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

**BEFORE SHRI ABY T. VARKEY, JM AND SHRI OM PRAKASH KANT, AM**

आयकर अपील सं/I.T.A.No.6824/Mum/2011
(**निर्धारणवर्ष/**Assessment Year:2007-08)

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| Assistant Commissioner of Income Tax-10(1)<br>455, Aayakar Bhavan, 4th Floor, M.K. Marg,<br>Mumbai-400 020 | **बनाम**<br>Vs. | M/s Tata Consultancy Services Ltd (successor company to M/s CMC Ltd.)<br>9th Floor, Nirmal Building<br>Nariman Point,<br>Mumbai-400 021 |
| **स्थायीलेखासं/.जी. आइ. आर. सं/.PAN/GIR No: .AAACC2030K** | | |
| अपीलार्थी/ **Appellant** | .. | प्रत्यर्थी / **Respondent** |

आयकर अपील सं/I.T.A.No.5903/Mum/2012
(**निर्धारणवर्ष/**Assessment Year:2008-09)

आयकर अपील सं/I.T.A.No.6831/Mum/2014
(**निर्धारणवर्ष/**Assessment Year:2009-10)

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| Deputy Commissioner of Income Tax, Range 10(1)<br>455, Aayakar Bhavan, 4th Floor, M.K. Marg,<br>Mumbai-400 020 | **बनाम**<br>Vs. | M/s Tata Consultancy Services Ltd (successor company to M/s CMC Ltd.)<br>9th Floor, Nirmal Building<br>Nariman Point,<br>Mumbai-400 021 |
| **स्थायीलेखासं/.जी. आइ. आर. सं/.PAN/GIR No: .AAACC2030K** | | |
| अपीलार्थी/ **Appellant** | .. | प्रत्यर्थी / **Respondent** |

आयकर अपील सं/I.T.A.No.510/Mum/2016
(**निर्धारणवर्ष/**Assessment Year:2010-11)
आयकर अपील सं/I.T.A.No.509/Mum/2016
(**निर्धारणवर्ष/**Assessment Year:2011-12)

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| Deputy Commissioner of Income Tax, 3(4)<br>29th Floor, Centre-1, World Trade Centre, Cuffe Parade<br>Mumbai-400 005 | **बनाम**<br>Vs. | M/s Tata Consultancy Services Ltd (successor company to M/s CMC Ltd.)<br>9th Floor, Nirmal Building<br>Nariman Point,<br>Mumbai-400 021 |
| **स्थायीलेखासं/.जी. आइ. आर. सं/.PAN/GIR No: .AAACC2030K** | | |
| अपीलार्थी/ **Appellant** | .. | प्रत्यर्थी / **Respondent** |

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| Revenue by: | Shri Sanjeev Kashyap |
| Respondent by: | Shri Harsh Kothari |

सुनवाईकीतारीख/Date of Hearing : 06/03/2023
घोषणाकीतारीख/Date of Pronouncement : 03/05/2023

## आदेश / O R D E R

**PER ABY T VARKEY, JM:**

These are appeals preferred by the Revenue against the order of the Ld. Commissioner of Income Tax Appeals-21, Mumbai [hereinafter referred to as the "Ld. CIT(A)"] dated 01.07.2021 for assessment year 2007-08; order of Ld. CIT(A)-21, dated 15.06.2012 for assessment year 2008-09; order of Ld. CIT(A)-21, dated 13.08.2014 for assessment year 2009-10; order of CIT(A)-22, dated 17.11.2015 for assessment year 2010-11; order of Ld. CIT(A)-22, dated 18.11.2015 for 2011-12.

**2.** The Ld. Authorised Representative (AR) for the assessee brought to our notice that assessee had filed Cross Objections/Cross Appeals in same appeals (AY 2009-10) which have been settled by way of applications made under the Direct Tax Vivad Se Vishwas Act, 2020. Therefore, all appeals

before us are that of Revenue. According to the Ld. AR, the grounds of appeals raised by the Revenue are similar/identical and are permeating in all assessment years,therefore, according to him, the appeal of AY 2007-08 may be taken as the lead year for adjudication.

**3.** Per contra, the Ld. Departmental Representative (DR) does not have any objection on this suggestion of the Ld. AR. The grounds of appeal raised by the Revenue for all the AYs 2007-08 to 2011-12 are given below :-

A) The grounds of appeal of the Revenue for AY 2007-08 are as under:

1. "On the facts and in the circumstances of the case as well as in law, the Ld. CIT(A) has erred in deleting the addition made by the Assessing Officer on account of exclusion of tax withheld amounting to Rs.1,90,52,834/- from the export turnover while computing deduction u/s 10A of the Act in respect of Hyderabad Unit without appreciating the fact that tax withheld by the foreign party was not received by the assessee in India in convertible foreign exchange.

