on quarterly basis to know its liability toward un-encashed leave credits of its employees. Assessee made 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. Appellant 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.

42.4 **Interest on employee loans:** During the year under consideration, the Appellant earned Rs. 3,21,52,103 as interest from

employee loans. The assessee had offered the same for tax under the head 'Profits and gains from business or profession'.

42.5 As an employee welfare measure, the assessee extended 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.

42.6 **Sale of scrap and incentive from airlines** – During the year under consideration, the assessee earned Rs. 4,42,01,732 from sale of scrap and Rs. 3,99,089 as incentive from airlines. The assessee had offered the same for tax under the head 'Profits and gains from business or profession'.

42.7 Few airline companies such as Lufthansa, Qatar Airways, Indigo, Spicejet etc., provided incentive amount for travelling of employees, officers etc., regularly.

42.8 The learned AO has reduced the interest income on GLES deposits with LIC relating to SEZ units eligible for 100% and 50% deduction amounting to Rs. 5,45,08,973 and Rs. 11,53,46,485 respectively from profits of the business of SEZ units for the reason that the said income is not derived from the activity of software development and export.

42.9 Similarly, the learned AO has reduced the receipts from sale of scrap, interest income from loans given to employees and incentive from airlines relating to SEZ units eligible for 100% and 50% deduction totally amounting to Rs. 90,76,993 and Rs. 1,24,28,805

respectively from profits of the business of SEZ units for the reason that the said income is not derived from the activity of software development and export.

42.10 The ld. CIT(A) granted relief to the assessee on this issue by following the decision of the Karnataka High Court in Wipro's case (supra).

43. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

***“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*

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*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 Hon'ble 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*

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*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 be granted to the assessee*

***Accordingly, this ground raised by assessee stands allowed.”***

43.1. Keeping in view of the above order in assessee's own case cited (supra), we decide the issue on similar lines.

44. In Ground No.5 the revenue alleged that the Id. CIT(A) erred in following the decision of Hon'ble High Court in case of Mphasis Software and Services India Pvt. Ltd.

45. The Id. A.R. submitted that the learned AO has reduced a sum of Rs. 2,84,43,240 and Rs. 11,81,41,152 from the deduction allowable under section 10AA in respect of 10 SEZ units and the remaining 4 SEZ units (for which deduction under section 10AA was not allowed) for the reason that the said amount is the profit margin on pure onsite revenues and hence not eligible for deduction under section 10AA.

45.1 The learned CIT(A) held in favour of the assessee by relying on the decision of the Karnataka High Court in CIT v Mphasis Software and Service India Pvt Ltd [2015] 62 taxmann.com 165 (Karnataka). The only ground of revenue before the ITAT is that the above decision has been challenged before the Apex court and has not attained finality. This ground cannot be the reason for not following the binding judgment of Jurisdictional High Court. Hence, the ld. A.R. alleged that this ground should therefore be rejected.

46. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

**“16. Ground nos. 41 & 42 - Reduction of deduction under section 10AA in respect of pure onsite revenue”**

*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 placed 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](http://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."***

46.1 Keeping in view of the above order of the Tribunal this issue is remanded to the ld AO to verify the documents filed by the assessee and consider the claim in accordance with law.

47. In Ground No.6, the revenue stated that the CIT(A) has no power to set aside the issue for verification to the AO (Brand Building Expenditure).

48. The ld. A.R. submitted that the learned AO has treated brand building expenses of Rs. 80,17,28,991 as deferred revenue expenditure, allowed only one fifth of the said expenditure amounting to Rs. 16,03,45,798 and held that the remaining four fifth of the

expenditure amounting to Rs. 64,13,83,193 is allowable as amortization over the next four years.

48.1 The learned CIT(A), relied on the decision of the ITAT in assessee's own case for AY 2005-06, directed the AO to consider and verify the nature of expenditure incurred under the head 'brand building'.

48.2 The AO has passed the order giving effect to CIT(A) order on 29.03.2019 (i.e., subsequent to the appeal filed before the Hon'ble ITAT). During the course of the proceedings, the assessee submitted full details of invoices/purchase orders for verification purposes. The learned AO rejected the same for the reason that there were no new facts or submissions brought out. Further, the AO held that since the issue had already been considered at the time of passing the assessment order, no relief was granted to the assessee in this issue.

