

आयकर अपीलिय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member

ITA Nos.365, 451/Hyd/2015 & 118/Hyd/2016		
Assessment Years: 2010-11 & 2011-12		
M/s. Brightcom Group Ltd (formerly known as LGS Global Ltd & Others), Hyderabad PAN:AAACL5827B/AACU4079Q	Vs.	Dy. C. I.T Circle 17(2) Hyderabad
(Appellant)		(Respondent)
ITA No.480/Hyd/2015 A.Y 2010-11		
Dy. C. I.T Circle 17(2) Hyderabad	Vs.	M/s. Brightcom Group Ltd Hyderabad PAN: AACU4079Q
(Appellant)		(Respondent)
Assessee by:	Shri P. Murali Mohan Rao, CA	
Revenue by:	Shri Jeevan Lal Lavidiya, CIT(DR)	
Date of hearing: 08/02/2023		
Date of pronouncement: 22/02/2023		

ORDER

Per R.K. Panda, A.M

ITA No.365/Hyd/2015 filed by the assessee is directed against the order dated 27.02.2015 passed by the Assessing Officer u/s 143(3) r.w.s. 144C(13) for the A.Y 2010-11. ITA No.451/Hyd/2015 filed by the assessee and ITA 480/Hyd/2015 filed by the Revenue are cross appeals and are directed against the order dated 27.02.2015 passed by the Assessing Officer u/s 143(3) r.w.s. 92CA of the Act for the A.Y 2011-12. ITA 118/Hyd/2016 filed by the assessee is directed against the order dated 11.2.2015 passed u/s 143(3) r.w.s. 92CA of the Act for the

A.Y 2011-12. Since identical issues are involved in all these appeals filed by the assessee, and the only appeal filed by the Revenue, therefore, for the sake of convenience, these appeals were heard together and are being disposed of by this common order.

ITA 365/Hyd/2015 A.Y 2010-11 (By Assessee)

2. Facts of the case, in brief, are that the assessee is a company engaged in the business of export of articles or things and computer software. It filed its return of income on 24.9.2010 declaring income of Rs. NIL after claiming deduction u/s 10A of Rs.5,24,25,966/-. The case was selected for scrutiny and statutory notices u/s 143(2) and 142(1) were issued to which the AR of the assessee appeared from time to time and filed the details Since the assessee in this case has entered into certain international transaction with its AEs, the Assessing Officer referred the matter to the TPO for determination of the ALP. The TPO vide order dated 13.01.2014 passed u/s 92CA(3) of the Income Tax Act, 1961 proposed an upward adjustment of Rs.6,14,62,097/- being the ALP of the international transactions by treating the investment of Rs.50,17,31,400/- in the subsidiaries as interest free loan and charging interest @ 12.5% thereon. The Assessing Officer accordingly made addition of the same to the total income of the assessee.

2.1 The Assessing Officer similarly noted that the assessee has claimed an amount of Rs.5,24,25,966/- as deduction u/s 10A of the I.T. Act. However, the Assessing Officer rejected the explanation given by the assessee and recomputed the eligible deduction u/s 10A at Rs.3,09,53,672/- and made addition of

Rs.2,14,72,294/- being excess deduction claimed u/s 10A. Accordingly, the Assessing Officer determined the total income of the assessee at Rs.8,45,30,581/-.

3. The assessee approached the DRP and the DRP vide order dated 24.12.2014 directed the TPO to ascertain the LIBOR rate for 12 months period prevailing in financial year 2009-10 and adopt LIBOR + 2% as interest receivable on loans given by the assessee to its AE. So far as the computation for the purpose of deduction u/s 10A of the I.T. Act is concerned, the DRP directed the Assessing Officer to verify the export bills/invoice wise export realized as claimed by the assessee with reference to the FIRC's and consider the export turnover to the extent the proceeds are realized in convertible foreign exchange within the stipulated time limit or within the extended time, if any, given supported by relevant certificates and accordingly recompute the deduction allowable u/s 10A.

4. Aggrieved with such order of the Assessing Officer/TPO/DRP, the assessee is in appeal before the Tribunal by raising the following grounds:

"1. Erred in passing the order u/s 143(3) r.w.s 144C(13) on date 27.02.2015 which is beyond one month from the end of the month in which such DRP directions are received.

2. Erred in computing Arm's Length Price of Rs.1,67,57,828/- u/s 92C(3) of the IT Act, 1961 by treating the investment of Rs.50,17,31,400/- in M/s Global IT Inc, USA, the assessee's wholly owned subsidiary as Interest free loan by charging interest LIBOR+2% without appreciating the fact that the investment had been made towards equity investment for the purpose of business expansion.

