आयकर अपीलीय अधिकरण
मुंबई पीठ "जे",मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
सुश्री पद्मावती. एस, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
MS. PADMAVATHY.S, ACCOUNTANT MEMBER

आअसं.8870/मुं/2010 (नि.व. 2006-07)
ITA NO.8870/MUM/2010 (A.Y.2006-07)

M/s. Zensar Technologies Ltd.,
Magnet House, 2nd Floor,
N.M.Marg, Ballard Estate,
Mumbai – 400 001
PAN: AAACF- 0742- K ..... अपीलार्थी/Appellant

बनाम Vs.

DCIT-2(3),
5th Floor, Aaykar Bhavan,
M.K.Road, MUMBAI – 400 020 ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by	:	Shri Nitesh Joshi, Advocate
प्रतिवादीद्वारा/Respondent by	:	Shri Manoj Kumar- CIT DR
सुनवाई की तिथि/ Date of hearing	:	06/09/2023
घोषणा की तिथि/ Date of pronouncement	:	01/12/2023

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 08/10/2010 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short 'the Act'].

2. The assessee is engaged in the business of Development and Marketing of Computer Software. The assessee provides both Offshore (from its unit located at Pune) and Onsite services to its customers. During the relevant

previous year, the assessee had entered into international transactions with its Associated Enterprises (AEs). The Transfer Pricing Officer (TPO) vide order dated 29/10/2009 made adjustment of Rs.32,57,969/- in respect of Secondment of employees to its AEs. The Assessing Officer in draft assessment order inter-alia made additions/disallowances on account of:

(i) Employees Stock Option Plan (ESOP);

(ii) Bad Debts written off;

(iii) Club Fees;

(iv) Disallowance u/s.14A of the Act;

(v) Depreciation on software expenses;

(vi) Re-computation of deduction u/s. 10A of the Act.

Aggrieved by the draft assessment order dated 17/12/2009, the assessee filed objections before the Dispute Resolution Panel(DRP). The DRP vide directions dated 28/09/2010 partly accepted the objections and granted part relief, accordingly. The Assessing Officer thereafter passed the impugned order confirming additions /disallowances sustained by the DRP, hence, the present appeal.

3. **Employees Stock Option Plan (ESOP) Expenses**:

3.1 The assessee claimed expenditure towards ESOP Rs.21,90,000/-. The Assessing Officer observed that during the relevant period as against exercisable options of 107329 only 97521 options were exercised. The Assessing Officer accordingly disallowed proportionate expenditure Rs.2,00,166/- i.e.(9.14% of 21,90,000/-) relating to unexercised options of 9808 (107329 - 97521). The DRP upheld the findings of the Assessing Officer. The

ld.Counsel for the assessee submitted that the issue raised in appeal is similar to the one decided by the Tribunal in assessee's own case in Assessment Year 2003-04 in ITA NO.4108/Mum/2008 decided on 12/05/2023 and Assessment Year 2004-05 in ITA No.5653/Mum/2009 decided on 19/04/2023.

3.2 The ld. Departmental Representative vehemently defended the assessment order, however, he fairly stated that similar issue has been considered by the Tribunal in assessee's own case in the preceding Assessment Years.

3.3 Both sides heard. During the relevant period undisputedly 97521 number of stock options were exercised. The assessee had claimed deduction of Rs.21,90,130/- towards Employees Stock Compensation Expenses. The Assessing Officer made proportionate disallowance of the expenditure i.e. Rs.2,00,166/-. The claim of the assessee is that amount of deduction has been claimed in accordance with SEBI guidelines. The liability towards ESOP expenses is an allowable deduction, as it is an ascertained liability. We find that similar issue was considered by the Co-ordinate Bench in assessee's own case in appeal by the Department in ITA No.5653/Mum/2009 (supra). The CIT(A) in A.Y.2004-05 and preceding A.Ys had deleted the addition on similar set of facts. The Tribunal after considering the facts and placing reliance on the decision in the case of PCIT vs. New Delhi Television Ltd, 398 ITR 57 (Del) upheld the findings of the CIT(A) and dismissed the ground raised by the Revenue. No contrary material has been placed before us by the Revenue, hence, we see no reason to take a different view. Accordingly, ground No.1 of appeal by the assessee is allowed.

