आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL ,'C' BENCH, CHENNAI

श्री एबी टी वर्की, न्यायिक सदस्य एवं श्री एस. आर.रघुनाथा, लेखा सदस्य के समक्ष

BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER AND SHRI S. R. RAGHUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.1193, 1194, 1205, 1206 & 1207/CHNY/2024**

(निर्धारण वर्ष / Assessment Years: 2010-11, 2011-12, 2012-13, 2013-14 & 2014-15)

Cognizant Technology Solutions India Pvt. Ltd., No.5/535, Okkiam Thoraipakkam, Old Mahabalipuram Road, Chennai – 600 096. **PAN : AAACD 3312M**	Vs	**The Asst. Commissioner of Income Tax,** Central Circle 1(1), Chennai.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

&

आयकर अपील सं./**ITA Nos.1262, 1263, 1264, 1265 & 1266/CHNY/2024**

(निर्धारण वर्ष / Assessment Years: 2010-11, 2011-12, 2012-13, 2013-14 & 2014-15)

The Asst. Commissioner of Income Tax, Central Circle 1(1), Chennai.	Vs	**Cognizant Technology Solutions India Pvt. Ltd.,** No.5/535, Okkiam Thoraipakkam, Old Mahabalipuram Road, Chennai – 600 096. **PAN : AAACD 3312M**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से/Assessee by : Shri N.V. Balaji, Advocate

राजस्व की ओर से /Revenue by : Shri R. Clement Ramesh Kumar, CIT & Ms. Anitha, Addl. CIT

सुनवाई की तारीख/Date of Hearing : 11.03.2025

घोषणा की तारीख/Date of Pronouncement : 16.05.2025

आदेश / O R D E R

PER S.R. RAGHUNATHA, AM:

These are cross appeals preferred by the assessee as well as the Revenue against the respective assessment year orders of the Ld. Commissioner of Income-tax (Appeals) – 18, Chennai (hereinafter referred to as 'Ld.CIT(A)'), dated 29.02.2024 for the assessment years 2010-11, 2011-12, 2012-13, 2013-14 & 2014-15 respectively.

2. All the issues in the appeal are arising in the appeal for A.Y.2011-12 and the assessee and department for A.Y.2011-12 is taken as the lead case for all the aforesaid assessment years and the decision of which will be followed mutatis mutandis for the issues permeating in the assessment years shown above.

3. Ground of appeal raised by the Assessee in ITA No.1194/Chny/2024 for AY 2011-12 are as under:

> *"The grounds of appeal listed below are without prejudice to each other.*
> ***Issue No. 1 – Disallowance under section 14A of the Income-tax Act, 1961 ('the Act') computed as per Rule 8D of the Income-tax Rules, 1962 ('the Rules')***
> *1. The learned CIT(A) erred in facts and law in upholding the applicability of Section 14A of the Act read with Rule 8D of the Rules thereby confirming the disallowance made by the learned Assessing Officer ('AO') under the normal provisions of the Act.*

2. The learned CIT(A) has erred in not appreciating the fact that the Appellant has not earned any exempt income during the subject year and hence, the provisions of Section 14A read with Rule 8D of the Rules shall not be invoked.
3. Without prejudice to the above, the learned CIT(A) has erred in not appreciating the fact that the learned AO has invoked the provisions of Section 14A read with Rule 8D of the Rules without providing a finding on incurrence of expenditure in relation to earning exempt income.
4. Without prejudice to the fact that the provisions of section 14A of the Act cannot be invoked, the learned CIT(A) has erred in not appreciating the fact that the investments made in debt-oriented mutual funds shall not be considered for the purpose of computing disallowance under section 14A of the Act.
5. Without prejudice to the above, the learned CIT(A) has erred in facts and law in not appreciating that the provisions of section 14A of the Act read with Rule 8D(ii) of the Rules cannot be applied given the Appellant's own surplus funds exceeds the investments that potentially yield any exempt income.
6. Without prejudice to the above, the learned CIT(A) has erred in treating the alternative plea of the Appellant that tax holiday under section 10A/ 10AA of the Act shall be granted to the Appellant on enhanced income arising out of disallowance made under section 14A of the Act as illogical without providing any cogent reasons for the same.

Issue No. 2 – Disallowance under section 40(a)(i) of the Act
The ld. CIT(A) has erred in law and facts, in upholding the disallowance made by the learned AO for the following payments invoking provision of section 40(a)(i) of the Act:
a) Payments towards Software Annual Maintenance Charges ('Software AMC')
7. The learned CIT(A) has erred in law and facts by not appreciating the fact that the software AMC payments are covered under the exclusion provided in sub-clause (b) to clause (vii) of section 9(1) of the Act.
8. Without prejudice to the above, the learned CIT(A) erred in upholding the disallowance made by the learned AO for the aforesaid payments under Section 40(a)(i) of the Act which have already been paid within the previous year and were not outstanding as at the year end.
9. The learned CIT(A) has erred in law and facts by holding that the payments towards software AMC is taxable as Fees for Technical Services ('FTS') or

Fees for Included Services ('FIS') under the relevant Double Taxation Avoidance Agreement ('DTAA').

10. The learned CIT(A) has erred in not considering the submissions of the Appellant that the said issue is decided by the Hon'ble ITAT in the Appellant's favor in an earlier AY in ITA No. 1202/Mds/2013.

11. Without prejudice to the above, the learned CIT(A) has failed to consider the fact that disallowance under section 40(a)(i) results in enhancement of business income and the same shall be eligible for enhanced deduction under section 10A/ 10AA of the Act.

b) Payments towards license to use software – ('Software License')

12. The learned CIT(A) has erred in law and facts by not appreciating the fact that the software license payments are covered under the exclusion provided in sub-clause (b) to clause (vi) of section 9(1) of the Act.

13. Without prejudice to the above, the learned CIT(A) erred upholding the disallowance made up the learned AO for the aforesaid payments under Section 40(a)(i) of the Act which have already been paid within the previous year and were not outstanding as at the year end.

14. Without prejudice to the above grounds of appeal, even if the payments made are to be considered as payments for purchase of 'software', the same cannot be treated as 'royalty' under the relevant DTAA's, as the Appellant only acquires a right to use of the 'copyrighted article' and not rights over the 'copyright' itself.

15. The learned CIT(A) failed to appreciate the fact that the above issue is covered in favour of the Appellant by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. Vs. CIT 432 ITR 471.

16. The learned CIT(A) has erred in not considering the submissions of the Appellant that the said issue is decided by this Hon'ble ITAT in the Appellant's favor in an earlier AY in ITA No.1798/Mds/2014.

17. Without prejudice to the above, the learned CIT(A) has failed to consider the fact that disallowance under section 40(a)(i) results in enhancement of business income and the same shall be eligible for enhanced deduction under section 10A/ 10AA of the Act.

Others

18. The learned AO has erred in law and facts, by initiating penalty proceedings under section 274 read with section 271(1)(c) of the Act, without appreciating the contentions placed in the above grounds.

The Appellant craves leave to add, supplement, amend, delete or otherwise modify any of the grounds stated hereinabove at the time of hearing."

4. Ground No. 1 is general in nature and hence, doesn't require any adjudication, therefore, we move to Ground No. 2, which is the Issue 1: i.e Disallowance under section 14A of the Income-tax Act, 1961 ('the Act'):

Assessment Year	**Appeal by**	**Ground No.**
AY 2010-11	Assessee (ITA No. 1193/CHNY/2024)	2 to 5
AY 2011-12	Assessee (ITA No. 1194/Chny/2024)	2 to 6
AY 2012-13	Assessee (ITA No. 1205/CHNY/2024)	2 to 5
AY 2013-14	Assessee (ITA No. 1206/CHNY/2024)	2 to 4
AY 2014-15	Assessee (ITA No. 1207/CHNY/2024)	2 to 4

4.1 The facts relating to the issue of disallowance under section 14A of the Act is common for all the AYs being AY 2011-12 to AY 2014-15 except AY 2010-11.

4.2 **Facts for AY 2010-11**: During the AY 2010-11, the assessee has earned exempt income of Rs.11,83,308/- from investment in mutual funds which is exempt as per section 10(35) of the Act. The AO has computed expenditure in relation to earning exempt income by applying Rule 8D and disallowed the same under section 14A of the Act.