3. Ought to have appreciated the fact that Honourable DRP for the AY 2008-09 has directed to delete the addition made towards interest on investment in subsidiary and hence the same should have been Rs followed for the year under consideration.

4. *The AO erred in re-categorizing the nature of asset by treating the "Investment" as "Loan" which is not permissible u/s 145 of the Act.*
5. *Erred in not appreciating the fact that the transaction relating to investment doesn't fall under the purview of Transfer Pricing u/s 92B, as no income is generated from the transaction of providing Rs loans and advances to the subsidiaries of the appellant company.*
6. *Erred in treating the Investment in subsidiaries as "Interest free Loans" without appreciating the fact that the same is shown under the head "Investments" in the Balance Sheet as reflected from the Annual report of the assessee for the FY 2009-10.*
7. *Erred in not appreciating the statement of changes in stockholder's Equity in the financial statement of the AE viz., Global IT Inc, USA for the year ended 31.03.2010 wherein it is evident that the investment is disclosed as additional capital of the A.E. had increased by \$1,08,82,000/-.*
8. *Ought to have appreciated that the assessee company has earned substantial profit from the AE (i.e., Global IT Inc, USA) which is due to investment and same is included in assessee's consolidated profits. Therefore further addition by charging interest in the hands of the assessee would tantamount to double taxation.*
9. *Erred in computing the amount of interest at Rs. 1,67,57,828/-, by applying the rate of interest @ LIBOR +2% p.a. for the whole year on the consolidated amount of investments, without considering the actual dates of investments.*
10. *Erred in finding infirmities in the TP Documentation without finding any cogent reason for the same.*
11. *Erred in disallowing the deduction of Rs. 20,30,780/- u/s 10A of the IT Act, 1961 by computing the eligible deduction u/s 10A of the Act at Rs.5,03,85,186/- as against the assessee's computation at Rs. Rs.5,24,15,966/-.*
12. *Ought to have appreciated that the assessee has complied with all the conditions laid down for claiming the exemption u/s.10A of the Act.*
13. *Erred in excluding "onsite development charges" of Rs.1,85,45,656/- from the Export turnover while calculating the exemption u/s 10A of the Act without appreciating that the assessee had applied to the Bank for obtaining the FIRC's relating to the onsite development charges.*
14. *Erred in excluding "Export proceeds" of Rs. 5,01,11,842/- from Export turnover while calculating the exemption u/s 10A of the Act, without appreciating that the assessee has applied to the Bank for obtaining the FIRC's relating to the export proceeds.*
15. *Without prejudice, erred in excluding "onsite development charges of Rs.1,85,45,656/- and "export proceeds" of Rs. 5,01,11,842/- from the*

export turnover without excluding the same from the total turnover of the assessee while computing the deduction u/s 10A of the Act.

16. Ought to have appreciated that whatever amount has been excluded from the export turnover, the same amount should also be excluded from the total turnover for the purpose of computation of deduction u/s.10A of the Act.

17. Ought to have appreciated that the assessee's claim u/s 10A of the Act has been allowed by the Revenue in the earlier years and the same cannot be disallowed in the subsequent years.

18. The assessee may add, alter or modify any other point to the Grounds of appeal at any time before or at the time of hearing of the appeal."

5. The assessee has also raised certain additional grounds. However, since the learned Counsel for the assessee did not press these grounds, therefore, these are dismissed as not pressed.

6. So far as the grounds of appeal No.2 to 10 relating to part relief granted by the DRP on account of TP adjustment is concerned, the facts, in brief, are as under:

7. The TPO during the course of TP assessment noted that the assessee in its TP study has reflected the following international transactions:

Name of the AE	Nature of Transaction	Amount in (Rs.)	Method
Lanco Global Systems Inc. USA	Rendering of software development services	5477946	TNMM
Global IT Inc. UISA	- do -	541680	TNMM
Techorbit Inc. USA	-do-	1354200	TNMM
Global IT Inc. USA	Investment	501731400	CUP

8. He, therefore, asked the assessee vide show-cause notice dated 17.12.2013 to furnish the relevant details and documentary evidence with respect to investment in subsidiaries

amounting to Rs.50,17,31,400/-. He also asked the assessee to explain as to why the investment should not be treated as interest free loan and interest @ 12.25% should not be charged. In response to the same the assessee filed its reply which has been reproduced by the Assessing Officer in the assessment order and which reads as under:

“1. During the financial year 2009-10, we have made an equity investment of Rs.50,17,31,400/- in our wholly owned subsidiary M/s Global IT Inc, USA (USD 1,08,82,000). This investment was made towards development of software product and new technology products. Against this investment the company M/s Global IT Inc USA has allotted the shares to us.