2. On the facts and in the circumstances of the case as well as in law, the Ld. CIT(A) has erred in deleting the addition made by the Assessing Officer on account of the inclusion in the total turnover of the living expenses of Rs 16.86 crores incurred by the Assessee on its employees deputed overseas while excluding the same from export turnover while computing deduction u/s 10A of IT Act of Hyderabad Unit, without appreciating the fact living expenses were not received by the assessee in India in convertible foreign exchange.

3. On the facts and in the circumstances of the case as well as in law, the Ld. CIT(A) has erred in deleting the addition made by the Assessing Officer on account of the deduction of total income of subsequent years Le AY 2008-09 by Rs.16.53 crores consequent to the warranty income being added in the current

assessment year, without appreciating the fact that the addition made in earlier years has been upheld by the Ld. CIT(A).

4. "The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."

5. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

B) The grounds of appeal of the Revenue for AY 2008-09 are as under:

1. "On the facts and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition made by the Assessing Officer on account of exclusion of tax withheld amounting to Rs.1,56,63,265/- from the export turnover while computing deduction u/s 10A of the Act in respect of Hyderabad STP Unit without appreciating the fact that tax withheld by the foreign party was not received by the assessee in India in convertible foreign exchange"

2. On the facts and the circumstances of the case the Ld. CIT(A) has erred in deleting the addition made by the Assessing Officer on account of the inclusion of the living expenses of Rs.19,43,93,990/- incurred by the Assessee on its employees deputed overseas while excluding the same from export turnover while computing deduction u/s 10A of IT Act of Hyderabad STP Unit, without appreciating the fact living expenses were not received by the assessee in India in convertible foreign exchange.

3. On the facts and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition made by the Assessing Officer on account of the exclusion tax withheld to Rs.11,14,577/- from the export turnover while computing deduction u/s 10A in respect of Mumbai STP Unit without appreciating the fact that tax withheld by the foreign party was not received by the assessee in India in convertible foreign exchange."

4. "The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."

5. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time or at the time of hearing of appeal."

C) The grounds of appeal of the Revenue for AY 2009-10 are as under:

1 "On the facts and in the circumstances of the case the Ld. CIT(A) has erred in not appreciating the fact that the decision of the Assessing Officer to exclude withholding tax in respect of Hyderabad Unit & Kolkata Unit while computing export turnover was correct as per terms of explanation 2 to section 10A of the Act."

2. On the facts and the circumstances of the case the Ld. CIT(A) has erred in directing the Assessing Officer to consider interest expenditure of Rs.7,32,000/- only & for working out disallowance u/s 14A of the Act.

3. On the facts and in the circumstances of the case the Ld. CIT(A) has erred in directing Assessing Officer to exclude investments of Rs.8.18 Crores in the opening & closing balances of investments & in holding that the said investments are not yielding any exempt income."

4. "The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."

5. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time or at the time of hearing of appeal."

D) The grounds of appeal of the Revenue for AY 2010-11 are as under:

1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to consider the withholding of tax as a part of export turnover."

2. "The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal."

3. "The appellant prays that the order of CIT(A) on the above ground be set- aside and that of the assessing officer be restored."

E) The grounds of appeal of the Revenue for AY 2011-12 are as under:

1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to consider the withholding of tax as a part of export turnover."

2. "The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time ofhearing of appeal"

3. "The appellant prays that the order of CIT(A) on the above ground be set aside and that of the assessing officer be restored."

**4.** As discussed, we will take up the Revenue's appeal for AY 2007-08 (ITA No.6824/MUM/2011) as the lead case.

**5. Ground No.1** is against the action of the Ld.CIT(A) deleting the addition made by the Assessing Officer (AO) on account of the exclusion of tax withheld, amounting to Rs.1,90,52,834/-,from the export turnover while computing the deduction u/s 10A of the Income Tax Act, 1961 (hereinafter 'the Act') in respect of the Hyderabad Unit.

**6.** Brief facts as noted by the AO was that, the assessee is engaged in the business of designing, development & implementation of software technology and applications and providing professional/consultancy services in relation

thereto. The assessee *inter-alia* had an STP Unit at Hyderabad whose profit was eligible for exemption u/s 10A of the Act. Upon verification of the computation of amount eligible for exemption u/s 10A of the Act, the AO noted that the assessee had considered the value of export turnover at Rs.67,83,63,156/- without excluding the foreign taxes of Rs.1,90,52,834/- which was withheld and paid on such turnover in the foreign countries. According to AO, as this amount was not received in India, the same was to be excluded from the 'export turnover' in terms of Explanation 2 to Section 10A of the Act. The AO accordingly re-computed and reduced the claim of exemption made u/s 10A of the Act. Aggrieved by this action of the AO, the assessee preferred an appeal before the Ld. CIT(A) who, following the ratio laid down by the Special Bench of this Tribunal at Chennai in the case of Zylog Systems Ltd Vs ITO (128 ITD 105) was pleased to delete the aforesaid disallowance. Aggrieved by the above order of Ld. CIT(A), the Revenue is now in appeal before us.