4.3 The Ld. CIT(A) noted that the assessee has claimed exempt income being dividend income u/s.10(38) of the Act. The Ld. CIT(A)

upheld the action of the A.O. vide Para no. 3.4.5 in it's order. The relevant Para no. 3.4.5 is reproduced below.

> *"……..*
> *3.4.5 Although the Appellant claims to have not incurred any expenditure in respect of exempt income, the Appellant has maintained common set of books of account for taxable and exempt income. Hence, the possibility of incurring common expenditure for both segments cannot be ruled out and therefore, there is no error in the AO's act of invoking rule 8D to compute the disallowance u/s 14A for the purpose of earning dividend and therefore the grounds of appeal nos 8 and 9 stand dismissed.*
> *……..."*

4.4 Aggrieved by the aforesaid action of Ld. CIT(A), the Assessee is in appeal before us. For AY 2010-11, the Assessee submitted various arguments before us which we have summarised as follows:

- The provisions of section 14A of the Act cannot be applied as the assessee has not incurred any expenditure in earning exempt income.
- As per provisions of sub-section (2) and (3) to section 14A of the Act, the AO does not have power to compute disallowance under section 14A as per provisions of Rule 8D, even for A.Ys. 2008-09 and onwards, if the AO does not express dissatisfaction.
- For the purpose of computation of disallowance u/s.14A of the Act read with rule 8D, the investments which have not

yielded any exempt income during the subject year shall not be considered.

- Without prejudice to the above, for the purpose of computation of disallowance u/s.14A of the Act read with rule 8D, the investment in debt-oriented mutual funds shall not be considered.
- The investments made by the assessee in the subsidiary companies shall not attract disallowance u/s.14A of the Act as the same have been made for strategic reasons and not for the purpose of earning exempt income.
- No disallowance can be made u/s 14A of the Act in respect of investments from which no exempt income has been earned during the year.
- Without prejudice to the above, disallowance u/s.14A r.w.r 8D shall be restricted to the exempt income of Rs.11,83,808/-.

5. We have heard both the parties and perused the records. We note that the issue raised by the Assessee is no longer res integra; and in this regard, it is noted that the disallowance u/s.14A of the Act should be restricted only on the investments which give rise to exempt income i.e., dividend income is covered by Hon'ble Madras

High Court judgements and this Tribunal is also consistently taking view that disallowance u/s.14A of the Act should be restricted only on exempt income earned.

5.1 To this preposition, the revenue opposed but could not make any argument or controvert factually or legally. We note that this issue is covered by the decision of Envestor Ventures Ltd. [2021] 123 taxmann.com 378 (Madras HC). The relevant extract of Hon'ble Madras High Court order is as follows:

> *"4. The substantial questions of law raised for consideration were answered against the Revenue in the case of Marg Ltd. v. CIT [2020] 120 taxmann.com 84/275 Taxman 502 (Mad.). The operative portion of the judgment reads as follows:*
>
> *"9. A Co-ordinate Bench of this Court, in the case of CIT v. Tidel Park Ltd. [TCA Nos.732 & 733 of 2018 decided on 7-7-2020], has relied upon the decisions of the Delhi High Court in the case of Joint Investments (P.) Ltd. v. CIT [2015] 59 taxmann.com 295/233 Taxman 117/372 ITR 694 (Delhi) and CIT v. Taikisha Engg. India Ltd. [2015] 54 taxmann.com 109/229 Taxman 143/370 ITR 338 (Delhi) and Bombay High Court decision in the case of Godrej & Boyce Mfg. Co Ltd. v. Dy. CIT [2010] 194 Taxman 203/328 ITR 81 and categorically held that the Assessing Officer was not justified in making excessive disallowance beyond the dividend income declared by the Assessee.*
>
> *10. A Division Bench of Karnataka High Court, to which one of us (Vineet Kothari, J) was a party, held in the case of Pragathi Krishna Gramin Bank v. Jt CIT [2018] 95 taxmann.com 41 256 Taxman 349 (Kar.) that disallowance under section 14A beyond and in excess of actual exempted income is per se asburd and hypothetical and it cannot be so made.*
>
> *……..*

11. Affirming the view of the Punjab and Haryana High Court in the case of Pr. CIT v. State Bank of Patiala [2017] 88 taxmann.com 667, the Hon'ble Supreme Court in the case of Maxopp Investment Ltd.(supra) held in paragraphs 40 and 41 as under:

"40 We note from the facts in the State Bank of Patiala cases that the AO, while passing the assessment order, had already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in rule 8D of the Rules and holding that section 14A of the Act would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT(A) disallowed the entire deduction of expenditure. That view of the CIT(A) was clearly untenable and rightly set aside by the ITAT. Therefore, on facts, the Punjab and Haryana High Court has arrived at a correct conclusion by affirming the view of the ITAT, though we are not subscribing to the theory of dominant intention applied by the High Court. It is to be kept in mind that in those cases where shares are held as 'stock-in-trade', it becomes a business activity of the assessee to deal in those shares as a business proposition. Whether dividend is earned or not becomes immaterial. In fact, it would be a quirk of fate that when the investee company declared dividend, those shares are held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits. The situation here is, therefore, different from the case like Maxopp Investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company. In that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee alone. Therefore, even at the time of investing into those shares, the assessee knows that it may generate dividend income as well and as and when such dividend income is generated that would be earned by the assessee. In contrast, where the shares are held as stock-in-trade, this may not be necessarily a situation. The main purpose is to liquidate those shares whenever the share price goes up in order to earn profits. In the result, the appeals filed by the Revenue challenging the judgment of the Punjab and Haryana High Court in State Bank of Patiala also fail, though law in this respect has been clarified hereinabove.

41. Having regard to the language of section 14A(2) of the Act, read with rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under section 14A was not

correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO. (Emphasis Supplied)"

12. Another Bench of Madras High Court in the case of CIT v. Chettinad Logistics (P.) Ltd. [2017] 80 taxmann.com 221 248 Taxman 55 wherein the Division Bench of the Court followed another Division Bench judgment in the case of Redington (India) Ltd. v. Addl. CIT [2017] 77 taxmann.com 257 (Mad.) and held that the view of the Central Board of Direct Taxes in Circular No. 5 of 2014 dated 11-2-2014, which has been relied by the Tribunal in the impugned order cannot be upheld and the disallowance under section 14A of the Act cannot go beyond the extent of exempted income itself. ……..
……..

9. We are unable to subscribe to the aforesaid view. The provisions of section 14A were inserted as a response to the judgments of the Supreme Court in Commissioner of Income-tax v. Maharashtra Sugar Mills Ltd. [1971] 82 ITR 452 and Rajasthan State Ware Housing Corporation v. Commissioner of Income-tax [2000] 242 ITR 450/109 taxmann.com 145 (SC) in terms of which, expenditure incurred by an assessee carrying on a composite business giving rise to both taxable as well as non-taxable income, was allowable in entirety without apportionment. It was thus that s.14A was inserted providing that no deduction shall be allowable in respect of expenditure incurred in relation to the earning of income exempt from taxation. As observed by the Supreme Court in the judgment in the case of Commissioner of Income-tax v. Walfort Share and Stock Brokers (P.) Ltd. [2010] 326 ITR 1' …. The mandate of s.14A is clear. It desires to curb the practice to claim deduction of expenses incurred in relation to exempt income against taxable income and at the same time avail of the tax incentive by way of an exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income.'

10. The provision this is clearly relatable to the earning of actual income and not notional or anticipated income. The submission of the Department to the effect that s.14A would be attracted even to exempt income 'includable' in total income would entail the assessment of notional income,

assumed to be exempt in the future, in the present assessment year. The computation of total income in terms of s.5 of the Act is on real income and there is no sanction in law for the assessment of admittedly notional income, particularly in the context of effecting a disallowance in connection therewith.

11. The computation of disallowance in terms of rule 8D is by way of a determination involving direct as well as indirect attribution. Thus, accepting the submission of the Revenue would result in the imposition of an artificial method of computation on notional and assumed income. We believe this would be carrying the artifice too far. (Emphasis is Ours)"

……..