2. In view of the above reply, it is therefore requested to drop the proposed additions/ disallowances for the AY 2010-11.”

9. However, the TPO did not accept the contentions of the assessee on the ground that the assessee did not submit the details of the investment in the AE claimed as equity investment despite numerous opportunities given to it. The assessee has not filed any documentary evidence in support of its contention despite repeated reminders. The assessee did not state as to whether the AE has been allotted shares to the taxpayer against the money remitted to it by the taxpayer. Further, if the AE has allotted the shares then how the share price was determined and the date of issuance of all shares etc., In absence of any evidence provided by the assessee the TPO adopted the interest @ 12.25% as ALP on the interest free loan of Rs.50,17,31,400/- and proposed upward adjustment at Rs.6,14,62,097/-the details of which are as under:

<i>Closing balance of investment</i>	-	<i>Rs.64,37,36,882/-</i>
<i>Less:Opening Balance of Investment-</i>		<i>Rs.14,20,05,482/-</i>
<i>Alleged Investment during the year</i>		<i><u>Rs. 50,17,31,400/-</u></i>
<i>Interest free loan/Advance during the year-</i>		<i>Rs.50,17,31,400/-</i>

Interest @ 12.25% on Rs.50,17,31,400 = Rs.6,14,62,097/-.

10. Before the DRP, the assessee submitted that :
- a) The investment was made towards. equity investment for the purpose of business expansion of the assessee company and its subsidiaries companies.
 - b) The investment made by the assessee company was out of internal funds raised by the assessee.
 - c) The assessee has not taken any borrowings for providing investment and no cost incurred by the assessee
 - d) The money was paid towards equity investment and no interest can be charged on such investment made by the assessee company.

11. Based on the arguments advanced by the assessee, the DRP directed the Assessing Officer to adopt LIBOR+2% for interest receivables on loans given by the assessee to its AE by observing as under:

“10.1 The panel has gone through the submissions of assessee and the order of the TPO/AO. The panel agrees with the views of the TPO that in respect of loans/ investments, Arms' Length interest rate to requires be determined. The transactions were entered by the taxpayer in foreign currency and the interest rates as applicable to the loans taken in the interest international financial markets should be adopted for bench marking in the rates. The panel does not agree with the contentions of the assessee. The loans were given international market by the assessee and the interest rate prevailing in the markets international should be adopted for the purpose of benchmarking the international the view of transactions. in the panel, the appropriate interest rate MUJRALT & receivable by assessee is the LIBOR. A mark up is also required on the LIBOR. The panel considers that a 2% markup on LIBOR is appropriate. Therefore, the interest rate that needs to be adopted for determination of the ALP in respect of loans given by assessee to its AE's is the LIBOR+2%. Accordingly, we direct the TPO to ascertain the LIBOR rate for 12 months period prevailing in FINANCIAL YEAR 2009-10 and adopt LIBOR+2% for interest receivable on loans given by assessee to its AE. For statistical purposes this ground of objection is treated as partly allowed”.

12. The Assessing Officer in the final order accordingly made the addition of Rs.1,67,57,828/-.

13. Aggrieved with such order of the Assessing Officer, the assessee are in appeal before the Tribunal.

14. The learned Counsel for the assessee at the outset submitted that the assessee has invested in share capital of the subsidiaries outside India. Referring to Pag No.161 of the Paper Book, he drew the attention of the Bench to the copy of the share certificate dated 31.3.2010 issued by the A.E certifying issue of 10,88,20,000 equity shares in the name of LGS Global Ltd which is the earlier name of the company. He submitted that investment in share capital of the subsidiaries outside India are not in the nature of international transaction u/s 92B of the Act. The investments in equity cannot be treated as loan and no interest can be charged on the same. Referring to the order of the DRP in assessee's own case for the A.Y 2008-09 in the case of Ybrant Digital Ltd (earlier name), he submitted that the DRP vide order dated 28.9.2012 has held that it is not correct to impute interest on investment made by the assessee in its own subsidiaries which in turn fetched the assessee company to expand its business and enter into new space as well as earned profits. It is not an idle investment made by the assessee to park its funds abroad without any benefit accruing to such transaction. Accordingly, the addition of Rs.2,56,18,200/- was directed to be deleted. He submitted that the Revenue accepted the order of the DRP on this issue and did not file any appeal. Thus, once the Department has accepted the position, they cannot take a different proposition for bringing such interest to tax. The learned Counsel for the assessee also relied on the following decisions to the proposition

that investment in share capital of the subsidiaries outside India are not in the nature of international transactions u/s 92B of the Act and the investments cannot be treated as loan and therefore, no interest can be charged on the same:

- i) Hon'ble Bombay High Court in the case of Vodafone India Services (P) Ltd vs. Union of India (2014) 50 Taxmann.com 300 (Bom.)
- ii) ITAT Hyderabad in the case of Prithvi Information Solutions Ltd vs. DCIT in ITA No.472/Hyd/2014.
- iii) ITAT Hyderabad in the case of Hill Country Properties vs. ACIT reported in 48 Taxmann.com 94
- iv) ITAT Hyderabad in the case of Vijay Electricals Ltd vs. Add. CIT in ITA 842/Hyd/2012 dated 31.05.2013
- v) ITAT Ahmedabad in the case of Micro Inks Ltd. v. ACIT in ITA No.1668/Ahd/2006

15. He accordingly submitted that the addition made by the Assessing Officer should be deleted.

16. The learned Counsel for the assessee submitted that recategorizing the nature of the asset by treating investment as loan is not permitted u/s 145 of the I.T. Act For the above proposition, he relied on the following decisions:

- i) DRP Hyderabad in the case of M/s. Visu International Ltd
- ii) ITAT Hyderabad in the case of Hill Country Properties vs ACIT (48 Taxmann.com 94)
- iii) ITAT Delhi in the case of CIT v EKL Appliances.

17. The learned Counsel for the assessee in another plank of his arguments referring to the following decisions submitted that the procedure laid down u/s 92C of the Act relating to computation of ALP should be followed.

- i) ITAT Hyderabad in the case of Social Media India Ltd vs. ACIT in ITA No.1711/Hyd/2012
- ii) ITAT Mumbai in the case of Dresser Rand India (P) Ltd vs. Add. CIT in ITA No.8753/Mum/2010
- iii) ITAT Mumbai in the case of Kodak India (P) Ltd vs. ACIT in ITA No.7349/Mum/2012.

18. The learned DR, on the other hand, heavily relied on the order of the Assessing Officer/TPO/DRP. He submitted that despite repeated number of opportunities granted by the TPO, the assessee did not furnish the requisite documents for which the TPO proposed the addition of Rs. Rs.6,14,62,097/- and the learned DRP was not correct in directing the Assessing Officer to adopt LIBOR+2%. He accordingly submitted that the order of the TPO should be upheld. In his alternate contention, he submitted that the matter may be restored to the file of the TPO for adjudication of the issue afresh by giving an opportunity to the assessee to produce all the relevant details including the issue of shares by the AE to the assessee.

19. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer, TPO and the DRP and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the TPO in the instant case proposed upward adjustment of Rs.6,14,62,097/- being the ALP of the international taxation

which was computed by applying the interest rate of 12.25% on investment of Rs.50,17,31,400/- treating the same as loan given by the taxpayer to its AE during the relevant financial year. When the assessee approached the DRP, we find the DRP directed the Assessing Officer to apply the LIBOR+2% on loans given by the assessee to its AEs. It is the submission of the learned Counsel for the assessee that when the assessee has invested in the equity share capital of the subsidiary outside India, the same is not in the nature of international transaction u/s 92B of the I.T. Act and the investment in equity cannot be treated as loan and therefore, no interest can be charged on the same. It is also his submission that recategorization of the nature of the asset by treating the investment as loan is not permitted u/s 145 of the I.T. Act. According to him, the procedure laid down under the provisions of section 92C of the I.T. Act relating to the computation of ALP should be followed.

20. We find merit in the above arguments advanced by the learned Counsel for the assessee. We find before the TPO, the assessee vide its reply dated 26.12.2013 had categorically stated that during the financial year 2009-10, they made equity investment of Rs.50,17,31,400/- in their wholly owned subsidiary M/s Global Inc, USA and the investment in equity was made for the purpose of development of software products and new technology products. It was categorically stated that against this investment the company M/s. Global I.T. Inc, US has allotted the shares copy of which is placed at page 161 of the Paper Book. Under these circumstances, the allegation of the TPO that the taxpayer did not submit the details of the investment in the AE

claimed as equity investment despite numerous opportunities given by the TPO is incorrect.

21. We further find the DRP in assessee's own case for the A.Y 2008-09, copy of which is placed at page 1 to 9 of the Paper Book, at Para 21 of the order has deleted the addition of Rs.2,56,18,200/- being the ALP of the international transaction pertaining to the Arm's Length interest on the investment of Rs.14,84,25,259/-. The relevant observation of the DRP at Para 21 of the order reads as under:

"21.0 The above submissions of the appellant have been duly considered by the Panel. It is clear from the consolidated profits submitted by the assessee company that the profits attributable to its wholly owned subsidiary i.e., International Expressions Inc. USA to the extent of 6,80,91,165/- have formed part of financial statements prepared accordingly. The main contention of the TPO to treat it as loan is that the company has treated these investments as advance in the balance sheet as on 31.3.2008. On the other hand, it is the contention of the ass that pending conversion and allotment of shares, these amounts invested there have been shown as advance but the fact remains is that by investing these amounts the eligible assessee has taken over the wholly owned subsidiary and enjoyed the profits accrued therein. Therefore, mere nomenclature in the accounts cannot be a determining factor to treat a particular entry as an advance or an investment in the equity. What is required to be seen the true nature of such investment made by the eligible assessee in its foreign subsidiary. It is a fact that the assessee has been allotted shares with effect from April, 2010 and the profits earned by such foreign subsidiary have been consolidated in the financial statements prepared by assessee company since 2007-08 financial year onwards. Therefore, it is not correct to treat the said investment as a loan and compute interest on such investment transaction. It is very clear from the perusal of the facts that the assessee company right from the beginning is intended to invest the amounts as part of expanding its business and entered into new area to widen its professional activity. On its part, the assessee fulfilled its legal obligation of intimating the RBI and obtaining unique identification number for the direct investment in overseas as well as intimating to the Authorized Bank regularly about the remittances as well as forwarding a copy of the share certificates within due dates as prescribed by RBI. Assessee is also harping on the point that the investments have been made out of internal accruals

but not out of borrowed funds; therefore, there is no cost to the assessee on this investment transaction. In view of the above discussion, the Panel feels that it is not correct to impute interest on the investments made by the assessee in its own subsidiary which in return fetched the assessee company to expand its business and enter into new space as well as earned the profits. It is not an idle investment made by the assessee to part its funds abroad without any benefit accruing to such transaction. Accordingly, the Assessing Officer/TPO is directed to delete the addition of Rs.2,56,18,200/-“.

22. The Revenue has accepted the same and no appeal has been filed by the Revenue, a statement made by the learned Counsel for the assessee at the Bar which could not be controverted by the learned DR

23. Further, we find the Hon'ble Bombay High Court in the case of Vodafone India Services (P) Ltd vs. Union of India reported in (2014) 368 ITR 1 has held that the issue of shares at a premium by the assessee to its nonresident holding company does not give right to any income from an admitted international transaction and therefore, there is no occasion to apply Chapter X in such cases.

24. We find the Coordinate Bench of the Tribunal in the case of Prithvi Information Solutions Ltd vs. DCIT in ITA No.472/Hyd/2014 dated 25.12.2014 for the A.Y 2009-10 has also decided an identical issue and held that if the investment is in the nature of equity then they cannot be treated as loans and advances and therefore, it cannot come within the purview of section 92B of the I.T. Act. Since admittedly the assessee has furnished the relevant details before the TPO as well as the DRP by submitting that the investment was made towards equity investment for the purpose of business expansion of the assessee company and its subsidiary company and the investments were

made out of the internal funds raised by the assessee and since the DRP in the assessee's own case in the immediately preceding A.Y has deleted such addition made by way of adjustment on ALP being investment in equity and the Revenue has accepted the same by not filing any appeal before the Tribunal, therefore, we are of the considered opinion that the DRP was not justified in directing the TPO to adopt LIBOR+2% as interest receivable by the assessee on loan to its AE especially when the assessee has not given any loan but the same is towards equity, the share certificate of which was already filed before the lower authorities. The grounds raised by the assessee on this issue are accordingly allowed.

25. The next issue that requires adjudication is regarding the disallowance of deduction of Rs.20,30,780/- u/s 10A of the Act by computing the eligible deduction u/s 10A of the Act at Rs.5,03,85,186/- as against the assessee's computation at Rs.5,24,50,966/-.

25.1 After hearing both the sides, we find the Assessing Officer on verification of the export sales and their invoices/sub tax forms noted that against the US\$ of 2,21,97,835/- equivalent to INR of Rs.99,03,62,533/-, the assessee has shown to have received USD14499302 and could not produce the proof of receipt for the balance amount of USD 76,98,533/- equivalent to Indian Rs.34,34,72,174/-. Therefore, the Assessing Officer for the purpose of computation of eligible export turnover reduced the amount of Rs.34,34,72,174/- being export proceeds not received in India. We find the DRP directed the Assessing Officer to verify the export bill/invoice records as claimed by the assessee with reference to the FIRC's and consider the export turnover to the

extent the proceeds are realized in convertible foreign exchange within the stipulated time limit or within the extended time limit, if any supported by the relevant certificate and accordingly recompute the deduction allowable u/s 10A by observing as under:

In view of the submissions of the assessee and in view of the conditions laid down in section 10A, we direct the AO to verify export bill invoice wise export realised as claimed by the assessee with reference to the FIRC's and consider the export turnover to the extent the proceeds are released in convertible foreign exchange within the stipulated time limit or within the extended time if any given supported by relevant certificates and accordingly recompute the deduction allowable u/s.10A. For statistical purpose, we treat the grounds at S.No.15, 16 as partly allowed and ground No.12 is rejected considering as general in nature.