Disallowance u/s. 14A:

4. During the relevant period the assessee had earned dividend income of Rs.44,80,516/-. The Assessing Officer invoked the provisions of Rule-8D of the Income Tax Rules, 1962 [in short 'the Rules'] and made disallowance of Rs.12,02,158/- u/s. 14A of the Act. The DRP placing reliance on the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. vs. DCIT, 328 ITR 81 directed the Assessing Officer to re-compute disallowance u/s.14A of the Act only on the direct expenditure which has nexus with the earning of the exempt income without resorting to the provisions of Rule-8D. The Assessing Officer in compliance of the DRP directions disallowed 5% of the dividend income u/s. 14A of the Act. The ld. Counsel for the assessee submitted that disallowance of 5% u/s. 14A of the Act is very much on the higher side. He prayed for restricting disallowance to 1% of the dividend income. The ld. Counsel for the assessee in support of this submissions referred to the decision of Tribunal in the case of Tata Motors Ltd. vs. DCIT, 177 ITD 327(Mum), wherein adhoc disallowance of 5% u/s. 14A of the Act made by the Assessing Officer was restricted to 1% of the exempt income earned during the year.

4.1 Prior to application of Rule 8D (w.e.f. from Assessment Year 2008-09), disallowance u/s. 14A of the Act was made on estimations. The Assessing Officer in the instant case made adhoc disallowance of 5% of the exempt income earned. We are of considered view that disallowance of 5% u/s. 14A of the Act is on higher side keeping in view facts of the case. The rate of 1% disallowance has been approved by the Tribunal in the case of Tata Motors

Ltd. vs. DCIT(supra). Considering facts of the case case disallowance of 2% of exempt income earned would meet the ends of justice. Accordingly, we direct the Assessing Officer to restrict disallowance u/s. 14A to 2% of the exempt income earned. The ground No.2 of appeal is thus, partly allowed.

Deduction u/s. 10A of the Act:

5. The assessee has three units at Pune, eligible for the benefit of deduction u/s. 10A of the Act. The Assessing Officer restricted the assessee's claim of deduction to Rs.29,22,37,238/-. While reworking the deduction the Assessing Officer:

(i) Reduced the telecommunication expenses Rs.2,54,06,145/- from export turnover only.

(ii) Restricted the deduction u/s. 10A of the Act to the extent of available Business Income instead of allowing deduction from gross total income.

(iii) In computing deduction u/s.10A of the Act, the Assessing Officer while passing the final assessment order reduced unabsorbed depreciation of preceding Assessment Years from profits eligible for deduction, whereas no such adjustment was done while passing the draft assessment order.

(iv) Further, the Assessing Officer adjusted unabsorbed depreciation pertaining to non-10A units against business income of 10A units before granting deduction u/s. 10A of the Act. The Assessing Officer made the said adjustment while passing the final assessment order, without

realizing the fact that no such adjustment was made at the time of passing draft assessment order and the same was not a subject matter of consideration before the DRP.

5.1 The ld. Counsel for the assessee submitted that while computing deduction u/s. 10A of the Act, the Assessing Officer reduced telecommunication charges from export turnover. It was categorically pointed to the Assessing Officer that telecommunication charges were not included by the assessee in export turnover. He further pointed that notwithstanding the fact that telecommunication charges were not part of the export turnover, if the said charges were reduced from export turnover the same should have also been reduced from total turnover. To support this contention, the ld. Counsel for the assessee placed reliance on the decision in the case of HCL Technologies Ltd., 255 Taxman 313(SC).