**7.** The case of the Revenue before us is that, the foreign taxes withheld and paid in foreign countries out of the export turnover was not received by the assessee in India in convertible foreign exchange and therefore it did not qualify as '*export turnover*' as defined in Explanation 2 to Section 10A of the Act. It was therefore claimed that the action of the Ld. CIT(A) directing the AO to include the same in computation of '*export- turnover*' was not justified. The Ld. AR on the other hand submitted that the Ld. CIT(A) had rightly followed the decision of the Special bench of this Tribunal in the case of **Zylog Systems Ltd v ITO (2011) 128 ITD 105 (Chennai) (SB)** wherein in the context of computation of deduction under section 10B of the Act, whose

language is *pari-materia* to Section 10A of the Act, this Tribunal following the ratio laid down by the Hon'ble Supreme Court in the case of **JB Boda & Co. (P) Ltd v CBDT (1997) 223 ITR 271 (SC)** had held that export proceeds which were received in foreign exchange and at the same time utilized for its business abroad was to be considered as a deemed receipt in India, provided that assessee has submitted all the details of exports, receipts of foreign exchange, withholding tax by foreign parties and expenses incurred abroad out of exports and that the same had been duly intimated to the RBI as per the prescribed procedure. The Ld. AR also brought to our notice that this decision of the Tribunal [**Zylog Systems Ltd supra**] had since been upheld by the Hon'ble Madras High Court. He therefore urged that the order of the Ld. CIT(A) does not call for any interference.

**8.** Having heard both the parties, it is noted that the assessee has STP units in Mumbai, Hyderabad and Kolkata from where it renders services relating to software development / implementation to clients outside India and accordingly the assessee claims deduction u/s 10A of the Act in respect of profits and gains derived by these undertakings from export of computer software. The entitlement of the assessee to deduction under section 10A in respect of these profits is not in dispute before us. The issue in dispute before us is whether the withholding taxes which was deducted and paid out of the consideration/turnover realized in the foreign countries is to be excluded or not from the computation of '*export turnover*' for the purposes of computation of eligible exemption u/s 10A of the Act. In order to answer the same, it would be gainful to reproduce the relevant provisions of Section 10A(3) and Clause (iv) of Explanation 2 to the said Section, which reads as follows:

"(3) This section applies to the undertaking if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into India by the assessee in convertible foreign exchange within a period of six months from the end of the previous year or within such further period as the competent authority may allow in this behalf."

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Explanation 2.—For the purposes of this section,—

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

**9.** From a reading of section 10A (3) of the Act, it is noted that the deduction of profits & gains derived by the undertaking from the export of things or computer software is available from the total income, if the proceeds from sale of articles/things/computer software exported out of India is received in India in convertible foreign exchange as prescribed. Clause (iv) Explanation 2 to sec. 10A defines *export turnover* as the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into India by the assessee in convertible foreign exchange. Thus, in order to qualify for deduction u/s 10A of the Act, there should be export of computer software as well as such export sale proceeds should be received in India in convertible foreign exchange. In the present case, it is noted that the assessee has sold computer software and rendered

services in relation thereto and therefore it is entitled to receive sale proceeds for the amount billed to the foreign customers. The foreign clients withheld tax as per the law in their respective countries and remitted the *net amount* to the assessee. While computing deduction under section 10A of the Act, the assessee considers the amount actually received from the client in foreign exchange as well as the component of tax that was withheld abroad as part of the *'export turnover'*, as according to the assessee, it was deemed to have been received by it. According to the assessee, the sale proceeds which suffers withholding tax in foreign country is the tax liability of the assessee on the sale proceeds in that Country and therefore the payment made thereof in compliance with the laws of that Country by way of withholding tax should be treated as received in India for the purpose of deduction u/s 10A of the Act.

**10.** At the time of hearing, the Ld. AR gave an illustration as if in the present case, assessee exported computer software and raised its invoice to the foreign customer for say. Rs.100/-. As per the laws prevailing in the jurisdiction of the foreign client, such client could not remit the entire amount of Rs.100/- to the assessee, since as per its law, the assessee had an income-tax liability of Rs.10/- in the source country and therefore the payer had to deduct tax at source (TDS) of Rs.10/- and remit only the balance amount to the assessee i.e. Rs. 90/-. Consequently, the assessee receives a sum of Rs.90/- in India in foreign exchange after payment of tax i.e. Rs.10/- by the foreign client on their behalf. The Ld. AR thus explained that, for arriving at the export turnover for the purposes of deduction under section 10A of the Act, the entire invoice amount of Rs.100/- inclusive of the component of tax withheld should be considered even though it actually received Rs.90/-