26. We have heard the rival arguments by both sides. We find the provisions of section 144C(8) reads as under:

“(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.”

27. As per the above provision, although the DRP has no power to set aside any proposed variation or issue any direction under sub-section (5) for further inquiry and passing of the assessment order, however, the Tribunal has the power to set aside any issue to the file of the Assessing Officer with direction to verify the details. Since the onus is on the assessee to prove to the satisfaction of the Assessing Officer that the proceeds are received in convertible foreign exchange within the stipulated time, therefore, considering the totality of the facts of the case and in the interest of justice we, deem it proper to restore the issue to the file of the Assessing Officer with a direction to verify the export bill/invoice-wise export realized as claimed by the assessee with

reference to FIRCs and to consider the export turnover to the extent the proceeds are realized in convertible foreign exchange within the stipulated time or within the extended time, if any, support by relevant certificate and recompute the deduction u/s 10A.

28. So far as the exclusion of Onsite Development Charges of Rs.1,84,45,656/- from the export turnover for computation of exemption u/s 10A is concerned, we find the export turnover as per P&L a/c was shown at Rs.102,32,52,683/- which consists of export sale of Rs.99,03,62,533/- and Onsite development charges of Rs.3,28,90,150/-. Since the assessee could not furnish any evidence towards Onsite Development Charges and could not substantiate that the Onsite charges rendered were only an extension of the services rendered in India, the Assessing Officer reduced the same from the export turnover for the purpose of calculation of deduction u/s 10A. The DRP has upheld the order of the Assessing Officer and the Assessing Officer in the final order reduced the onsite development charges both.

29. After hearing both sides, we find it is an admitted fact that the assessee did not furnish any evidence before the Assessing Officer regarding the onsite development charges and that the onsite Services rendered were only an extension of the services rendered in India. Therefore, considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to give an opportunity to the assessee to substantiate the same to the satisfaction of the Assessing Officer regarding the details of onsite development charges and that the services

rendered were only for the extension of services rendered in India. The grounds raised by the assessee are accordingly allowed for statistical purposes.

30. Ground of appeal No.1 was not pressed for which the same is dismissed. Ground of appeal No.18 being general in nature is dismissed.

31. In the result, appeal of the assessee is partly allowed for statistical purposes.

ITA No.451/Hyd/2015 – A.Y 2010-11 (By assessee)

32. The grounds raised by the assessee are as under:

“1. Erred in passing the order u/s 143(3) r.w.s 144C(13) on date 27.02.2015 which is beyond one month from the end of the month in which such DRP directions are received dated 24.12.2014.

2. Erred in making the addition of Rs.7,05,54,464/- u/s 92CA of the Act 2. in relation to the international transactions by charging interest on 3.34 (i.e. LIBOR + 2%) on investment in Associated Enterprises (AE's).

3.Erred in rejecting the TP documentation submitted by the assessee by showing inappropriate reasons and not supported by any material evidence, which is not correct.

4. The AO erred in re-categorizing the nature of asset by treating the "Investment" as "Loan" which is not permissible u/s 145 of the Act.

5. Ought to have appreciated that during the financial year 2009-10, the assessee has invested an amount of Rs. 96,07,30,000/- in its wholly owned subsidiaries as additional equity investment towards expansion of its Business and shares has been allotted to the assessee Company.

6. Ought to have appreciated that the income earned from the Rs. 2,investments has already been offered to tax by the associated enterprises in the form of profits and further addition in the hands of the assessee would tantamount to double taxation.

7. Erred in not following the directions of the DRP in the assessee's KS. 2 own case for the AY 2010-11 wherein the Honourable DRP has directed not to charge interest on Rs. 96,07,30,000/-.

8. Ought to have appreciated the fact that for the AY 2008-09 the Honourable DRP has deleted the addition made in respect of interest charged on the investment in subsidiary.

9. Erred in not appreciating the fact that the transaction relating to Rs investment doesn't fall under the purview of Transfer Pricing u/s 92B, as no income is generated from the transaction of providing loans and advances to the subsidiaries of the appellant company.

10. Erred in considering the amount of Rs. 90,56,47,100/- as an Rs investment in subsidiaries, without appreciating the fact that the same was due to reclassification of the head "goodwill" to "investment" and that provisions of transfer pricing are not applicable to the transaction as there is no income.