22. We, therefore, dispose of the present appeal by answering question of law in favour of the Assessee and against the Revenue and by holding that the disallowance under rule 8D of the IT Rules read with Section 14A of the Act can never exceed the exempted income earned by the Assessee during the particular assessment year and further, without recording the satisfaction by the Assessing Authority that the apportionment of such disallowable expenditure made by the Assessee with respect to the exempted income is not acceptable for reasons to be assigned the Assessing Authority, he cannot resort to the computation method under Rule 8D of the Income-tax Rules, 1962.

23. The appeal is accordingly disposed of. No costs."

5. Thus, by following the above decision, the present Tax Case Appeal is dismissed and the substantial questions of law are answered against the Revenue. No costs."

5.2 In the present facts and circumstances of the case and by respectfully following the judicial precedent (supra), we are of the view that the action of the ld.CIT(A) cannot be countenanced and hence we direct the AO to restrict the disallowance u/s.14A of the Act to the exempt income earned for A.Y.2010-11. The Assessee

also submitted that the regarding the issue of enhancement of the exemption u/s.10A, 10AA of the Act, this issue was not discussed by the Ld. CIT(A) in their orders.

5.3 For AY 2010-11 the Assessee submitted that the AO provided the relief under Section 10A / 10AA of the Act on the enhanced profits arising due to disallowance under Section 14A of the Act. Now, given that the disallowance u/s.14A of the Act is restricted to exempt income earned for AY 2010-11, we direct the AO to recompute the consequential relief u/s.10A/ 10AA of the Act on the enhanced profits arising due to disallowance under Section 14A of the Act. Accordingly, the Grounds of appeal are partly allowed for AY 2010-11.

6. Facts for AY 2011-12 to AY 2014-15: During the A.Y. 2011-12 to A.Y.2014-15, the assessee has not earned any income from its investments which are exempt under the provisions of the Act. The AO has computed expenditure in relation to earning exempt income by applying Rule 8D and disallowed the same under section 14A of the Act and Ld. CIT(A) upheld the Order of the AO.

6.1 Aggrieved by the aforesaid action of Ld. CIT(A), the Assessee is in appeal before us. For AY 2011-12 to AY 2014-15, the Assessee submitted that no disallowance under section 14A of the Act read with Rule 8D shall be made where there is no exempt income earned during the year.

7. We have heard both the parties and perused the records. We note that it is now a settled principle that the disallowance u/s.14A of the Act shall not be made where there is no exempt income earned during the year and this principle has already been decided in the case of CIT vs Chettinad Logistics (P.) Ltd 95 taxmann.com 250 (SC) in favour of the Assessee. Also, this Tribunal has been consistently of the above view and therefore, we hold the issue in favour of the assessee. Accordingly, the Grounds of appeal are partly allowed for A.Y.2011-12 to A.Y.2014-15 and on the very same reasoning, similar grounds raised by the Assessee in other appeals as noted in the chart supra stands partly allowed.

5.1 Since, the Grounds relating to disallowance u/s.14A of the Act for AY 2011-12 to AY 2014-15 is held in favour of the Assessee, the consequential grounds relating to consequential relief under Section 10A/ 10AA of the Act is infructuous and accordingly, dismissed.

8. Issue 2: Disallowance under section 40(a)(ia) of the Act:

The next issue in this appeal of assessee is as regards to the order of Ld.CIT(A) in confirming the action of the AO in making disallowance u/s.40(a)(ia) of the Act on the payment towards Software Annual Maintenance Charges ('Software AMC') and payments towards license to use software ('Software License') for AY 2010-11 to AY 2012-13.

(a) Payments towards Software Annual Maintenance Charges ('Software AMC')

Assessment Year	Appeal by	Ground No.
AY 2010-11	Assessee (ITA No. 1193/CHNY/2024)	6 to 11
AY 2011-12	Assessee (ITA No. 1194/Chny/2024)	7 to 11
AY 2012-13	Assessee (ITA No. 1205/CHNY/2024)	6 to 10

(b) Payments towards license to use software ('Software License')

Assessment Year	Appeal by	Ground No.
AY 2010-11	Assessee (ITA No. 1193/CHNY/2024)	12 to 17
AY 2011-12	Assessee (ITA No. 1194/Chny/2024)	12 to 17
AY 2012-13	Assessee (ITA No. 1205/CHNY/2024)	11 to 16

8.1 During the AY 2010-11, the assessee had made payments to non-resident vendors towards procurement of license to use software in its business ('Software License') and software Annual

Maintenance Charges ('AMC') for regular upgrades of the latest version of the software, corrective patches, resolution of issues in the software over online/ remote mode. The assessee has not deducted tax at source on the aforesaid payments made to non-resident vendors on the premise that the same is not taxable in India under the provisions of the Act.

8.2 The AO had concluded that taxes are required to be withheld on payments made towards Software AMC and Software License based on provisions of the Act and had disallowed the payments u/s.40(a)(ia) of the Act.

Payments towards Software Annual Maintenance Charges ('Software AMC')

8.3 On appeal, the Ld. CIT(A) upheld the action of the AO vide Para no. 3.5.6 & 3.5.7 in it's order. The relevant Para no. 3.5.6 & 3.5.7 is reproduced below:-

> *".....3.5.6 Considering the above, I hold that the payments for AMC are in the nature of fees for technical services as defined in the Act u/s.9(1)(vii) and also as per Article of DTAA. Thus, the company was liable to deduct tax u/s.195 and it failed to do so. The submission made by the appellant with respect to payment towards AMC charges fails and hence, Ground Nos.5 to of appeal are dismissed.*

3.5.7 Accordingly, as discussed supra and as analysed in above referred CIT(A) order of assessee on the issue of AMC charges, the TDS provisions u/s.195 is attracted and the above payments made by the assessee company outside India without deduction of TDS u/s 195 of the Income Tax Act to the tune of Rs.1,56,23,813/- stands disallowed u/s.40a(ia) of the Income tax Act, 1961 and is sustained. The alternate plea raised by the appellant is not entertained as disallowance u/s.40a(ia) is for a specific violation as prescribed in the Act and the disallowance does not serve its purpose if the tax holiday benefit is given to the same….."

8.4 The assessee had raised various grounds on the issue before us for A.Y.2010-11 to A.Y.2012-13 and had also brought to our notice that for A.Y. 2010-11, there was mistake on the amount of adjustment upheld and also the country of residence of vendor to whom the payment was made which was subsequently rectified by Ld.CIT(A) vide the Corrigendum issued on 24.04.2024 bearing DIN No.ITBA/COM/F/17/2024-25/1064323210(1).

8.5 Given the above, we are not dealing with the Ground on error in the ld.CIT(A) Order and accordingly, proceed to decide the issue on other grounds raised before us.

8.6 Before us, the Ld. AR for the assessee submitted detailed arguments on why the disallowance u/s.40(a)(i) should not be upheld by this Tribunal. The summary of the arguments of Ld.AR before us is as below:

- It is trite law that in the absence of tax liability of the recipient of income under the Act, no liability for withholding of tax can be imposed on the deductor Company. Reference in this regard was made to Apex Court judgement in the case of GE India Technology Centre Private Ltd. vs. CIT(A) [2010] 327 ITR 456 (SC)

- The services rendered by the non-resident vendors would fall within the purview of the exclusionary clause provided in section 9(1)(vii)(b) of the Act, as the payments made by the assessee (a resident) are utilized to earn income from a source outside India as the Company is an exporter of computer software and related services. Reliance in this regard was placed on various decisions as listed below:
    - *CIT Vs Aktiengesellschaft Kuhnle Kopp and Kausch W. Germany by BHEL 262 ITR 513 (Mad HC)* reference in this regard is made to Page No. 220 (Para No. 8) of the case law paper book
    - *Deputy/Joint Commissioner of Income-tax (OSD) vs Aspire Systems India (P.) Ltd [2023] 157 taxmann.com*

699 (Chennai ITAT) reference in this regard is made to Page No. 381 (Para No. 12) of the case law paper book