in India only because of the tax withholding obligations imposed on the foreign client by the laws of the foreign State. According to assessee, alternatively and in the absence of tax withholding requirements, the assessee would have otherwise brought back the entire amount of Rs.100/- in India in foreign exchange and thereafter it would pay and discharge its income-tax liability of Rs.10/- in the foreign country. The Ld. AR thus explained that, if under the alternative scenario the '*export turnover*' for the purposes of Section 10A of the Act would be Rs.100/-, then the same analogy should be applied in the present scenario as well, wherein instead of first bringing back the entire consideration and then remitting the foreign taxes, the foreign customer is withholding the tax and paying it on it's [assessee's] behalf and thereafter remits the net consideration. According to Ld. AR, this two-way traffic was unnecessary in order to avail the deduction u/s 10A of the Act. It is noted that this particular proposition has been examined by the Hon'ble Supreme Court in the case of **JB Boda & Co. (P) Ltd. v. CBDT (1997) 223 ITR 271 (SC)** though in the context of Section 80-O of the Act. In the decided case, the assessee was a reinsurance broker who arranged for reinsurance of a portion of risk covered by Indian or foreign insurance companies with various re-insurance companies. Assessee deducted its share of brokerage from the reinsurance premium received in foreign currency from the Indian ceding company and paid the net amount to the foreign re-insurance companies. The CBDT did not approve the assessee's agreement for the purposes of claiming deduction under section 80-0 and observed that the income was generated in India and was not received in convertible foreign exchange inasmuch as the amount was received in Indian rupees from the Indian cedant. The Hon'ble Supreme Court, while deciding the issue in favour of the assessee, held that the

income was received in India in convertible foreign exchange and observed as under:-

> "It seems to us that a two way traffic is unnecessary. To insist on a formal remittance to the foreign reinsurers first and thereafter to receive the commission from the foreign reinsurer, will be an empty formality and a meaningless ritual on the facts of this case."

**11.** It is noted that the ratio laid down in the above judgment by the Hon'ble Apex Court (supra) was followed with approval the Special Bench of this Tribunal in the case of **Zylog Systems Ltd. v. ITO (supra).** In the decided case the assessee, was engaged in the business of software development and had claimed deduction under section 10B of the Act in respect of export of software. During the year, out of total export turnover of Rs.28.61 crore earned by the assessee, it had directly utilized and appropriated sum of Rs.15.14 crore in USA towards the foreign expenses incurred for the purpose of carrying on export activities. The AO excluded the amount of Rs. 15.14 crore which was used in USA from the computation of export turnover for the purposes of quantifying deduction u/s 10B of the Act, as the AO was the view that the impugned sum was not received or brought back in convertible foreign exchange in India. On appeal, the Ld. CIT(A) placing reliance on the judgement of the Hon'ble Supreme Court in the case of J B Boda (supra) held that the Assessing Officer was not justified in excluding the sum of Rs.15.14 crore from the export turnover while computing the deduction under section 10B of the Act. On further appeal, this Tribunal upheld the order of the Ld. CIT(A) by holding as follows:

"27. We have heard the rival submissions and considered the facts and materials on record. The Ld. CIT(A) while allowing the assessee's claim in respect of this issue, has observed as under:

'2.2 I have carefully perused the facts and examined all the submissions of the appellant on this issue. I am of the considered view that one limb of the Government cannot be allowed to defeat the operations of the other limb. Section 10B of the Act requires that foreign exchange in lieu of the exports should be brought to India within the prescribed time. However, the RBI allows the assessee to retain the said foreign exchange in foreign countries for the specific purposes and due approval is also granted for that purpose. The RBI and FEMA also monitor the utilization of such foreign exchange and the assessees are required to file periodic reports to those authorities. In such situation, the circulars of the RBI allowing its retention, utilization or capitalization abroad cannot be ignored. This becomes more important when provisions of section 10B(3) are considered which provide that the sale proceeds of the articles or computer software exported out of India are required to be brought in India in convertible foreign exchange within a period of six months from the end of the previous year or within such further time as the competent authority may allow in this behalf. Explanation (1) to section 10B prescribes the competent authority to be the RBI or any other authority as authorized under any law for the time being in force for regulating payments and dealing in foreign exchange. In the present case, the competent authority involved is RBI under whose schemes and circulars the appellant has capitalized the foreign exchange earning and invested the same in approved joint ventures in USA. Therefore, the said reinvestment of export earning is deemed to have been received in India. In other words, it is just like bringing the foreign exchange in India and thereafter remitting the same abroad for investment in the joint venture. The Hon'ble Supreme Court in the case of J.B. Boda& Co.

(supra) while deciding similar issue relating to deduction under section 80-O had held that "two way traffic of receiving foreign exchange here and sending it back is a ritual which is unnecessary". The Hon'ble Court had relied on the Board's Circular No. 731, dated 20-12-2005, 217 ITR (St.) 5 to decide this matter in favour of the assessee.