49. The learned DR has filed written submissions in Assessee's appeal before the Bench on 25.03.2021. In respect of this issue, the learned DR has accepted the directions of the ld. CIT(A). The relevant extract from the submissions are as follows:

*"The Ld.CIT(A) decided similarly with a direction to the Ld.AO to consider and verify the nature of the expenditure included under the head brand building. I agree with the decision and the same may be upheld."*

50. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

**“12. Ground No.25: 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

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and exhibitions are in relation to ongoing business of assessee. As held by Hon'ble Bombay High Court in case of *CIT vs Jeffrey 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](http://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](http://taxmann.com) 152 (Bombay)
- (vi) *DCIT v Polygel Industries (P.) Ltd* [2015] 56 [taxmann.com](http://taxmann.com) 198 (Mumbai - Trib.)
- (vii) *PCIT v Seagram Manufacturing (P.) Ltd* [2017] 78 [taxmann.com](http://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.”*

50.1 Keeping in view of the above order of the Tribunal this ground of the appeal of the revenue is dismissed.

51. In ground No.7 the revenue stated that the ld. CIT(A) erred in allowing the issue on commission when the assessee is liable to deduct TDS.

52. The facts of the case are that the assessee generates substantial part of its business from overseas clients mainly from the North American, European and Asia Pacific markets. In order to procure new business outside India and strengthen its existing business outside India and continually meet the demands and requirements of its existing clients outside India, the Company 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, a commission is paid to them in accordance with the terms of the agreement entered with them. During the year, the assessee had incurred an amount of Rs. 31,61,02,585 towards commission charges. No tax was deducted at source in respect of the impugned payments. As stated above, the BAP render services outside India.

They do not render services from India or in India. BAP are also 'non-residents' 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.

52.1 The learned AO has disallowed commission paid to non-resident entities amounting to Rs. 31,61,02,585 under section 40(a)(ia) for not deducting tax at source in respect of the said payments under section 195. Reliance has been placed on the decision of the Karnataka High Court in Samsung Electronics Co. Ltd and others decision dated 24.9.2009 (1st decision) reported in [2010] 320 ITR 209 in support of the impugned conclusion.

53. The learned CIT(A) held in favour of the assessee by relying on the decision of the ITAT in assessee's own case for AY 2006-07 [IT(TP)A No. 799/Bang/2015 dated 10.11.2017].

54. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in assessee's own case in earlier assessment year in ITA No.718/Bang/2017 dated 28.11.2022 for the assessment year 2012-13 wherein it was held as under:

*“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:

<b>Name of Vendor</b>	<b>Vendor Country</b>	<b>Amount in INR</b>	<b>Remarks</b>
Almoayyed Computers	Bahrain	2,75,791	Partner Commission payment for National Bank of Bahrain internet banking
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 EGABI SOLUTIONS,	--- Egypt	311 (20,73,900)	Misc Commission 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

<i>OCEANIC BANK INT (NIGERIA)</i>	<i>Nigeria</i>	<i>2,56,19,058</i>	<i>Towards License Commission</i>
<i>FIRST BANK OF NIGERIA PLC</i>	<i>Nigeria</i>	<i>1,43,53,056</i>	<i>Towards License Commission</i>
<i>FIRST CITY MONUMENT BANK</i>	<i>Nigeria</i>	<i>46,66,014</i>	<i>Towards License Commission</i>
<i>SPRING BANK PLC</i>	<i>Nigeria</i>	<i>1,34,86,672</i>	<i>Towards License Commission</i>
<i>FIDELITY BANK PLC</i>	<i>Nigeria</i>	<i>1,20,14,044</i>	<i>Towards License Commission</i>
<i>KAKAWA DISCOUNT HOUSE LIMITED</i>	<i>Nigeria</i>	<i>5,76,153</i>	<i>Towards License Commission</i>
<i>BPI BANK</i>	<i>Ghana</i>	<i>6,87,728</i>	<i>Towards License Commission</i>
<i>UNITED BANK FOR AFRICA PLC</i>	<i>Nigeria</i>	<i>2,97,49,999</i>	<i>Towards License Commission</i>
<i>UNION HOMES SAVINGS AND LOANS PLC</i>	<i>Nigeria</i>	<i>26,90,280</i>	<i>Towards License Commission</i>
<i>WEMA BANK PLC.</i>	<i>Nigeria</i>	<i>2,23,98,439</i>	<i>Towards License Commission</i>
<i>Segmentist Yazilim ve Danismanlik</i>	<i>Turkey</i>	<i>40,29,941</i>	<i>License Fees Commission</i>
<i>SIMBA TECHNOLOGY LIMITED,</i>	<i>Kenya</i>	<i>86,21,565</i>	<i>BAP Commission</i>
<i>Square IT Corporation</i>	<i>Japan</i>	<i>43.23.811</i>	<i>Fees Commission &amp;</i>
<i>Taldor</i>	<i>Israel</i>	<i>32.67.330</i>	<i>Commission Fees</i>
<i>TALDOR COMPUTER SYSTEMS (1986)LTD</i>	<i>Israel</i>	<i>15,67,500</i>	<i>Commission Fees ATS Project</i>
<i>THE TRIZETTO GROUP INC</i>	<i>USA</i>	<i>1,56,41,366</i>	<i>Trizetto Referral Fees &amp; revenue share</i>
<i>TOTAL INFORMATION MANAGEMENT (TIM)</i>	<i>Philippines</i>	<i>1,86,46,433</i>	<i>BAP Commission</i>
<i>Trevally Financial Software</i>	<i>South Africa</i>	<i>3,15,57,928</i>	<i>Fees Commission</i>
<i>TREVALLY FINANCIAL SOFTWARE</i>	<i>South Africa</i>	<i>35,15,794</i>	<i>Fees Commission</i>
<i>WAREEF UNITED COMPANY,</i>	<i>Saudi Arabia</i>	<i>(30,88,272)</i>	<i>BAP Commission</i>