- *Titan Industries v ITO (11 SOT 206 Bang.)*
- *Lufthansa Cargo India (P) Ltd v DCIT (91 ITD 133 Del.)*
- *ITO v Bajaj Hindustan Ltd (47 SOT 74 Mum. (URO))*
- *Ajappa Integrated Project Management Consultants P. Ltd vs. ACIT (33 CCH 207 Chen)*
- *Mahindra Holidays & Resorts (97 DTR (Chennai Trib) 393)*
- *Aqua Omega Services P Ltd v ACIT (23 ITR Trib 191 Chen)*

- In respect of those payments made to residents of Singapore, USA and UK, the tax treaties of these countries contain *'make available'* clause. Since software AMC does not make available any technical knowledge, skill, know-how, the same is not taxable as per respective DTAAs:
  - *CIT vs DeBeers India Minerals Private Limited (2012) 346 ITR 467 (Kar HC)* reference in this regard is made to Page No. 239 (Para No. 22) of the case law paper book
  - *Raymond Limited vs. DCIT [86 ITD 791 (Mum. ITAT)]*
  - *CESC Ltd vs. DCIT [87 ITD 653 (Cal. ITAT)]*
  - *NQA Quality Systems Register Ltd vs. DCIT 2 SOT 249 (Del. ITAT)*

- *Ernst & Young Private Limited In Re. 323 ITR 184 (AAR)*
- *Sundaram Asset Management Company Ltd Vs DCIT, LTU [2019] 111 taxmann.com 11 (Chennai ITAT)* reference in this regard is made to Page No. 396 (Para No. 9) of the case law paper book.

- Routine repair/ maintenance services and remote IT support services do not constitute 'technical services':
  - *Lufthansa Cargo India (P) Ltd. vs. DCIT: 91 ITD 133 (Del ITAT) reference in this regard is made to Page No. 419 (Para No. 35) of the case law paper book*
  - *M/s Bosch Ltd vs. ITO : 141 ITD 38 (Bang ITAT) reference in this regard is made to Page No. 432 (Para No. 17) of the case law paper book*
  - *ADIT vs. BHEL-GE-Gas Turbine Servicing (P) Ltd.: 151 TTJ 126 (Hyd. ITAT)*
  - *Bharti AXA General Insurance Co. Ltd: 326 ITR 477 (AAR)*

8.7 Further, the Ld. AR also argued that the software AMC does not make available any technical knowledge, skill, know-how and the same is not taxable as per respective DTAAs is also covered by the decision of this Hon'ble Tribunal in assessee's own case in favour of

the Company for AY 2008-09 by the Chennai ITAT in ITA No.1202/Mds/2013.

8.8 Further, it was also brought to our notice that aforesaid issue for A.Y.2009-10 was also held in favour of the assessee by the Commissioner of Income-Tax (Appeals) ['CIT(A)'] Large Taxpayer Unit ('LTU') in ITA No.51/ 12-13/ LTU(A) and no further appeal has been filed by the department before the Tribunal.

9. The revenue representative by the ld. DR relied on the order of the Ld.CIT(A) for their arguments.

10. We have heard both the parties and perused the records. From the details submitted by the assessee, we understand that the payments made to the non-resident vendors in relation to Software AMC for years under appeal (i.e. AY 2010-11 to AY 2012-13) were made to vendors who are resident of Singapore, USA, Netherlands, Australia, United Kingdom, Canada, Germany and Austria. Further, the Ld.AR submitted the year-wise list of payments made to these non-resident vendors which is reproduced below for ease of reference:

Assessment Year 2010-11

S No	Name of Company	Country of residence	Currency	Amount (in foreign currency)	Amount (in RS.)
Payments made towards Software AMC - Countries with 'make available' clause					
1	Riverbed Technology Inc	USA	USD	6,137	2,97,779
2	Inflow Technologies (Singapore) Pte Ltd	Singapore	USD	190	9,073
3	Riverbed Technology Inc	USA	USD	6,137	2,87,027
Total of payments (with 'make available' clause) (A)				12,464	5,93,879
Total of payments (without 'make available' clause) (B)				0	0
Total Software AMC payments (C) = (A)+(B)				12,464	5,93,879

Assessment Year 2011-12

S No	Name of Company	Country of residence	Currency	Amount (in foreign currency)	Amount (in RS.)
Payments made towards Software AMC - countries with 'make available' clause					
1	Actuate Pte Ltd	USA	USD	53,672	24,07,189
2	Allround Automations	The Netherlands	USD	1,800	81,756
3	Amax Engineering Corporation	USA	USD	3,000	1,36,260
4	Apnic Pty Ltd	Australia	AUD	7,226	3,28,677

5	Atlassian Software Systems Pty Ltd	Australia	USD	5,139	2,30,484
6	Flexera Software Ltd (Ind)	United Kingdom	USD	8,592	3,85,351
7	Mobile Complete Inc	USA	USD	4,900	2,18,197
8	Parasoft Corporation	USA	USD	3,456	1,55,002
9	Tibco Software Inc	USA	USD	3,834	1,74,961
10	Xenos Group Inc	Canada	USD	1,59,300	74,20,194
11	Zoho Corp	USA	USD	2,923	1,31,798
12	Zoho Corp	USA	USD	8,320	3,76,480
Total of payments (with 'make available' clause) (A)				2,62,162	1,20,46,349
Payments made towards Software AMC - countries without 'make available' clause					
1	SAP AG	Germany	EUR	60,000	35,77,464
Total of payments (without 'make available' clause) (B)				60,000	35,77,464
Total Software AMC payments (C) = (A)+(B)				3,22,162	1,56,23,813

Assessment Year 2012-13

S No	Name of Company	Country of residence	Currency	Amount (in foreign currency)	Amount (in RS.)
Payments made towards Software AMC – countries with 'make available' clause					
1	Core Security Technologies	USA	USD	11,250	5,00,738

2	Riverbed Technology Pte Ltd	Singapore	USD	12,275	5,42,901
3	Sparx System Pty Ltd	Australia	USD	3,337	1,47,984
4	Xenos Group Inc	Canada	USD	20,132	8,97,686
Total of payments (with 'make available' clause) (A)				46,994	20,89,309
Payments made towards Software AMC - countries without 'make available' clause					
1	Altova GmbH	Austria	EUR	7,660	4,85,179
Total of payments (without 'make available' clause) (B)				7,660	4,85,179
Total Software AMC payments (C) = (A)+(B)				54,654	25,74,488

11. We find that this issue is covered by the decision of this Tribunal in assessee's own case in ITA No.1202/Mds/2013 for AY 2008-09. The relevant finding of this Tribunal reads as under:

> *"28. We have heard both parties and gone through the case file. We make it clear that on being granted opportunity to rebut, the Revenue has failed to draw our attention to any material on record supporting its plea that both payees(supra) are not Singaporean entities. Coming to its argument that the annual maintenance charges amount to 'technical services' within the meaning of section 9(1)(vii), go against the case law of GE India Technology Centre Pvt. Ltd vs CIT 327 ITR 465 holding that section 195 applies only when the payment is taxable in India in the hands of non-resident payee which is not the case in hand as the concerned payees have carried out maintenance contracts outside India without 'making available' any technology. There is also no element of any technology changing hands as stipulated in the DTAA (supra). Thus, we agree with the findings of the CIT(A) that the assessee was not under any obligation to deduct TDS in question and section 9 r.w.s 195 is not applicable. In these circumstances, we reject the relevant grounds raised in the appeal.*
>
> *The Revenue's appeal I.T.A.No.1202/Mds/2013 is dismissed."*

11.1 The revenue represented by ld.DR did not bring on record any arguments to controvert the above decision placed on record before us by the Ld.AR for the assessee. Therefore, relying upon the decision of this Tribunal in ITA No. 1202/Mds/2013, we hold the issue of Software AMC payments made in relation to vendors from countries having 'make available clause' (i.e. Singapore, USA, Netherlands, Australia, United Kingdom, Canada) in favour of the assessee and against the revenue.