2.3 Keeping in view the discussions held above, I am of the considered view that Assessing Officer was not justified in excluding a part to the export proceeds retained by the appellant abroad in accor- dance with the RBI guidelines while computing deduction under section 10B of the Act. The said expenses have been incurred by the appellant for the on-site development of products abroad through its branch office and the utilization of the said proceeds by the appellant abroad for specific expenses related to exports have not been doubted by the Assessing Officer. The appellant is required to file periodic reports to the RBI regarding the exports and the utilization of the foreign exchange in accordance with the guidelines issued by the RBI. No specific instance have been brought on record by the Assessing Officer to prove that the said foreign exchange had not been realized by the appellant within the due date abroad from the contracting parties. Once the appellant receives the export proceeds in foreign exchange abroad within due dates and the same are utilized by the appellant for the purpose of its own business through its branch office abroad, the said sale proceeds are required to be considered as deemed receipts in India. I am of the view that the decision of Hon'ble Supreme Court in the case of J.B. Boda& Co. (supra) and the Board's Circular No. 731 is directly applicable in favour of the appellant. Although the said decision and circular is with reference to section 80-O but the ratio and the reasoning is applicable for the purpose of deciding this issue under section 10B also. In view of the above, the Assessing Officer is directed to include the export proceeds of Rs. 15,14,20,226 retained by the appellant abroad in

accordance with RBI guidelines while computing deduction under section 10B of the Act. This ground of appeal is allowed.'

As such we concur with the Ld. CIT(A) for the reasons recorded by him as above and dismiss the revenue's appeal. We are also of the opinion that the decision of the Hon'ble Supreme Court in the case of J.B. Boda& Co. (P.) Ltd. v. Central Board of Direct Taxes [1997] 223 ITR 271 1 would apply to this case also even though the present case is on section 10B of Income-tax Act.

**12.** It is noted that the above decision of the Special Bench has since been upheld by the Hon'ble Madras High Court in **TCA Nos.312 & 385 of 2011 dated 20.02.2020.** It is noted that the Hon'ble High Court followed the decision of the Hon'ble Supreme Court in the case of **CIT Vs Mphasis Ltd (113 taxmann.com 74)** which had affirmed the view taken by the Division Bench of the Karnataka High Court reported in **74 taxmann.com 274** that the expenditure incurred by the assessee in foreign currency out of the sale proceeds will be includible in the definition of *'export turnover'* for the purpose of computing deduction under Section 10B of the Act. The relevant portion of the judgment of the Hon'ble Karnataka High Court is noted to be as follows:

"18. From the aforesaid provision it is clear that the consideration in respect of computer software received in or brought into India by the assessee in convertible foreign exchange is deducted from the profits of the said business. In other words the assessee is not liable to pay any income tax on such consideration received from export of computer software. However the said export turnover does not include freight, telecommunication charges or insurance attributable to the delivery of computer software outside India or expenses if any incurred in foreign exchange in providing technical service outside India. In other words out

of the said export turnover the following amounts have to be deducted; a. freight b. telecommunication charges c. insurance attributable to the delivery of computer software outside India; d. expenses, if any, incurred in foreign exchange in providing technical services outside India;

19. If the assessee is engaged in the business of providing technical services outside India in connection with the development or production of computer software then expenses if any incurred in foreign exchange in providing technical services outside India is liable to be deducted out of export turnover. The said provision has no application in the case of export out of India of computer software or its transmission from India to a place outside India by any means. The law makes a distinction between technical services rendered in connection with export of computer software and export of technical services for the purpose of development or production of computer software outside India. If the technical services rendered by the assessee's Engineers is in connection with the export of computer software for the purpose of testing, installation and monitoring of software such a turnover do not fall within clause of subsection (1) of section 80HHE of the Act. Such a turnover falls within sub-clause (i) of subsection (1) of Section 80HHE of the Act, that is export out of India of computer software or its transmission from India to a place outside India by any means. The expenditure incurred in the form of foreign exchange for such services cannot be excluded in computing the export turnover as it forms part of the export turnover. In the instant case as is clear from the order of the Assessing Authority, he proceeds on the assumption that the assessee is a company engaged in rendering technical services outside India in connection with production of said software. Therefore the expenditure incurred in foreign exchange in providing such technical services outside India of Rs.62.7 lakhs was excluded in computing the export turnover and total turnover for arriving at deduction under Section 80HHE of the Act. The assesee is engaged in the business of export out of India of computer

software and its transmission to places from India outside India. Before a computer software is exported, the Software Engineers of the assessee would have initial discussion with regard to the requirements, specifications etc. Thereafter computer software is manufactured and then it is transmitted from India to a place outside India. The software Engineers deputed abroad who among other things have to do testing, installation and monitoring of software supplied to the client. Though the said services are technical in nature it does not fall within clause (ii) of subsection (1) of section 80HHE of the Act of providing technical services outside India in connection with the development or production of computer software. It falls under sub-clause (1) of sub-section (1) of Section 80 HHE of the Act. Therefore, the said expenditure cannot be excluded in computing export turn over. In that view of the matter we do not see any merit in this appeal. Accordingly, the said question of law is answered in favour of the assessee and against the revenue. Ordered accordingly."