5.2 The ld. Counsel for the assessee submitted that the Assessing Officer has erred in restricting the deduction u/s. 10A of the Act to the extent of available business income instead of allowing deduction from the gross total income. He submitted that the assessee had unabsorbed depreciation for the Assessment Years 1995-96 to 1999-2000 aggregating to Rs.8,17,44,039/-. During the aforesaid Assessment Years, the assessee did not claim benefit of deduction u/s. 10A of the Act. The unabsorbed depreciation was partly absorbed in Assessment Year 2003-04 (Rs.4,71,82,000/-) and Assessment Year 2005-06 (Rs.79,89,390/-). Thus, the balance unabsorbed depreciation brought forward to Assessment Year 2006-07 was Rs.2,65,72,649/-. The entire unabsorbed depreciation was set off during the impugned assessment year.

The ld. Counsel for the assessee submitted that unabsorbed brought forward depreciation has to be allowed after deduction u/s. 10A of the Act. The unabsorbed depreciation can be set off against any head of income. To support his argument he placed reliance on the decision by the Hon'ble Supreme Court of India in the case of CIT vs. Yokogawa India Ltd. 391 ITR 274 and the decision of Hon'ble Bombay High Court in the case of Black Veatch Consulting Pvt. Ltd., 348 ITR 72. He further pointed that similar issue has been decided by the Tribunal in assessee's own case in preceding Assessment Years i.e. ITA No.7944/Mum/2010 for Assessment Year 2001-02, ITA No.4137/Mum/2007 for Assessment Year 2002-03 and ITA No.2908/Mum/2008 Assessment Year 2003-04.

5.3 The ld. Counsel for the assessee submitted that the Assessing Officer while computing deduction u/s. 10A of the Act erred in reducing from profits eligible for deduction u/s. 10A of the Act consequential, depreciation of Rs.1,01,407/- in relation to Assessment Year 2002-03 and unabsorbed depreciation of Rs.2.65 crores for Assessment Year 2005-06 when this was not a subject matter of the draft assessment order. The Assessing Officer exceeded his jurisdiction while passing the final assessment order in making adjustment which was not subject matter before the DRP. To support his submissions the ld. Counsel for the assessee placed reliance on the following decisions:

(i) CIT vs. Sanmina SCI India Pvt. Ltd., 398 ITR 645 (Madras).

(II) PCIT VS. Woco Motherson Advanced Rubber Technologies Ltd., Tax Appeal No.129 of 2017 decided on 20/06/2017 by Hon'ble Gujarat High Court.

5.4 The ld. Counsel for the assessee further pointed that the Assessing Officer erred in adjusting unabsorbed depreciation of non-eligible undertaking against the income of undertaking eligible for deduction u/s. 10A of the Act. He asserted that the Assessing Officer exceeded his jurisdiction while passing the final assessment order for making the adjustment of unabsorbed depreciation of non-eligible units in the final assessment order, when the issue was not contended while passing draft assessment order and in the proceedings before the DRP. The ld. Counsel for the assessee pointed that the Assessing Officer has erred in not following the directions of the DRP by not setting off the total income of Rs.1,91,47,546/- against unabsorbed depreciation of Rs.2,65,72,649/- determined vide order dated 22/12/2008 passed u/s. 143(3) of the Act for Assessment Year 2005-06, in accordance with the provisions of section 32(2) of the Act.

6. The ld. Departmental Representative vehemently defended the assessment order. However, the ld. Departmental Representative submitted that if at all there is any discrepancy in computation of deduction u/s. 10A of the Act, the issue can be restored back to the file of Assessing Officer for fresh computation, in accordance with law. The ld. Departmental Representative fairly admitted that in so far as the issue relating to unabsorbed depreciation of past year to be considered while computing deduction u/s. 10A of the Act is concerned, the issue has already been considered by the Tribunal in assessee's

own case in Assessment Year 2003-04(supra) and Assessment Year 2005-06(supra).

7. Both sides heard. The assessee has raised multiple grounds assailing recomputation of deduction claimed by the assessee u/s. 10A of the Act. The challenge to reworking of deduction u/s. 10A of the Act on different facets of disallowance is made in ground No.3, 4 and 7 of appeal. Hence, these grounds of appeal are taken up together for adjudication.