12. The Ld.AR for the assessee stated that the services rendered by the non-resident vendors would fall within the purview of the exclusionary clause provided in section 9(1)(vii)(b) of the Act, as the payments made by the Company (a resident) are utilized to earn income from a source outside India as the Company is an exporter of computer software and related services. Reliance is placed on the judgement of the **Hon'ble Jurisdictional High Court of Madras** in **CIT Vs. Aktiengesellschaft Kuhnle Kopp and Kaush W. Germany by BHEL 262 ITR 513**. The Ld. AR also stated that routine repair/ maintenance services and remote IT support services do not constitute 'technical services' and relied on the following cases:

- Lufthansa Cargo India (P) Ltd. vs. DCIT: 91 ITD 133 (Del ITAT)
- M/s Bosch Ltd vs. ITO : 141 ITD 38 (Bang ITAT)
- ADIT vs. BHEL-GE-Gas Turbine Servicing (P) Ltd.: 151 TTJ 126 (Hyd. ITAT)
- Bharti AXA General Insurance Co. Ltd: 326 ITR 477 (AAR)

13. The revenue, on the other hands, vehemently argued that the software AMC payments made in relation to vendors from countries where there is no 'make available clause' (i.e. Germany and Austria) is taxable in India by virtue of Section 9(1)(vii) and placed on record before us the jurisdictional High Court decision in the case of **Regen Powertech (P.) Ltd [2019] 110 taxmann.com 55 (Madras)** which was pronounced recently in 2019 after the Madras High Court judgement quoted by Ld.AR. Given the same, we are of the opinion that the software AMC payments made in relation to vendors from countries which does not have any 'make available clause' in the DTAA, shall be taxable as per Sec. 9(1)(vii) of the Act and also the DTAA. Therefore, the disallowance made by the AO in relation to vendors from Germany and Austria are upheld, by dismissing the grounds raised by the assessee.

14. The Ld.AR for the assessee as a without prejudice argument submitted that the said disallowance results in enhanced business income eligible for deduction under section 10A/ 10AA of the Act. For A.Y.2010-11, the ld.AR also pointed out that the AO provided the relief under Section 10A/ 10AA of the Act on the enhanced profits arising due to disallowance of payment of Software AMC. Now, given that the aforesaid decision of this Tribunal results in reduced disallowance for AY 2010-11, we direct the AO to recompute the consequential relief under Section 10A/ 10AA of the Act on the enhanced profits arising due to disallowance of payments towards Software AMC.

15. For A.Y. 2011-12 and A.Y.2012-13, we follow this Tribunal decision in assessee's own case in ITA No.1798 & 1799/Mds/2014 vide order dated 15.07.2016 for the A.Y.2009-10 and direct the AO to compute the relief under Section 10A/ 10AA of the Act on the enhanced profits arising due to disallowance of payments towards Software AMC.

16. Accordingly, the Grounds of appeal filed by the assessee on payments in relation to Software AMC is **Partly Allowed**.

Payments towards Software License:

17. On appeal before the Ld.CIT(A) by the assessee, the Ld. CIT(A) upheld the action of the AO vide Para no. 3.5.7 & 3.5.8 in it's order for A.Y. 2011-12. The relevant Para No. 3.5.7 & 3.5.8 is reproduced below.

"3.5.7
.....

Software License:

It is clear from the above said analysis of the DTAA, Income Tax Act, Copyright Act that the payment would constitute 'royalty' within the meaning of Article 12(3) of the DTAA and the provisions of 9(1)(vi) of the Act. The definition of 'royalty' under clause 9(1)(vi) of the Act is broader than the definition of 'royalty' under the DTAA. It is clear that the payment made by the appellant to the non-resident supplier would amount to royalty. In view of the said finding, it is clear that there is obligation on the part of the appellant to deduct tax at source under section 195 of the Act and it failed to do so. The submission made by the appellant with respect to purchase of software license fails and hence, Ground Nos.3 & 4 of appeal are dismissed.

Accordingly, as discussed supra and as analysed in CIT(A) order as extracted above, the payments made for software licenses during the year squarely attract TDS provisions. The above payments made by the assessee company outside India for software license without deduction of TDS u/s 195 of the Income-tax Act to the tune of Rs.1,12,52,512/- is being disallowed u/s 40(a)(i) of the Income-tax Act and it is added to the total income of the current year.

3.5.8 Basis the above, I am of the considered opinion that the AO has rightly rejected the claim of the Appellant. Therefore, the grounds of appeal no 15 to 27 stand dismissed....."

18. The assessee had raised various grounds on the issue before us for A.Y.2010-11 to A.Y. 2012-13 and had also brought to our notice that for A.Y. 2010-11, there was a mistake on the amount of adjustment upheld and also the country of residence of vendor to whom the payment was made which was subsequently rectified by Ld.CIT(A) vide the Corrigendum issued on 24.04.2024 bearing DIN No. ITBA/COM/F/17/2024-25/1064323210(1).

19. Given the above, we are not dealing with the Ground on error in the ld.CIT(A) Order and accordingly, proceed to decide the issue on other grounds raised before us.

20. Before us, the Ld.AR for the assessee submitted detailed arguments on why the disallowance u/s.40(a)(i) should not be upheld by this Tribunal. The summary of the arguments of Ld.AR before us is as below:

- The services rendered by the non-resident vendors would fall within the purview of the exclusionary clause provided in section 9(1)(vi)(b) of the Act, as the payments made by the assessee (a resident) are utilized to earn income from a source

outside India as the assessee is an exporter of computer software and related services.

- The assessee cannot be expected to effect tax deduction at source on the payments due to subsequent amendment made under the Explanation 4 to section 9(1)(vi) of the Act. Reliance was placed on various judgement in this regard by the ld.AR.

- If a payment is treated as royalty under the Act, the same may not still be subject to withholding tax under section 195 of the Act, if the said payment is not treated as royalty under the applicable DTAA. Reliance was placed on Union of India v Azadi Bachao Andolan - 263 ITR 707 (SC) and various other decisions.

- The payments made during the subject A.Y. are not taxable as royalty as the same relates to payment for the acquisition of a 'copyrighted article' and not the 'copyright' as such and hence, is not 'royalty' under the relevant DTAA. Reliance was placed on the Apex Court decision in the case of Engineering Analysis Centre of Excellence (P.) Ltd vs CIT [2021] 125 taxmann.com 42 (SC) and other judgements.

- Further, amendments made in the Act vis-a-vis the definition of royalty do not affect the taxability of payments made to non-residents who are governed by the applicable DTAA. Reliance is placed on B4U International Holdings Ltd. Vs Deputy CIT (International Taxation) (Mumbai): 346 ITR 62 (AT)/ 52 SOT 545

- Further, in the case of Engineering Analysis Centre of Excellence (P.) Ltd vs CIT, SC has held that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software is not the payment of royalty for the use of copyright in the computer software were not liable to deduct any TDS under section 195 of the Act.

- Issue covered in assessee's own case in favour of the assessee during the A.Y. 2009-10 by the Chennai ITAT in **ITA No.1798/Mds/2014** reference in this regard is made to Page No. 310 (Para No.27) of the case law paper book.

21. We have heard both the parties and perused the records. From the details submitted by the assessee, we understand that the

payments made to the non-resident vendors in relation to Software License for years under appeal (i.e. AY 2010-11 to AY 2012-13) were made to vendors who are resident of countries with which India has entered into DTAA. Further, the Ld.AR submitted the year-wise list of payments made to these non-resident vendors which has been perused by us.

21.1 We find that this issue is squarely covered by the decision of this Tribunal in assessee's own case in **ITA No. 1798/Mds/2014** for **A.Y.2009-10**. The relevant finding of this Tribunal reads as under:

25. The last issue relates to the addition of Rs. 1.95 Crs (rounded of) u/s 40(a)(i) of the Act. Assessee paid the said amount to the residents of Singapore and USA. the same was paid in connection with the purchase of **"off the shelf software"**. Assessee did not affect the TDS while paying the said amount. In the scrutiny assessment, AO noticed the above and observed that the said payments constitute

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royalty as contained in Explanation-2 read with Explanation-3 to section 9(1)(vi) of the Act. AO invoked the provisions of section 40(a)(i) of the Act.