**13.** In view of the above, we find that, in the facts of the present case before us, there is no dispute that the assessee had established an STP unit which was eligible for the deduction under section 10A of the Act and that the assessee had derived export turnover from foreign customers. However, the amount due against the exports was received after deducting/netting off the foreign taxes which the foreign customers had withheld and paid for and on behalf of the appellant. We find that the AO had excluded the foreign taxes discharged by the foreign customers for and on behalf of the assessee out of the export proceeds on the ground that the assessee did not first bring back this component of the export turnover in foreign exchange to India. In our considered view, it would not be just for insisting the two way traffic of the same amount first bring the entire export proceeds in foreign exchange and then again remit the

payments towards the taxes incurred in relation thereto back to the foreign country. Therefore, the payment made towards the taxes due against the export realization is deemed to be brought to India, as there is no requirement of two-way traffic of the same amount as held in the above judgments (supra). According to us therefore, the order of the Ld. CIT(A) does not warrant any interference. Accordingly this Ground is dismissed.

**14. Ground no. 2** is against the action of the Ld. CIT(A) deleting the addition made by the AO on account of the inclusion in the total turnover of the living expense of Rs.16.86 crores incurred by the assessee on its employees deputed overseas while excluding the same from export turnover while computing the deduction u/s 10A of the Act of Hyderabad unit.

**15.** It is noted that the issue involved is similar to the Ground No. 1 above. The facts as noted by the AO is that theassessee had exported computer software to its sister concern M/s CMC America and in relation thereto the assessee had deputed its employees to USA for implementation of such software at M/s CMC America. Pursuant to an agreement entered into by the assessee with M/s CMC America, the latter bore the living expenses of assessee's employees which was subsequently recovered from the assessee by deducting such expenses from the amounts payable by it to the assessee towards the export proceeds. Accordingly, the assessee actually received the *net export proceeds* viz., the amount invoiced, less the living expenses incurred by M/s CMC America on behalf of the assessee for its employees stay in America. For the purposes of computing deduction under section 10A of the Act, the assessee did not include the living expenses of Rs.16.86 crores either as a part of total turnover or as a part of export turnover. The AO however

held that as the living expenses were not received in India in foreign exchange, the same cannot be considered as a part of the '*export turnover*' in view of the definition set out in clause (iv) of Explanation 2 to Section 10A of the Act. However, the AO added the amount of living expenses to the '*total turnover*' as declared by the assessee as the term '*total turnover*' was not defined in section 10A of the Act, and therefore in his view, the *total turnover* of the unit should be the total amount of invoices raised by the unit. The AO accordingly re-computed and reduced the eligible deduction u/s 10A of the Act. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who held that the amount of living expenses was to be considered both as a part of the total turnover as well as export turnover. To arrive at this conclusion, the Ld. CIT(A) followed the decision of the Special bench of this Tribunal in Zylog's case (supra). Aggrieved the Revenue is before us.

**16.** We have heard both the parties and perused the records. It is noted that the assessee had raised invoices aggregating to Rs.87.83 crores upon M/s CMC America. In terms of the agreement, M/s CMC America had incurred and paid the living expenses of the employees deputed by the assessee towards implementation of these export orders amounting to Rs.16.86 crores which was reduced from the export dues payable to the assessee and accordingly the net sum of Rs.70.96 croreswas remitted by M/s CMC America to the assessee.When the expenditure towards living expenses of the employees was an allowable expenditure in the hands of the assessee, it would not be justified for insisting the two-way traffic of the same amount by first bringing in the entire export proceeds in foreign exchange and then again make the payment towards the living expenses of the employees. This arrangement between the

assessee and M/s CMC America for administrative convenience cannot be viewed adversely, so as to deny the corresponding benefit of deduction u/s 10A of the Act. In our considered view and for the reasons elaborately discussed in **Paras 8 to 13** earlier, the payment made for living expenses abroad from the export realization is deemed to be brought to India. The decision of the Hon'ble Supreme Court in **JB Boda (supra)** and Special Bench decision in **Zylog System (supra)** is found to be squarely applicable. Hence, we countenance the action of the Ld. CIT(A) including the 'living expenses' both in the export turnover and total turnover for the purposes of computing deduction u/s 10A of the Act. It is also noted that the living expenses recovered/adjusted by M/s CMC America out of the export proceeds was neither towards freight or telecommunication charges or insurance attributable to the delivery of computer software nor is it the AO's case that these expenses were towards provision of technical services outside India and the same cannot be excluded as per the meaning of export turnover provided under clause (iv) of Explanation 2 to Section 10A of the Act. For the aforesaid reasons therefore, we uphold the order of the Ld. CIT(A) on this issue. Therefore this ground of Revenue stands dismissed.

