IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE
BEFORE SHRI. B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No.725/Bang/2018
Assessment Year : 2013–14

IBM India Pvt. Ltd., No.12, Subramanya Arcade, Bannerghatta Road, Bangalore-560 029. PAN – AAACI 4403 L.	**Vs.**	The Asst. Commissioner of Income Tax, Circle – 4(1)(2), Bangalore.
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Percy Pardiwala, Sr. Advocate along with Ajay Roti, C.A
Respondent by	:	Shri K.V Arvind, Advocate, Standing Counsel along Shri Dilip Advocate for Dept.

Date of Hearing	:	03-06-2020
Date of Pronouncement	:	31-07-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against final assessment order dated 08/01/2018 passed by Ld.ACIT Circle 4(1)(2), Bangalore, under section 143 (3) r.w s.144C (1) and 92CD of the Act, on following grounds of appeal:

1. Assessment order bad in law

1.1. At the outset, M/s IBM India Private Limited (hereinafter referred to as 'the Appellant' or 'the Company') prays that the order dated January 8, 2018 received on January 10, 2018, passed under section 143(3) read with section 144C(1) and section 92CD of the Income-tax Act, 1961 ('Act'), by the learned Assistant Commissioner of Income-tax, Circle - 4(1)(2), Bangalore ('ACIT'), be struck down as invalid, as the order is bad in law and on facts.

2. Reliance on the Draft Assessment Order ('DAO') of AY 2009-10 for making adjustments for AY 2013-14

2.1. The learned ACIT and the Hon'ble Dispute Resolution Panel ('DRP') have erred in law and on facts by placing reliance on the DAO of AY 2009-10. Specifically, the learned ACIT and Hon'ble DRP have erred:

a) In not following the settled legal principle of res judicata not applying to income-tax proceedings;

b) In not appreciating the fact that the order on which the learned ACIT had placed reliance was a draft assessment order;

C) In not appreciating the fact that the erstwhile DAO passed by the erstwhile Assessing Officer has been quashed by the Hon'ble Karnataka High Court vide its order dated July 18, 2016. ; and

d) In placing reliance on the DAO of AY 2009-10 without application of mind and without taking cognizance of the submissions/ arguments put forth during the assessment proceedings of AY 2013-14.

3. Denial of relief under section IOAA of the Act

3.1. The learned ACIT and the Hon'ble DRP have erred in law and on facts in denying the relief claimed by the Appellant under section 10AA of the Act of INR 303,16,58,824. The learned ACIT has also erred in law and on fact in denying the relief claimed by the Appellant under section 10AA of the Act on the incremental revenue pursuant to the Advance Pricing Arrangement entered by the Appellant.

3.2. The learned ACIT has erred in law and on facts by holding that the Appellant did not have any evidence for manufacture and export of computer software from eligible units in Special Economic Zone ('SEZ'). The Hon'ble DRP has erred in fact in concluding that since Document of Understanding/Statement of Work are not registered with the SEZ authorities, the requirements of section 10AA of the Act are not met.

3.3. The learned ACIT has erred in law and on facts by concluding that the Appellant had made contrary submissions in connection to transmission or export of computer software outside India from its SEZ units without taking cognizance of the submissions made by the Appellant.

3.4. The learned ACIT and the Hon'ble DRP have erred in law and on facts by concluding that the various obligations and procedures prescribed under the SEZ

schemes and regulations have not been adhered to and that for claiming tax benefit the same has to be complied with.

3.5. The learned ACIT has erred in law and on facts in holding that the unit wise P&L account submitted by the Appellant in relation to the eligible units was not a reliable document for allowing claim under section 10AA of the Act.

3.6. The learned ACIT and the Hon'ble DRP have erred in law and on facts by not taking cognizance of the judicial precedent in the Appellant's own case, wherein the manner of determining profits eligible for tax holiday by the Appellant has been held to be accurate/appropriate.

3.7. The learned ACIT and the Hon'ble DRP have erred in law and on facts in holding that the undertakings were not independent and that they were formed by the splitting up and reconstruction of business already in existence.

3.8. The learned ACIT and Hon'ble DRP have erred in fact by relying on his analysis of Inter Company Agreements ('ICA') even though the Appellant has not submitted any ICA with the learned ACIT during the course of the assessment proceedings for the subject AY.

3.9. The Hon'ble DRP has erred in fact by concluding that the Appellant failed to match the accounting invoices with the SOFTEX forms without taking cognizance of the submissions made by the Appellant during the assessment proceedings for the subject AY.

3.10. The Hon'ble DRP has erred in fact by concluding that the Appellant failed to produce invoices for verification without taking cognizance of the submissions made by the Appellant during the assessment proceedings for the subject AY.