11. Ought to have appreciated the fact that the amount of Rs. Rs 90,56,47,100/- was reclassified from "Goodwill" to "Investment and the actual amount of investment in the subsidiaries is Rs.2,19,50,20,970/- till financial year 2008-09, but this amount was shown under two heads under "goodwill" for an amount of Rs.90,56,47,100/- and the other under the head "investments" of Rs.1,28,93,73,870/- and this fact is apparent from Balance Sheet as on 31.03.20110.

12. Erred in stating that the assessee has not furnished supporting R= documents in respect to the classification of goodwill, without appreciating that the same fact can be seen from Fixed Assets schedule of FY 2009-10.

13. Erred in treating the amount of Rs. 24,58,52,364/- as investment in subsidiaries and computing interest 3.34% (LIBOR + 2%) without, without appreciating the fact that the assessee company has incurred the above amount in the process of setting up of three locations towards initial set up cost in order to capture the market for growing business opportunities globally.

14. Erred in re-categorizing the initial set-up cost under the head "work in progress" of Rs.24,58,52,364/- as "Interest Free loan" which is not permitted u/s 145 of the Act.

15. Ought to have appreciated that the provisions of transfer pricing are not applicable to the transaction of Rs. 24,58,52,364/- towards initial set up cost, as there is no income.

16. Without prejudice to the above grounds, erred in applying interest rate 3.34% (i.e. LIBOR + 2%) for the whole year on the consolidated amount of advances, without considering the actual date of advances.

17. Erred in treating gain on foreign exchange fluctuation of Rs.4,22,579/- as other income without appreciating that the gain is a notional income and not a real income.

18. *The assessee may add, alter or modify any other point to the Grounds of appeal at any time before or at the time of hearing of the appeal”.*

ITA 480/Hyd/2015 – A.Y 2010-11 (BY Revenue)

33. Aggrieved by the part relief granted by the DRP, the Revenue is in appeal before the Tribunal by raising the following grounds:

“1. The Hon'ble DRP erred in holding that interest rates should be taken at LIBOR+2% as against 12.25% adopted by the Assessing Officer.

2. The Hon'ble DRP erred in holding that telecommunication charges should be excluded from “the total turnover” for the purpose of computing deduction u/s 10B.

3. The appellant prays that the order of the DRP on the above grounds be set aside and that the Assessing Officer be restored.

4. The appellant craves leave to amend or alter any grounds or add a new ground that may be necessary”.

34. Ground of Appeal No.1 by the assessee was not pressed by the learned Counsel for which the learned DR has no objection. Accordingly, ground of appeal No.1 by the assessee is dismissed as not pressed.

35. Ground of appeal Nos.2 to 16 by the assessee and ground of appeal No.1 by the Revenue relate to the order of the DRP in holding that the interest rate should be taken at LIBOR+2% as against 12.25% adopted by the Assessing Officer.

36. After hearing both the sides, we find the above grounds of appeal by the assessee and the Revenue are identical to Grounds of appeal 2 to 10 in ITA No.365/Hyd/2015. We have already decided the issue and the addition made by the Assessing

Officer has been deleted in toto in the preceding Paragraphs.. Following our reasonings given therein, the above grounds raised by the assessee are allowed and the ground raised by the Revenue is dismissed.

37. Ground of Appeal No.17 by the assessee relates to the treatment of gain on Foreign Exchange fluctuation of Rs.4,22,579 as other income.

37.1 At the outset, the learned Counsel for the assessee submitted that the assessee has already offered such foreign exchange fluctuation as other income and addition of the same will amount to double taxation and therefore, he has no objection if the same is restored to the file of the Assessing Officer with a direction to verify the same and if it amounts to double addition, then the same has to be deleted. The learned DR has no objection for the above proposition. Therefore, the issue of foreign exchange fluctuation gain of Rs.4,22,579/- is restored to the file of the Assessing Officer with a direction to verify that the assessee has already offered the same to taxation and addition of the same will amount to double addition. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The grounds raised by the assessee on this issue are accordingly allowed for statistical purposes.

38. Ground of appeal No.2 by the Revenue relates to the exclusion of telecommunication charges from the total turnover for the purpose of computing deduction u/s 10B of the I.T. Act.