7.1 In ground of appeal No.3, the assessee has assailed restricting of deduction u/s. 10A of the Act to the extent of available Business Income instead of allowing deduction from gross total income. The Hon'ble Apex Court in the case of CIT vs. Yokogawa India Ltd. (supra) has held that deduction u/s. 10A of the Act would be allowed while computing gross total income of eligible undertaking under Chapter-IV of the Act and not at the stage of computation of total income under Chapter-VI of the Act . Similar view has been expressed by the Hon'ble Jurisdictional High Court in the case of CIT vs. Black Veatch Consulting Pvt. Ltd (supra). The Hon'ble Court held that deduction u/s. 10A of the Act in respect of eligible unit has to be allowed at the stage of computation of profits and gains of business i.e. before set off of brought forward depreciation and losses. We find merit in ground No.3 of appeal.

7.2 In ground No.4 (a), (b) & (c) the assessee has assailed the findings of Assessing Officer in reducing telecommunication charges from export turnover only. The Co-ordinate Bench has considered this issue in appeal by the Revenue in assessee's own case for Assessment Year 2005-06 in ITA

No.8389/Mum/2010 decided on 13/11/2023. Following the decision rendered by Hon'ble Apex Court in the case of HCL Computer Ltd.(supra) the Tribunal held that telecommunication charges reduced from export turnover while computing deduction u/s. 10A of the Act are also to be reduced from total turnover. In view of the settled legal position, we accept the prayer made by the assessee in ground No.4(c) of appeal. Consequently, the alternate prayer made in ground No.4(a) and (b) becomes academic, hence, not deliberated upon.

7.3 In ground No.4(d) and ground No.7(c) of the appeal, the assessee has assailed the finding of Assessing Officer in recomputation of deduction u/s.10A of the Act after adjusting unabsorbed depreciation of preceding Assessment Years. The Assessing Officer while framing draft assessment order had not made any such adjustments, hence, the said issue was not subject matter of consideration before the DRP. The Assessing Officer exceeded his jurisdiction by making fresh disallowance while passing final assessment order. The fresh adjustment made by the Assessing Officer while passing the order u/s. 144C(13) of the Act does not emanate from the directions of the DRP. This fact has not been controverted by the Revenue. The Hon'ble Madras High Court in the case of CIT vs. Sanmina SCI India Pvt. Ltd.(supra) considered similar issue. The question before the Hon’ble Court was:

“1. Whether on the facts and in the circumstances of the case the tribunal was right in holding that the assessing officer has no jurisdiction to set off the losses prior to computation of deduction 10A in the order passed u/s.143(3) r/w.144C being the giving effect to order of the DRP proceedings, by relying on the provisions of section 144C (13)?

2. Whether on the facts and in the circumstances of the case the tribunal was right in

holding that the assessing officer has no jurisdiction to set off the losses prior to computation of deduction 10A in the order passed under section 143(3) r/w.144C being the giving effect to order of the DRP proceedings on the ground that Assessing officer had not proposed such set off of losses in the draft assessment order without appreciatin(hereinafter referred to as ' Act ')g that the said order had dealt with computation of deduction under section 10A and had also taken note of the losses to be set off."

The Hon'ble Court after considering the provisions of section 144C of the Act and various decisions, answered the question in favour of the assessee. The Hon'ble Court held:

"7. *We have heard the submissions of the Learned Counsel appearing on both sides. Section 144C of the Act was inserted vide Finance (2) Act 2009 with retrospective effect from 1.4.2009 to provide for a scheme of assessment in respect of matters that included Transfer Pricing adjustments. It is a self contained code and the sequence of events as contemplated thereunder are as follows;*

144C(1) - An order of draft assessment proposing a variation to the income or losses returned by an Assessee is to be forwarded to the assessee by the Assessing Officer.

144C(2) - Upon receipt thereof, an Assessee is given two options to be exercised within thirty (30) days of receipt of the draft order - either to accept the draft order and intimate the assessing officer accordingly or file objections to the proposed variations with the DRP and the Assessing Officer.

144C(3) - If option (1) is exercised by the Assessee or objections not received within the specified period, then the Assessing Officer shall complete the assessment on the basis of the draft order.

144C(4) - A time limit of one month from the end of the month in which acceptance is received or the period for filing of objection expires, is provided for passing of the order of final assessment in terms of Section 144C(3).