26. During the first appellate proceedings, CIT (A) observed that the said purchases of **copyrighted article and copyright of the software** do not constitute 'royalty' and therefore, there is no liability to deduct tax on payments. CIT (A) noticed that the beneficial provisions of DTAA should be taken into account. Further, he mentioned that an insertion of Explanation 4 to section 9(1)(i) in the absence of amendment to definition of 'royalty' in the relevant DTAA, the payment for 'copyrighted article' shall not be considered as 'royalty'. For this proposition, CIT (A) relied on the judgment of the Hon'ble Delhi High Court in the case of DIT vs. Nokia Network OY (358 ITR 259). Aggrieved with the above, Revenue raised the Ground no.6 with its sub-grounds and argued that the said Delhi High Court judgment in the case of Nokia Network OY (supra) will not be accepted by the Revenue as the same is in appeal before the Apex Court. It is the requirement of the Revenue that the issue should be raised before the Tribunal to keep the issue alive for future.

27. They also raised argumentative grounds saying that the amended provisions to section 9 of the Act has retrospective effect from 1.6.1976 as the amendments are clarificatory in nature. Rebutting the same, Ld Counsel for the assessee submitted that the Government is against the retrospective amendments and the same was repeatedly asserted by the Finance Minister in the Floor of the House. When there are payments like this to the tax residents abroad are involved, where DTAA exists with Singapore and USA, the beneficial provisions apply and not the domestic laws and the amendments if any to the domestic laws. Ld Counsel for the assessee mentioned number of decisions on the issues relating to the copyrighted article v/s copyright of the software; the retrospective effect of the Explanations to section 9 etc. In any case, similar issues were the subject matter of favourable decisions of the Tribunal in the earlier assessment years in the assessee's own case. In our opinion, CIT (A) merely complied with the direction of the Tribunal. Therefore, in our opinion the decision taken by the CIT (A) is fair and reasonable and it does not call for any interference. Accordingly, this ground raised by the Revenue is dismissed.

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28. In the result, appeal of the Revenue is dismissed.

21.2 The aforesaid principle as held by this Tribunal above in the assessee's own case was also upheld by the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. Vs. CIT 432 ITR 471 and neither the revenue nor the Ld.CIT(A) in the Order brought on record any facts or arguments that controvert with the decision of this Hon'ble Tribunal in the assessee's own case and also the Apex Court judgement in the case of Engineering Analysis Centre of Excellence (P.) Ltd (supra). Therefore, we are inclined to follow the decision of this Hon'ble Tribunal in the assessee's own case for A.Y.2009-10 (Supra) and therefore, we hold the issue of Payments made for Software License in favour of the Assessee.

22. Since, the disallowance of payment made to Software License is directed to be deleted by the AO for **A.Y.2010-11 to A.Y.2012-13**, the consequential grounds relating to consequential relief under Section 10A/ 10AA of the Act is infructuous and accordingly, **dismissed**.

23. Accordingly, the Grounds of appeal are **partly allowed** for **A.Y. 2010-11 to A.Y.2012-13** and on the very same reasoning, similar grounds raised by the Assessee in other appeals as noted in the chart supra stands **partly allowed**.

Grounds in revenue appeal in Lead Case ITA No.1263/Chny/2024 (AY 2011-12):

24. Ground of appeal raised by the department in ITA No.1263/Chny/2024 for AY 2011-12 are as under:

1. *The order of the Id. CIT(A) is opposed to law and facts of the case.*

2. *The Id. CIT(A) erred in directing to allow set off of loss incurred by the eligible units u/s.10A/10AA against the profits of other units without appreciating that the issue, whether the stage of deduction u/s.10A/10AA is at the Gross Total Income stage or at the Computation of total income stage decided in the case of CIT vs. Yokogawa India Ltd. [2016] Tax Corp (DT) 67973 (SC) is still pending for reconsideration by three judges Bench of the Supreme Court and hence has not reached finality.*

3. *The Id. CIT(A) erred in directing to verify and allow depreciation on software licence @ 60% if the same is an application software without appreciating the fact that the assessee had only acquired a license to use the software and further classified the same as "intangible asset" in the books of the assessee, as such the depreciation rates as applicable to "licenses" as stated in Part B of New Appendix- 1 of the IT Rules, which 25% shall only be applicable to such acquisition of license.*

4. *The Id. CIT(A) has erred in deleting the addition of unrealized gain on mutual funds without appreciating that as per the books of accounts of the assessee itself the same has been sold and for the purpose of taxation of capital gains, the condition,'transfer' of the asset has taken place.*

5. *The Id. CIT(A) has erred in deleting the disallowance made in the computation of 'Book Profits' made u/s.115JB of the Act of the amount of expenditure disallowed u/s.14A r.w.Rule 8D of the Act, amounting to Rs.2,71,85,283/- without appreciating that as clause (f) of Explanation (1) to Section 115JB, such a disallowance is required to be made.*

6. *For these grounds and any other ground including amendment of grounds that may be raised during the course of the appeal proceedings, the order of ld. CIT(A), with respect to the grounds raised, may be set aside and that of the Assessing officer be restored.*

25. Ground No. 1 is general in nature and hence, doesn't require any adjudication, therefore, we move to Ground No. 2, which is Issue 3: Disallowance of set-off of losses incurred by units eligible for deduction under section 10A and 10AA against other taxable income.

26. The facts relating to the issue of disallowance of set-off of losses incurred by units eligible for deduction u/s.10A and 10AA against other taxable income is common for all the A.Ys being A.Y.2010-11 to A.Y. 2014-15

Assessment Year	**Appeal by**	**Ground No.**
AY 2010-11	Department (ITA No. 1262/CHNY/2024)	2
AY 2011-12	Department (ITA No. 1263/CHNY/2024)	2
AY 2012-13	Department (ITA No. 1264/CHNY/2024)	2
AY 2013-14	Department (ITA No. 1265/CHNY/2024)	2
AY 2014-15	Department (ITA No. 1266/CHNY/2024)	2

26.1 The Assessee had set-off the losses of the eligible units against the profits from the units that were not eligible for tax holiday during the subject AY. The AO had denied set-off of losses pertaining to section 10A/ 10AA units with the profits of the taxable units against which appeal was preferred by the Assessee before the Ld. CIT(A).

26.2 The Ld. CIT(A) relying on the decisions of the assessee's own case and also the supreme court decision of Yokogawa India Ltd.

[(2016) Tax Corp (DT) 67973 (SC), held the issue in favour of the Assessee.

26.3 This ground in this appeal of Revenue is as regards to the order of ld.CIT(A) in allowing the set-off of losses incurred by the units claimed deduction u/s.10AA of the Act against the taxable income of other units. We note that this issue is squarely covered by the decision of this Tribunal in assessee's own case in ITA No.160 & 233/ Chny/ 2022 for AY 2015-16 and by the decision of Hon'ble Madras High Court in assessee's own case and it has been noted by the ld.CIT(A) also in para 3.3.4 wherein the Ld.CIT(A) allowed set-off of losses against the profits of eligible units for claiming deduction u/s.10AA of the Act. The relevant finding of CIT(A) in para 3.3.4 reads as under:

"……

3.3.4 During the course of the hearing, the Appellant placed reliance on the judgment of the Honorable Madras High Court, in Appellant's own appeals for AY 2004-05 on the same issue, vide order dated 20-Nov-2020. The Appellant relied on the following extracts of the said Order:

"9. As far as the substantial question of law with regard to Set off of brought forward losses before allowing tax holiday deduction is concerned, the same is covered by the decision in CIT v. M/s. Yokogawa India Ltd. [(2016) Tax Corp (DT) 67973 (SC)], the relevant portion of the same is quoted below:

"15. Sub-section (4) of Section 10A which provides for pro rata exemption, necessarily involving deduction of the profits arising

out of domestic sales, is one instance of deduction provided by the amendment. Profits of an eligible unit pertaining to domestic sales would have to enter into the computation under the head "profits and gains from business" in Chapter IV and denied the benefit of deduction. The provisions of Sub-section (6) of Section 10A, as amended by the Finance Act of 2003, granting the benefit of adjustment of losses and unabsorbed depreciation etc. commencing from the year 2001-02 on completion of the period of tax holiday also virtually works as a deduction which has to be worked out at a future point of time, namely, after the expiry of period of tax holiday. The absence of any reference to deduction under Section 10A in Chapter VI of the Act can be understand by acknowledging that any such reference or mention would have been a repetition of what has already been provided in Section 10A. The provisons of Sections 80HHC and 80HHE of the Act providing for somewhat similar deductions would be wholly irrelevant and redundant if deductions under Section 10A were to be made at the stage of operation of Chapter VI of the Act. The retention of the said provisions of the Act i.e. Section 80HHC and 80HHE, despite the amendment of Section 10A, in our view, indicates that some additional benefits to eligible Section 10A units, not contemplated by Sections 80HHC and 80HHE, was intended by the legislature. Such a benefit can only be understood by a legislative mandate to understand that the stages for working out the deductions under Section 10A and 80HHC and 80HHE are substantially different. This is the next aspect of the case which we would now like to turn to.