<b>TOTAL</b>		23,68,35,533
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**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](http://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](http://taxmann.com) 48 (Madras)*
- (ii) *Apsara Silks v ITO [2016] 69 [taxmann.com](http://taxmann.com) 399 (Bangalore - Trib.)*
- (iii) *CIT v Farida Leather Company [2016] 66 [taxmann.com](http://taxmann.com) 321 (Madras)*
- (iv) *DIT v Credit Lyonnais [2016] 67 [taxmann.com](http://taxmann.com) 199 (Bombay)*
- (v) *CIT v Grup Ism (P) Ltd [2015] 57 [taxmann.com](http://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 are those 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.*

<b>Vendor name</b>	<b>Country</b>	<b>Taxability under the Act</b>	<b>Taxability under the Treaty</b>
<i>Almoayyed Computers</i>	<i>Bahrain</i>	<i>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</i>	<i>No DTAA</i>

<i>BAHWAN CYBERTEK LLC</i>	<i>Oman</i>	<i>Same as above</i>	<i>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>
<i>Bowin Consultancy Services</i>	<i>Taiwan</i>	<i>Same as above</i>	<i>No DTAA. Same as above</i>
<i>CAS Trading House Pvt.Ltd.</i>	<i>Nepal</i>	<i>Same as above</i>	<i>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</i>
<i>CELER Consulting S.A. de C.V</i>	<i>Mexico</i>	<i>Same as above</i>	<i>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>
<i>EGABI Solutions</i>	<i>Egypt</i>	<i>Same as above</i>	<i>No FTS clause under the Treaty; No PE in India; further, other income taxable only in Nepal and not in India; hence payment not</i>
<i>Millennium Information Technologies</i>	<i>Sri Lanka</i>	<i>Same as above</i>	<i>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>

<p>(i) Nihon Unisys Ltd, (ii) Square IT Corporation</p>	<p>Japan</p>	<p>Same as above</p>	<p>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</p>
<p>(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</p>	<p>Nigeria</p>	<p>Same as above</p>	<p>NO DTAA. Same as above</p>
<p>BPI Bank</p>	<p>Ghana</p>	<p>Same as above</p>	<p>NO DTAA. Same as above</p>
<p>Segmentist Yazilim ve Danismanlik L</p>	<p>Turkey</p>	<p>Same as above</p>	<p>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</p>

<i>Simba Technology Limited,</i>	<i>Kenya</i>	<i>Same as above</i>	<i>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</i>
<i>(i) Taldor, (ii) Taldor Computers Systems (1986) Ltd</i>	<i>Israel</i>	<i>Same as above</i>	<i>Payment does not 'make available' any technology, skills, process, know how etc as per the protocol to Treaty. Hence, payment not taxable</i>
<i>The Trizetto Group Inc</i>	<i>USA</i>	<i>Same as above</i>	<i>Payment does not 'make available' any technology, skills, process, know how etc. Hence, payment not taxable under the</i>
<i>Total Information Management (Tim)</i>	<i>Philippines</i>	<i>Same as above</i>	<i>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</i>
<i>Trevally Financial Software</i>	<i>South Africa</i>	<i>Same as above</i>	<i>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>

**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/s 195 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.*

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*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 must be granted to the assessee.*

*Accordingly, these grounds raised by assessee stands allowed.”*

54.1 Keeping in view of the above order of the Tribunal this ground of the appeal of the revenue is remitted to AO as decided in assessee's own case cited (supra).

55. In the result, the appeal filed by the assessee as well as by revenue are partly allowed for statistical purposes.

Order pronounced in the open court on 9<sup>th</sup> Jan, 2023.

**Sd/-**  
**(N.V. Vasudevan)**  
**Vice President**

**Sd/-**  
**(Chandra Poojari)**  
**Accountant Member**

Bangalore,  
Dated 9<sup>th</sup> Jan, 2023.  
VG/SPS

**Copy to:**

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

By order

Asst. Registrar, ITAT, Bangalore.