144C(5) - Where objections are filed by an assessee, the DRP shall issue such directions as it thinks fit enabling the Assessing Officer to complete and issue the order of final assessment.

Sub-sections (6), (7), (8) and (9) of s.144C set out the procedure to be followed by the DRP in issuance of directions.

144C(10) - This sub-section mandates that every direction issued by the DRP shall be binding on the Assessing Officer.

144C(11) ensures adherence to the principles of natural justice by the DRP, protecting the interests of the Assessee as well as Revenue prior to the issuance of directions.

144C(12) stipulates a time limit of nine (9) months from the end of the month when the draft order is forwarded to the Assessee for the issuance of directions.

144C(13) - Upon receipt of the directions of the DRP, the Assessing Officer shall pass an order of final assessment in conformity with the directions of the DRP within one month from the end of the month in which the direction is received. The provision specifies that there shall be no requirement for affording an opportunity of being heard to the Assessee prior to passing of an order of final assessment.

8. *The question posed relates essentially to whether the impugned order of Final Assessment dated 20.2.014 is an excess of jurisdiction by the Assessing Officer or within the powers granted to him in terms of s.144C of the Act. The answer reveals itself on an analysis of the Scheme itself. The tone is set in sub-section (1) thereof wherein the role of an Assessing Officer and the limits of his jurisdiction are demarcated, in that, the order of draft assessment is to set out the proposed variations and forward the same to the Assessee for response. Then again, sub-section (3) of 144C requires the Assessing Officer to complete the assessment on the basis of the draft order. In setting out the scope of the DRP to issue directions, sub-section (6) restricts the DRP to consideration of the draft order and the objections filed by the Assessee along with connected evidence, report, records, and enquiries.*

9. *It is only in sub-section (8) where the power of enhancement is granted to the DRP, that the scope of the variations as proposed under section 144C(1) stand expanded. The interests of both the Assessee and the Revenue to respond to the proposed variations has been protected and an opportunity to be heard has been specifically provided for under sub-section (11). Thus where Legislature provided for any variation in assessment over and above that proposed in the order of draft assessment, it has specifically provided for an opportunity of hearing prior thereto. Thereafter in terms of sub- section (13), the Assessing Officer is bound to conform to the directions given by the DRP and give effect to the same. Contrary to the mandate in sub-section (11), it has been thought unnecessary to grant an opportunity to the assessee prior to the passing of the final order. This leads to the inescapable conclusion that the Assessing Officer is not expected to, and shall not venture to raise any issue except the variations specified by him in 144C(1) in the order of draft assessment or any issue raised by the DRP by way of enhancement in terms of sub-section (8) of 144C. The scheme of s.144C would thus be wholly violated if the Assessing Officer takes it upon himself to include in the final order of assessment such additions/disallowance/variations that do not form part of the order of draft assessment.*

10. Further, we do not agree with the submission of the Learned Counsel for the Appellant to the effect that since the provisions of s.10A have been dealt with in the

order of assessment, albeit in another context, the Assessing Officer is at liberty to consider any and all aspects relating to s.10A including the issue of priority in the set off of losses at the stage of final assessment. The proposition sought to be put forth is too wide to be accepted and would distort the scheme of s.144 C as noted above. We now advert to the provisions of s.144B and the judgments cited at the Bar in support of their respective submissions.

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15. The question for determination in the present appeal can be decided on the language of s.144C and does not call for any comparison with s.144B. However, in so far as the comparison has been made, we proceed to address the same. While the scheme of assessment set out in s.144B and s.144C appear to be similar upto a point, there is a material and substantive difference therein that is brought about by the presence of sub-section (13) in s.144C. Both provisions remain similar upto the stage of disposal of objections by IAC/DRP, i.e., the proposal of specific variations in a draft order, grant of opportunity to the Assessee to respond, acceptance thereof or objections thereto raised by the Assessee, completion of assessment on the basis of draft order or forwarding to the IAC/DRP the draft order along with objections, consideration of the proposed variations along with the objections and connected records by the IAC/DRP and the mandate to grant an opportunity of hearing by the IAC/DRP. Thus there is a commonality of strategy that flows through s.144 B(1) to (4) and 144 C (1) to (9). The minor differences in the approach inter se are not relevant and are thus not adverted to. Sub-section (5) of Section 144 B emphasizes the binding nature of the directions issued by the IAC upon the Assessing Officer and is mirrored by the provisions of sub-section (10) of s.144C which mandates that every direction issued by the DRP by binding upon the Assessing Officer. There the comparison ends. S.144 B proceeds thereafter to deal with other incidental matters in sub-sections (6) and (7) thereof and s.144 C proceeds, in sub-section (12) to set a time limit for the issuance of the directions by the DRP.