**17. Ground no. 3** is against the action of the Ld. CIT(A) directing the AO to delete the addition of Rs.16.53 crores made on account of warranty income in the subsequent AY 2008-09, since the addition of the impugned sum of Rs.16.53 crores had been added and taxed in the relevant AY 2007-08.

**18.** The brief facts are that, the assessee provides warranty services for the computers sold by it. Accordingly, the assessee receives from its customer not only the sale price of the computer sold but also the warranty charges for the

warranty services that will be rendered by the assessee after the sale of the computers. Up to AY1992-93, the assessee offered the entire income consisting of sale price and warranty income in the year of installation/commissioning of computer. From the assessment year 1992-93, the assessee started following the proportionate completion method for offering the warranty income earned by it to tax in future years. For instance, if the assessee raised an invoice for, say, Rs.100 (*sale price of Rs.90+ warranty income of Rs.10 for providing warranty services over 2 years*), prior to AY 1992-93, assessee offered the entire amount of Rs.100 to tax in the year of sale. However, from the AY 1992-93, the assessee offered Rs.90 being the sale price in AY 1992-93 and Rs.5/- each being proportionate warranty income over the two years i.e. AYs 1993-94 & 1994-95. According to the assessee, such change in the accounting policy& the consequent tax treatment was made so as to bring the same in line with the accounting principle of matching revenue with cost because the assessee incurred cost towards the warranty services rendered in the subsequent years when its customers raised claims for repairs, etc. during the warranty period. The AO's predecessor rejected the proportionate completion method adopted by the assessee and held that the warranty income component was also taxable in the same year,i.e. the year of sale. Consequent thereto, in each assessment year, the Revenue taxed the warranty income component on the sales made during the year as the income of the assessee for the same year and reduced the warranty income offered by the assessee in the return of income, as the same had already been added and assessed in the income of the earlier year/s. As a corollary, the AO in the relevant AY 2007-08 added and taxed the warranty income of Rs.16.53 crore (which was offered by the assessee to tax in subsequent year) as the

income of the current year and, at the same time, he reduced the warranty income of Rs.11.15 crore which was offered as income of the current year by the assessee because the same had already been assessed and added to the total income in the assessment framed for the earlier AY 2006-07. Aggrieved by this action of the AO, the assessee preferred an appeal before the Ld. CIT(A).

**19.** Before the Ld. CIT(A), the assessee raised two alternate contentions viz., (i) that the AO erred in making an addition of warranty income of Rs.16.53 crore without appreciating the change in the method followed by assessee for offering warranty income to tax, and (ii) that without prejudice, should the amount of Rs.16 53 crore be held to be assessable to tax as income of the relevant AY 2007-08, then, the same should be reduced from the income of the subsequent AY 2008-09, where the assessee had already offered the same amount to tax in its return of income for that year, as it would otherwise amount to double taxation of the same sum. In the appellate order, the Ld. CIT(A) dismissed the assessee's main contention resulting in taxation of Rs.16.53 crore in the present AY 2007-08. The Ld. CIT(A) however allowed the alternate contention and directed the AO to reduce the amount of Rs.16.53 crore offered by the assessee in the subsequent AY 2008-09, as it had already been held to be taxable in the current AY 2007-08. Aggrieved by the action of Ld. CIT(A), the Revenue is before us.

**20.** We note that there is no dispute about the fact that the warranty income of Rs.16.53 crore which has been offered to tax by the assessee in the subsequent AY 2008-09, had been brought to tax by the AO in the current AY 2007-08. This action of the AO has been upheld by the Ld. CIT(A). It is also noted

that the assessee has settled the appeal on this issue under the DTVSV, 2020 and therefore, the same has attained finality. We therefore do not find any infirmity in action of the Ld. CIT(A) accepting the assessee's plea for reducing the addition of Rs. 16.53 crore sustained in the relevant year from the income of the subsequent year as it would otherwise amount to double taxation of the same amount. It has also been brought to our notice that, the Ld. CIT(A) in his appellate order for subsequent assessment year i.e. AY 2008-09 has also directed that the warranty amount of Rs. 16.53 crore is to be reduced while computing the income of that year i.e. AY 2008-09. The Revenue has not challenged this finding of Ld. CIT(A) in appeal for AY 2008-09 and therefore this issue has attained finality in subsequent AY 2008-09. In the light of aforesaid facts, this ground raised by the Revenue has become academic and accordingly, we uphold the impugned order of the Ld. CIT(A). Therefore, Ground No. 3 of the appeal is also dismissed.

**Assessment year-2008-09 (Department's appeal-ITA No. 5903/Mum/2012)**

**21.** It is noted that all the Grounds of Appeal raised by Department in this year are similar to Ground nos. 1 and 2 raised by it in their appeal for Assessment year 2007-08. Even the orders passed by the AO and the Ld. CIT(A) are on similar lines. Therefore, the decision of ours would apply *"mutatis mutandis"* for this AY 2008-09 as well. Accordingly, all the grounds raised in this appeal are dismissed.