16. From a reading of the relevant provisions of Section 10A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that,

"The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in

specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision."

17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No.794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'.

18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly."

10. Accordingly, all the aforesaid questions are answered against the Revenue, as covered by aforesaid decisions of this Court and Supreme

Court and in favour of the Assessee in terms of the aforesaid judgments. The Tax Case Appeals are accordingly disposed of."

3.3.5 Further, during the course of hearing, the AR contended that for AYs 2016-17, 2017-18 and 2018-19, the subject issue was examined by the assessing officer of the Appellant during the course of assessment proceedings under section 143(3) of the I.T.Act. Based on the reliance placed by the Appellant on the above judicial precedents in Appellant's own case, no adjustment in respect of the subject issue has been made to the total income of the Appellant for the AY 2011-12.

3.3.6 I have carefully considered the facts of the case and the judgment in the Appellant's own case placed on record at the time of the hearing.

3.3.7 In light of the above, relying on the above facts and judicial precedents cited supra in Appellant's own case, I direct the AO to allow the set-off the losses incurred by the Appellant in 10A/10AA units to the taxable income of other units. Accordingly, the grounds of the Appellant in Ground No. 9 and 10 are allowed in favour of the Appellant."

27. Since, this issue is squarely covered by the decision of Hon'ble Madras High Court, supra, in assessee's own case in allowing losses incurred by the units u/s.10AA of the Act, the profits and set-off of losses against other taxable profits of the business made by the assessee, we respectfully following the decision of Hon'ble Madras High Court and the decision of Hon'ble Supreme Court in the case of CIT vs. Yokogawa India Ltd. 391 ITR 274 (SC) direct the AO to allow the losses incurred by the units u/s.10AA of the Act to set off with the profits taxable profits of the business made by the assessee by upholding the order of the ld.CIT(A) in this matter.

27.1 Accordingly, this issue raised in the Grounds of appeal based on chart mentioned supra, filed by the Revenue for A.Y 2010-11 to A.Y 2014-15 are dismissed.

28. **Issue 4: Treatment of computer software as 'Intangible asset' and restriction of depreciation thereon to 25 percent**

Assessment Year	Appeal by	Ground No.
AY 2011-12	Department (ITA No. 1263/CHNY/2024)	3
AY 2012-13	Department (ITA No. 1264/CHNY/2024)	3
AY 2013-14	Department (ITA No. 1265/CHNY/2024)	3
AY 2014-15	Department (ITA No. 1266/CHNY/2024)	3

29. The facts relating to the issue of treatment of computer software as 'Intangible asset' and restriction of depreciation thereon to 25 percent is common for all the A.Ys being A.Y. 2011-12 to A.Y. 2014-15 is that the assessee uses various computer software in the development of customized software for export and the effective delivery of various IT and IT enabled services. The assessee has claimed depreciation on such software at the rate of 60% prescribed under the Income-tax Rules, 1962. The AO had treated the computer software as 'intangible assets' eligible for depreciation at the rate of 25% as against the rate of 60% claimed by the assessee.

29.1 On appeal by the assessee before the Ld.CIT(A), the Ld.CIT(A) held the issue in favour of the assessee relying on this Tribunal decision in assessee's own case in ITA No.160 & 233/ Chny/ 2022 (supra) for A.Y. 2015-16.

30. This ground in this appeal of Revenue is as regards to the order of Ld.CIT(A) allowing the depreciation on computer software at 60%. We note that this issue is squarely covered by the decision of this Tribunal in assessee's own case in ITA No.160 & 233/ Chny/ 2022 and it has been noted by ld.CIT(A) in para 3.6.5. The relevant finding of ld.CIT(A) in para 3.6.5 reads as under:

> *"…….*
> *3.6.5 Further, the Appellant also placed reliance on a recent decision of the Honourable Chennai Income-tax Appellate Tribunal in the Appellant's own case vide order dated 29.12.2023 in ITA No.160/Chny/2022 wherein the issue has been decided in favour of the Appellant.*
>
> *The Appellant relied on the following extracts of the said Order:*
>
> *"8. Before us, the Ld. counsel for the assessee submitted that admitted position is that these software applications and licenses are in the category of intangible assets, but these are held to be computer as held by Honourable Madras High Court in the case of CIT vs. Computer Age Management Services [2019] 109 taxmann.com 134 (Mad.). We noted that this issue is squarely covered by decision of Honourable Madras High Court in the case of CIT vs. Computer Age Management Services, supra, and the assessee even now on computer software licenses is eligible for claim of depreciation at 60%. The Honourable Madras High Court held as under:*

"7. As noticed above, the assessee is in the business of registrar and transfer agent as licensed by the SEBI handling large volume of market sensitive data and information, which is available only through general customized application software. The assessee acquired software licenses capitalized during the relevant years in the books of accounts and claimed depreciation at 60%. In paragraph 20 of the order passed by the Tribunal, the nature of items, on which, the assessee claimed depreciation at 60%, has been listed out and they are 17 in number, from which, we find that substantial amount of server licenses, which have been obtained by the assessee are customized and some of which are single user licenses.

8. The question would be as to whether the software application, which was acquired by the assessee would fall under Entry 5 of Part A of New Appendix I, which states that computers including computer software are entitled to depreciation at 60%. Note 7 of the Appendix defines the expression 'computer software' to mean any programs recorded on CD or disc, tape, perforated media or other information storage devices.

9. The case of the Revenue is that software are licenses and that they are intangible assets and would fall under Part B of New Appendix I, which deals with knowhow, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature.

10. We find that Part B of New Appendix I is a general entry whereas Entry 5 of Part A of New Appendix I is a specific entry read with Note 7. In the instant case, the Tribunal, in our considered view, rightly held that the assessee is eligible to claim depreciation at 60%. Hence, we allow this issue of assessee's appeal."

3.6.6 After carefully consideration of the facts of the case and the submissions of the AR including the above favorable order passed in the Appellant's own case, I direct the AO to delete the disallowance made to the depreciation of computer software and grant depreciation at the rate of 60 percent on the computer software.
……"

31. Since, this issue is squarely covered by the decision of this Tribunal in assessee's own case (supra), we respectfully following

the decision of this Tribunal and accordingly uphold the order the ld.CIT(A) and hence this issue raised in the Grounds of appeal based on chart mentioned supra, filed by the Revenue for AY 2011-12 to AY 2014-15 are dismissed.

32. **Issue 5: Unrealized gains on mutual fund units remaining unsold at the end of the year added as income of current year**

Assessment Year	**Appeal by**	**Ground No.**
AY 2011-12	Department (ITA No. 1263/CHNY/2024)	4
AY 2012-13	Department (ITA No. 1264/CHNY/2024)	4

33. During the A.Y. 2011-12 and A.Y. 2012-13, the Assessee has earned income from transfer of investments in units of Mutual Funds which was offered to tax under the head 'capital gains'. The amount of capital gains disclosed in the financial statements represented the amount of gains accounted for as per the accounting principles followed by the Assessee.

33.1 It was submitted by the assessee that the variance between the amount of capital gains as per the financial statements and tax purposes is on account of the unrealized gains of Rs.13,21,009/- and Rs.1,71,88,219/- respectively recognized in the books of account for

A.Y.2011-12 & A.Y.2012-13 as per the mercantile basis of accounting applicable to the assessee. The said amount relates to units not transferred and the remaining on hand with the assessee as on 31.03.2011 and 31.03.2012.