16. Sub-section 13, the interpretation of which is a subject matter of this appeal contains a substantive mandate cast upon the assessing officer in the following terms as extracted below. It is relevant to mention, at this stage that there is no equivalent in s.144B to sub-section (13) of s.144C.

'(13) Upon receipt of the directions issued under sub- section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 (or section 153B), the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.'

17. Sub-section (13) of s.144 C is specific and mandates that the Assessing Officer shall issue the order of final assessment in conformity with the directions of the DRP without provision of any further opportunity of being heard to the assessee, within one month from the end of the month, in which the directions are received. There is thus a vital distinction in the scheme of assessment as provided under s.144 B vis-a-vis that which is set out in s.144C. While the Assessing Officer in terms of s.144 B is bound by the directions issued by the IAC, the Statute is silent as regards any fetter to his powers otherwise. Contrast this with sub-section (13) of s.144C, the elements of which have been set out in detail above. It reveals a conscious decision by Legislature to limit the independent participation of the Assessing Officer in the process of assessment only to the stage of proposal of variations in terms of s.144C(1) and not thereafter. The express language of sub-section (13) thereof would admit of no other interpretation.

18. Insistences in taxing statutes where the Assessee has been specifically denied an opportunity of hearing are few and far between. On the contrary the principles of natural justice are always enforced in favour of the Assessee and Courts have, even when a provision is silent in regard to the provision of opportunity, read the requirement into the statutory provision. The powers of an Assessing Officer under sub-section (13) of 144 C have clearly been limited to giving consequence to the directions of DRP and cannot extend any further. Any attempt by the Assessing Officer to delve beyond would result in great prejudice to an Assessee in the light of the express stipulation that no opportunity is to be provided and an interpretation to further such a conclusion would be wholly unacceptable and contrary to law.

19. Sub-section (4) of 144 B does not contain the elements of sub-section (13) of s.144C including the stipulation regarding the non-grant of opportunity to an Assessee and the powers of an Assessing Officer thereunder would consequently be wider. The decisions of the High Courts cited by the Learned Standing Counsel have necessarily to be seen in this context only, and thus are of no assistance to him. The submissions of the Learned Standing Counsel in regard to the decision of the MP High Court in Banarsidas Bhanot & Sons (supra) are also rejected in the light of the observations at page 492 of the judgment, extracted below. The Division Bench clarifies the position that the draft order has set out in detail the specific additions and disallowances that had been proposed and had merely lacked the computation of total income. The matter was remanded after noting specifically that the remand was for a reason that would not be prejudicial to the Assessee, In the present case, however, the Department seeks to bring in an entirely different disallowance in the final order of assessment which would certainly cause prejudice to the assessee and for which, admittedly, no opportunity has been granted.

'In the instant case, the draft order contained the various additions and disallowances which the ITO proposed in making the assessment under different heads and, therefore, there was full opportunity to the assessee to meet the proposed variations in the income returned by it. The draft order was wanting

merely in the computation of total income, the necessary material for which was already mentioned in the order. The defect in the draft order was, therefore, not such which could have in any way caused prejudice to the assessee.'

20. Acceptance of the proposition advanced by the Department would tantamount to giving leave to the Assessing Officer to pass more than one order of assessment in the course of a single proceeding, which is not envisaged in the scheme of the Act. Subsequent assessments either rectifying, revising or reopening the original assessment are permitted by exercising specified powers under different statutory provisions. The order of draft assessment under section 144C(1) is for all intents and purposes an order of original assessment though in draft form. In this light of the matter, the order of the Tribunal to this effect is right in law and calls for no interference.