**Assessment year-2009-10 (Department's appeal-ITA No. 6831/Mum/2014)**

**22.** It is noted that Ground of Appeal No. 1 raised by department in this year is similar to Ground no. 1 raised in the appeal forAssessment year 2007-08. Even the orders passed by the AO and the Ld. CIT(A) are on similar lines. Therefore, the decision of ours in AY 2007-08 would apply "*mutatis mutandis*" to this AY 2009-10 as well. Accordingly, Ground No. 1 stands dismissed.

**23.** Ground no. 2 and 3 are against the action of the Ld. CIT(A) directing the AO to re-compute the disallowance u/s 14A of the Act in accordance with the directions set out in the appellate order.

**24.** Brief facts are that, during the relevant year, the assessee received dividend income of Rs. 4.70 crore and in relation thereto, the assessee had *suo- moto* disallowed a sum of Rs. 10,41,486/- under section 14A of the Act being a portion of common expenses attributable to the activity of investments. The Assessing Officer was not satisfied with the assessee's manner of disallowance under section 14A of the Act; and re-worked the disallowance under section 14A of the Act to the tune of Rs.53,99,136/-, resulting in further disallowance of Rs.43,57,650/-. Aggrieved, the assessee challenged the disallowance worked out by the AO before the Ld. CIT(A) who following the findings given in the earlier AY 2008-09, directed the AO to re-work the disallowance under section 14A of the Act on the same lines.

**25.** Being aggrieved with the decision of Ld. CIT(A), both the assessee and Revenue preferred appeal before us. In the meanwhile, the AO gave effect to the directions of the Ld. CIT(A) vide his order u/s 250/143(3) dated 8 April 2015 in which no relief was given with respect to the disallowance made

under section 14A of the Act. In other words, the disallowance of Rs. 43,57,650 made by the AO was retained upon giving effect to the directions contained in the order of the Ld. CIT(A). So as such the action of AO in the assessment order stood the same on this issue. According to the assessee, therefore, there cannot be any grievance of the Revenue.

**26.** It was pointed out by the Ld. AR that, the assessee had settled its appeal for the relevant AY 2009-10 under the Direct Tax Vivad Se Vishwas Act, 2020, in which one of the several grounds (Ground No. 5) was the disallowance of Rs. 43,57,650/- u/s 14A of the Act. The assessee has placed before us the relevant declaration filed under DTVSV Act, 2020 which has been accepted by the competent authority. And consequent thereto,the assessee is noted to have withdrawn its appeal filed before this Tribunal for AY 2009-10, copy of which has been placed before us.

**27.** In view of the above, it is noted that the disallowance of Rs.43,57,650/- made by the AO u/s 14A of the Act remained the same, even pursuant to the directions of Ld. CIT(A) in as much as the assessee did not get any relief and the assessee had also settled the dispute regarding disallowance u/s 14A of the Act under the DTVSV, 2020. In this factual background, the Ld. DR for the Revenue could not controvert that this ground of the Revenue has become infructuous. Accordingly the same is dismissed.

**Assessment year-2010-11 (Department's appeal - ITA No. 510/Mum/2016)**

**28.** It is noted that Ground No. 1 of the appeal raised by Department in this year is similar to Ground no. 1 raised in the appeal for Assessment year 2007-

08. Even the orders passed by the AO and the Ld. CIT(A) are on similar lines. Therefore, the decision of ours in AY 2007-08 would apply "*mutatis mutandis*" to this AY 2010-11 as well. Accordingly, Ground No. 1 stands dismissed.

**Assessment year-2011-12 (Department's appeal-ITA No. 509/Mum/2016)**

**28.** It is noted that Ground No. 1 of the appeal raised by Department in this year is similar to Ground no. 1 raised in the appeal for Assessment year 2007-08. Even the orders passed by the AO and the Ld. CIT(A) are on similar lines. Therefore, the decision of ours in AY 2007-08 would apply "*mutatis mutandis*" to this AY 2011-12 as well. Accordingly, Ground No. 1 stands dismissed.

Order pronounced in the open court on this 03/05/2023

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|---|---|
| Sd/- | **Sd/-** |
| (OM PRAKSH KANT) | (ABY T. VERKEY) |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

मुंबई/Mumbai
दिनांक/Dated :03/05/2023
*Mahesh R. Sonavane*

**प्रतिलिपिअग्रेषितCopy of the Order forwarded to:**

1. अपीलार्थी/The Appellant
2. प्रतिवादी /The Respondent
3. आयकरआयुक्तCIT
4. विभागीयप्रतिनिधि ,आय ,. अपी. अधि. मुबंई/DR, ITAT, Mumbai
5. गार्डफाइल/Guard file.

BY ORDER,

//True Copy//

Dy/. Asstt. Registrar
Private Secretary **ITAT,**
**Mumbai**