33.2 The AO has added the unrealized gains on mutual fund units remaining unsold at the end of the year amounting to Rs.13,21,008/- for A.Y. 2011-12 and Rs.1,71,88,219/- for A.Y.2012-13. On appeal by the assessee before the Ld.CIT(A), the Ld.CIT(A) held the issue in favour of the Assessee. Relevant extract of the Ld.CIT(A) order for AY 2011-12 is as follows:

> *"……..*
> *3.7.3 l have carefully considered the facts of the case and the submissions of the AR. I have also gone through the arguments of the AO. The AR during the hearing stated that the AO has treated the un-realized gain on mutual fund units remaining unsold in the hands of the Appellant recognized in the financial statements as having accrued to the Appellant during the AY 2011-12 under consideration on the presumption that the units have been sold by the Appellant during the financial year. However, it is clear that these units were unsold during the year end and as informed by the AR, the capital gain on sale of mutual funds were offered to tax as income from Capital Gains in the year in which they were sold.*
> *3.7.4 In light of the above, relying on the above facts, I direct the AO to delete the disallowance on unrealized gains on mutual fund units remaining unsold at the end of the year added as income of current year. Accordingly, the ground of the Appellant in Ground No.30 and 31 are allowed in favour of the Appellant."*

33.3 The Ld.CIT(A) also held the issue in favour of the assessee on similar grounds for A.Y.2012-13. These grounds are of revenue's appeal before us relating to the aforesaid order of Ld.CIT(A) on the issue on unrealised gains on mutual fund units remaining unsold as at the end of the year.

34. We have heard the rival contentions, and gone through the facts and circumstances of the case. We note that the AO has made the addition of the unrealized gains on mutual fund units remaining unsold at the end of the year. As per ld.CIT(A) order, the AO has treated the un-realized gain on mutual fund units remaining unsold in the hands of the assessee recognized in the financial statements as having accrued to the assessee during assessment year under consideration on the presumption that the units have been sold by the assessee during the financial year. Hence, the AO has added unrealized gains on mutual fund units remaining unsold at the end of the year as income of current year but on perusal of the Ld.CIT(A) order, these units were unsold during the year end and the capital gain on sale of these mutual funds were offered to tax as income from Capital Gains in the year in which they were sold.

34.1 The revenue did not bring anything on record to controvert this fact relevant for A.Y.2011-12 & A.Y.2012-13. Hence, the Ld.CIT(A) has rightly deleted the addition and held that un-realized gain on mutual fund units remaining unsold in the hands of the assessee cannot be added back as income of the current year and the capital gain on sale of mutual funds were offered to tax as income from Capital Gains in the year in which they were sold. We do not find any infirmity in the decision of the ld.CIT(A) to intervene with the above order of Ld.CIT(A) and accordingly, this issue raised in the Grounds of appeal based on chart mentioned supra, filed by the Revenue for A.Y.2011-12 and A.Y.2012-13 are dismissed.

35. **Issue 6 : Addition of disallowance under section 14A read with rule 8D in computing book profits under section 115JB of the Act**

Assessment Year	Appeal by	Ground No.
AY 2010-11	Department (ITA No. 1262/CHNY/2024)	3
AY 2011-12	Department (ITA No. 1263/CHNY/2024)	5
AY 2012-13	Department (ITA No. 1264/CHNY/2024)	5
AY 2013-14	Department (ITA No. 1265/CHNY/2024)	4
AY 2014-15	Department (ITA No. 1266/CHNY/2024)	4

36. The facts relating to the issue of Disallowance under section 14A read with rule 8D in computing the book profits u/s.115JB of the

Act is common for all the A.Ys with that of the normal provisions A.Y.2010-11 to A.Y.2014-15

36.1 The Ld. AO has added the amount of disallowance u/s.14A of the Act to the book profits by treating the same as the amount of expenditure relatable to any income to which section 10 applies as per the provisions of clause (f) to Explanation 1 of section 115JB of the Act.

36.2 The Ld. CIT(A) while dealing with the issue under the provisions of section 115JB of the Act held the issue in favour of the Assessee by relying on the recent decision of this Hon'ble Tribunal in the assessee's own case vide order dated 29.12.2023 in ITA No. 233/Chny/2022.

37. This ground in the appeal of Revenue is as regards to the order of ld.CIT(A) in deleting the disallowance u/s.14A read with rule 8D in computing book profits u/s.115JB of the Act. We find that this issue is squarely covered by the decision of this Tribunal in assessee's own case in ITA No.160 & 233/Chny/ 2022. The relevant finding of this Tribunal reads as under:

"…….
16……The next issue in this appeal of Revenue is as regards to the order of CIT(A) in deleting the disallowance made by A.O on account of expenses relatable to exempt income by invoking the provisions of Section 14A of the Act r/w Rule 8D(2) of the Rules under the provisions of Section 115JB of the Act while computing the book profit. We noted that this issue is also squarely covered by the Special Bench of this Tribunal in the case of ACIT vs. Vireet Investments (P.) Ltd. [2017] 82 taxmann.com 415 (Delhi-Trib.)(SB), wherein it is held that disallowance u/s. 14A of the Act r/w Rule 8D of the Rules cannot be added back while computing the book profit u/s. 115JB of the Act. This issue is also covered by the following decisions:
I. Pr. CITvs. Bhushan Steel Ltd. in ITA NO.593 & 595 of 2015 (Delhi HC);
II. PCCIT vs. Jj Glastronics P. Ltd. 139 taxmann.com 375 (Karnataka HC);
III. Jayant Packaging (P.) Ltd. vs DCIT 189 ITD 321 (ITAT-Chennai).

No contrary decision is brought to our notice by the Revenue and hence, this issue of Revenue's appeal is dismissed.
……."

38. Therefore, by following the decision of this Tribunal in assessee's own case (Supra) we are of the considered view that the Ld.CIT(A) has rightly deleted the disallowance made by the AO invoking the provisions of Section 14A r.w.r. 8D while computing the book profits u/s.115JB of the Act; and accordingly, this Ground of Revenue stands dismissed for A.Y.2010-11 to A.Y.2014-15.

Grounds filed by the assesseee on consequential penalty proceedings invoked:

39. **Issue 7: Consequential penalty proceedings initiated by the Ld.AO**

Assessment Year	Appeal by	Ground No.
AY 2010-11	Assessee (ITA No. 1193/CHNY/2024)	18
AY 2011-12	Assessee (ITA No. 1194/Chny/2024)	18
AY 2013-14	Assessee (ITA No. 1206/CHNY/2024)	5
AY 2014-15	Assessee (ITA No. 1207/CHNY/2024)	5

40. The assessee submitted before us that the AO has erred in law and facts, by initiating penalty proceedings under section 274 read with section 271(1)(c) of the Act, without appreciating the contentions placed on the issues under appeal.

41. The Ld.CIT(A) in his Order for the A.Ys under appeal held that no order under section 271(1)(c) was passed by the AO and therefore, grievance of the assessee is premature and hence the same is dismissed.

42. We do not find any infirmity to intervene with the Order of Ld.CIT(A) and accordingly, we dismiss the grounds raised by the assessee based on the chart tabulated supra in relation to initiation

of penalty proceedings u/s. 271(1)(c). We keep the issue open on merits to be challenged at the time of Order under Section 271(1)(c) passed for the A.Ys under appeal.

43. To sum up, the assessee's appeals in ITA Nos.1193,1194,1205,1206 and 1207/Chny/2024 are partly allowed whereas the Revenue's appeals in ITA Nos. 1262, 1263, 1264, 1265 and 1266/Chny/2024 are dismissed.

Order pronounced in the open court on 16th May, 2025 at Chennai.

Sd/-	*Sd/-*
(एबी टी वर्की)	(एस. आर. रघुनाथा)
(ABY T VARKEY)	**(S. R. RAGHUNATHA)**
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

चेन्नई/Chennai,
दिनांक/Date: 16.05.2025

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:
1. . निर्धारिती /Assessee
2. राजस्व /Revenue
3. आयकर आयुक्त/CIT, Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.