21. The variation in the order of final assessment dated 22.2.2014 relating to the priority of set off of losses is purely misconceived and an excess of jurisdiction by the Assessing Officer in terms of s.144C(13) of the Act. The questions of law are thus answered in favour of the Assessee and against the Department. The Tax Case Appeal is dismissed."

7.4 Similar question was considered by Hon'ble Gujarat High Court in the case of PCIT vs. Woco Motherson Advanced Rubber Technologies Ltd.(supra) The Hon'ble Court held that where no addition was proposed by the Assessing Officer in draft assessment order, against which the assessee had no opportunity to file objections before the DRP, the Assessing Officer cannot make such additions/adjustments in the final assessment order passed u/s. 144C(13) of the Act. In other words, while passing final assessment order the Assessing Officer cannot go beyond what is proposed in the draft assessment order. Any addition made by Assessing Officer while passing final assessment order that does not emanate from the draft assessment order and the directions of DRP is without jurisdiction. Hence, ground No.4(d) and 7(c) of appeal are allowed.

Items assessed under the head income from other sources:

8. The ld.Counsel for the assessee submitted that during the period relevant to assessment year under appeal, the assessee has earned interest/rent income. The details are as under:

Particulars	(Rs.In lacs)
Interest on deposits with Banks	135.36
Interest on staff loans	1.91
Interest from subsidiaries	2.95
Interest on Income tax refund	23.98
Interest on margin Money	4.50
Rent from Data craft	12.05
TOTAL	**180.75**

The assessee has considered aforesaid incomes as part of Business Income. The Assessing Officer assessed the said Miscellaneous Income under the head Income from Other Soruces. The ld.Counsel for the assessee submitted that in Assessment Year 2003-04 the Tribunal has held “interest on staff loan” as part of business income. In so far as other Miscellaneous Incomes are concerned, no submissions were advanced by the ld.Counsel for the assessee. We find that in Assessment Year 2003-04 the assessee had earned interest income on bank deposits, rent and interest on vehicle loans to the staff. The assessee treated the aforesaid incomes as part of business income. The issue travelled to the Tribunal in appeal by the assessee in ITA No.2908/Mum/2008, the Tribunal vide order dated 12/05/2023 allowed interest income from staff loan as part of the business income. In the impugned Assessment Year as well vehicle loan was extended to staff as a welfare measure. Following the order of Co-ordinate Bench in assessee's own case for Assessment Year 2003-04, interest on staff loans is allowed as business income of the assessee. In so far

as the other streams of interest income/rent is concerned, the assessee's claim of business income is rejected. Accordingly, ground No.5 of the appeal is partly allowed.

Adding back of Dividend Income while computing deduction u/s. 10A of the Act:

9. The ld.Counsel for the assessee submitted that the Assessing Officer has erred in considering exempt dividend income of Rs.44,80,516/- while adding back the amount of deduction u/s. 10A of the Act claimed in the return of income by erroneously considering a figure of Rs.33,07,17,704/- as deduction claimed u/s. 10A of the Act in the return of income as against the actual claim of deduction of Rs.32,62,37,188/-. The ld.Counsel for the assessee referred to the computation of income at page-1 of the Paper Book.

9.1 From submission of the ld. Counsel for the assessee , we gather that the issue raised by the assessee in ground No.5-II appears to be that of an arithmetical error. We deem it appropriate to restore this issue back to the file of Assessing Officer for verification and make necessary corrections, if required. Thus, ground No.5-II of the appeal is allowed for statistical purpose.

Error in considering gross total income from business:

10. The ld.Counsel for the assessee submitted that the Assessing Officer has wrongly considered total gross income from business at Rs.31,88,09,887/- as against the actual of Rs.31,53,86,302/-, thereby committing casting error of Rs.34,23,585/-. The ld. Departmental Representative submitted that the issue can be restored back to Assessing Officer for verification.