38.1 After hearing both sides, we find that the Assessing Officer while calculating the export turnover u/s 10A in the final

order has excluded the communication expenses of Rs.33,21,679/- from the export turnover but has not excluded the same from the total turnover. When the assessee approached the DRP, the DRP directed the Assessing Officer to deduct the same from the total turnover while calculating exemption u/s 10A of the I.T. Act. We find the issue stands squarely covered in favour of the assessee and against the Revenue by a plethora of decisions. We find the Hon'ble Supreme Court in the case of HCL Technologies Ltd reported in 404 ITR 719 has observed as under:

“17. The similar nature of controversy, akin this case, arose before the Karnataka High Court in CIT v. Tata Elxsi Ltd. [2012] 204 Taxman 321/17/taxman.com 100/349 ITR 98. The issue before the Karnataka High Court was whether the Tribunal was correct in holding that while computing relief under Section 10A of the IT Act, the amount of communication expenses should be excluded from the total turnover if the same are reduced from the export turnover? While giving the answer to the issue, the High Court, inter-alia, held that when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to it, the said ordinary meaning is to be in conformity with the context in which it is used. Hence, what is excluded from ‘export turnover’ must also be excluded from ‘total turnover’, since one of the components of ‘total turnover’ is export turnover. Any other interpretation would run counter to the legislative intent and would be impermissible.

18.

19. In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under Section 10A of the IT Act are allowed only in Export Turnover but not from the Total Turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the Respondent which could have never been the intention of the legislature.

20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well”.

39. Similar view has been taken by the Hon'ble Supreme Court in the case of Tesco Hindustan Services (P) Ltd reported in

(2018) 96 Taxmann.com 76. In view of the above, we hold that the DRP is fully justified in holding that the communication expenses of Rs. Rs.34,40,948/- to be deducted from both total turnover and export turnover. Accordingly, the ground raised by the Revenue on this issue is dismissed.

40. Ground of Appeal No.3 & 4 by the Revenue being general in nature are dismissed.

ITA 118/Hyd/2016 – A.Y 2011-12 (By assessee)

41. The grounds raised by the assessee read as under:

“1. Erred in law in making the reference to TPO without meeting the preconditions for such reference u/s.92CA of the I.T Act,1961 and not providing an opportunity of being heard.

F.No. 500/9/2015 - APA-11, Instruction No. 15/2015 dated 16.10.2015

2. Erred in making the TP addition where the assessee is entitled to deduction u/s 10A in India, or where the tax rate in the country of the AE's is higher than the rate of tax in India and where the establishment of tax avoidance or manipulation of prices or establishment of shifting of profits is not possible.

3. Erred in making the addition of Rs.3,35,01,076/- u/s 92CA of the| Act by charging interest @ 2.91% (i.e.LIBOR + 2%) on investment| of Rs. 115,05,06,437/- made in Associated Enterprises during the year under consideration.

4. Ought to have appreciated the fact that out of total investment of Rs. 115,05,06,437/- in AE's, an amount of Rs. 115,05,06,437/- and Rs.7,33,277/- has been invested in AE's towards the additional equity capital and equity capital respectively.

5. Erred in making the adjustment without appreciating the fact that 5. the share were already allotted to the assessee and have produced| share certificates.

6. Ought to have appreciated that for the AY 2008-09 in the appellant's own case, the Honourable DRP has deleted the addition made in respect of investment made in respect of| interest charged in investments in subsidiaries. Erred in not appreciating the fact that the transaction relating to

7. investment doesn't fall under the purview of Transfer Pricing u/s 92B, as no income is generated from the transaction of providing i loans and advances to the subsidiaries of the appellant company.

8. Erred in holding that "AE's have derived benefit of interest free loan and assessee is deprived of funds without compensation" without appreciating the fact that assessee has made equity investment in its wholly owned subsidiaries towards expansion of business out of internal funds of company.

9. The AO erred in re-categorizing the nature of asset by treating the "Investment" as "Loan" which IS not permissible u/s 145 of the Act.

10. The appellant may add, alter or modify or substitute any other point to the Grounds of appeal at any time before or at the time of hearing of the appeal".

42. Ground of appeal 1 by the assessee was not pressed for which the learned DR has no objection for the same. Accordingly ground of appeal No.1 is dismissed as not pressed.

43. Ground of appeal No.10 being general in nature is dismissed.

44. The remaining grounds relate to the order of the DRP in directing the Assessing Officer to apply the interest rate of 2.91% i.e. LIBOR+2% on investment of Rs.115,05,06,437/- in AE's which was invested for equity capital and additional equity.

44.1 After hearing both sides, we find that the above grounds are identical to Ground of Appeal 2 to 10 in ITA No.365/Hyd/2015. We have already decided the issue and the grounds raised by the assessee has been allowed. Following similar reasonings, the grounds raised by the assessee are allowed.

45. In the result, all the three appeals filed by the assessee are partly allowed and the only appeal filed by the Revenue is dismissed.

Order pronounced in the Open Court on 22nd February, 2023.

Sd/- (LALIET KUMAR) JUDICIAL MEMBER	Sd/- (R.K. PANDA) ACCOUNTANT MEMBER
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Hyderabad, dated 22nd February, 2023.

Vinodan/sps

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7	Guard File

By Order