10.1 Both sides heard. Purportedly, there is a mistake in considering the total income from business. We deem it appropriate to restore this issue back to the file of Assessing Officer for the limited purpose of verification. If there is any mistake in mentioning of the amount, the Assessing Officer is directed to rectify the same after verification. Consequently, ground No.6 of appeal is allowed for statistical purpose.

Non-grant of TDS Credit:

11. The Assessing Officer is directed to verify from documents on record the tax deducted at soruce on behalf of the assessee. If credit of TDS is not allowed or short credit of TDS is granted, the assessee be allowed benefit of entire TDS, in accordance with law. Thus, ground No.8 of appeal is allowed for statistical purpose.

Grant of Interest u/s. 244A of the Act:
Charging of interest U/s. 234D of the Act :

12. Grant of interest u/s.244A of the Act and charging of interest u/s. 234D of the Act is consequential and mandatory. Hence, we deem it appropriate to restore ground No.9 and 10 of appeal to the Assessing Officer for re-examination and direct the Assessing Officer to allow interest u/s.244A, if the assessee is found to be eligible and charge interest u/s. 234D of the Act, in accordance with law. Consequently, ground No.9 and 10 are allowed for statistical purpose.

Secondment of Employees:

13. In ground No.11 of the appeal the assessee has assailed the findings of Assessing Officer in making addition of Rs.32,57,969/- based on the adjustment

made by TPO in order dated 29/10/2009 passed u/s. 92CA(3) of the Act. The ld.Counsel for the assessee submitted that the TPO while benchmarking the transaction has applied the same rate as that of third party placement agency. Since there are additional services/benefits provided by the third party agency while providing recruitment services, the rate charged by third party cannot be applied in the present case. In the present case, there is deployment of employees for providing software services onsite. He further pointed that the TPO while making the adjustment on provision for services, the TPO has considered the U.S salary cost of seconded employees, whereas it should have been on the basis of Indian salary. He submitted that this issue has been considered by the Tribunal in assessee's own case for Assessment Year 2004-05 in ITA No.5653/Mum/2009 decided on 19/04/2023.

14. We have heard the submissions made by ld. Counsel for the assessee. We find that the Tribunal in Assessment Year 2004-05 approved the approach of the CIT(A) in considering Indian salary of the employees. In the impugned assessment year the TPO made adjustment of Rs.32,57,969/- based on U.S salary cost. Both sides are unanimous in stating that the facts and basis of adjustment in the Assessment Year under appeal is similar to Assessment Year 2004-05 and Assessment Year 2005-06. The Co-ordinate Bench in ITA No.8389/Mum/2010 for Assessment Year 2005-06 vide order dated 13/11/2023 decided the issue as under:

> *" 21. In ground No.6 of appeal, the Revenue has assailed restricting disallowance with respect to secondment of employees to AEs. The TPO while considering the issue had made adjustment of Rs.63,85,284/-. In the first appellate proceedings the CIT(A) observed that the facts in impugned Assessment Year are similar to the facts in AY 2004-05. The CIT(A) taking consistent view held that the assessee should be remunerated on the basis of Indian Salary and not on the basis of US salary. Thus, the CIT(A) restricted the adjustment to Rs.11,80,385/-. We find that the Co-ordinate*

Bench in assessee's own case in preceding year i.e. Assessment Year 2004-05 in ITA No.5653/Mum/2009(supra) approved the approach of the CIT(A) in considering Indian salary of employees. Taking into consideration entire facts, we see no reason to interfere with the findings of CIT(A) on this issue, hence, ground No.6 in the appeal by the Revenue is dismissed."

In light of parity of facts and admitted position, we see no reason to take a different view in the impugned Assessment Year. The Assessing Officer is directed to rework adjustment in similar manner. The ground No.11 of appeal is allowed for statistical purpose.

15**.** In the result**,** appeal of the assessee is partly allowed in the terms aforesaid.

Order pronounced in the open court on Friday the 01st day of December, 2023.

Sd/-	Sd/-
(PADMAVATHY. S)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Dated: 01/12/2023
Vm, Sr. PS(O/S)

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्तCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5.. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)
ITAT, Mumbai