4. Disallowance of amounts under section 37(1) which have been disallowed suo moto by the Appellant under section 40(a) of the Act

4.1. The learned ACIT has erred in facts and in law in holding that a sum of INR 3,456,564,364 disallowed by the Appellant under section 40(a) of the Act should be disallowed under section 37(1) of the Act

4.2. The learned ACIT has erred in law and on facts by not appreciating that the basis of year-end provisions, as furnished by the Appellant, demonstrate that the same are for abilities which have arisen/been incurred, and therefore, the same cannot be disallowed by under section 37(1) of the Act.

4.3. The learned ACIT has erred in law and on facts by concluding that based on the documents submitted by the Appellant, it is very clear that the amounts under dispute are not an allowable expenditure.

4.4. The learned ACIT has erred in facts and in law in concluding that the amounts are not allowable expenses without taking cognizance of the fact that the details and supportings were submitted demonstrating deduction of taxes at source (where applicable) and also establishing genuineness and business expediency of the amounts.

4.5. The learned ACIT has erred in law and on facts by holding that the fact that the provisions have been reversed subsequently signifies that the expenses provided for in the books are no more required. In doing so, the learned ACIT has

failed to appreciate that the subsequent reversal is for accounting purpose (reporting correct profit for the given year), and the invoices received subsequently, and which have been offset by the reversal, corroborate the fact that the liability has been incurred in the current year.

4.6. The learned ACIT has erred in law and on facts by holding that the accounting practice adopted by the Appellant could result in merger of expense of different periods in the books. In doing so, the learned ACIT has failed to appreciate that the entries passed by the Appellant ensures that the matching principle is followed, and in case the provision exceeds the invoices received subsequently, the excess provision would be offered to tax in the subsequent year and there is no loss to the Revenue.

4.7. The Hon'ble DRP has erred in law in directing the learned ACIT to carry out further verification which is not permissible in view of section 144C(8) of the Act which clearly states that the DRP shall not issue any direction for further enquiry and passing of assessment order.

4.8. Without prejudice to the above, the learned ACIT has erred in law and on fact in not taking cognizance of the additional evidence submitted by the Appellant as a consequence of the directions of the Hon'ble DRP.

5. Disallowance under section 40(a) of the Act in respect of payments to non-resident Associated Enterprises ('AEs') and Non-Aes.

5.1. The learned ACIT and the Hon'ble DRP have erred in law and on facts in disallowing payments made by the Appellant to non-residents amounting to INR 981,37,37,374 under section 40(a) of the Act as follows:

5.1.1. INR 460,49,70,453 made to IBM Singapore Pte Ltd by treating the sum as 'royalty'

5.1.2. INR 520,87,66,921 made to other non-residents by concluding that the certificates issued by the Chartered Accountant ('CA') are not reliable

5.2. The learned ACIT has erred in facts in disallowing the foreign payments made during the year on which tax is not deducted by not considering the evidence submitted by the Appellant.

5.3. The learned ACIT has erred in fact and in law in not appreciating that certain sums are mere reimbursements and hence cannot be considered as "income".

5.4. The learned ACIT has erred in law and on facts in placing reliance on the sworn statement which does not pertain to the current year, in holding that the certificates issued by the CA are not reliable and disallowing the amount for the current year.

5.5. The learned ACIT and the Hon'ble DRP have erred in law in disallowing the payment made to IBM Singapore Pte Ltd given that the amendment to definition of royalty related provisions under section 9(1)(vi) of the Act is not relevant to determine disallowance for non-deduction of tax at source as the corresponding amendment has not been made under section 40(a)(i) of the Act.

5.6. The Honble DRP has erred in law in directing the learned ACIT to carry out further verification which is not permissible in view of section 144C(8) of the Act

which clearly states that the DRIP shall not issue any direction for further enquiry and passing of assessment order.

5.7. Without prejudice to the above, the learned ACIT has erred in law and on fact in not taking cognizance of the additional evidence submitted by the Appellant as a consequence of the directions of the Hon'ble DRP.

6. Disallowance of claim made under section 40(a) of the Act pertaining to AY 2012-13

6.1. The learned ACIT has erred in facts and in law in disallowing a sum of INR 359,66,16,945 claimed by the Appellant under section 40(a) of the Act consequent to tax deduction and deposit (where applicable) on the amounts disallowed in AY 2012-13

6.2. The learned ACIT has erred in facts and in law in not taking cognizance of the fact that the details and supportings were submitted during the assessment proceedings of AY 2012-13, demonstrating deduction of taxes at source (where applicable) and also establishing genuineness and business expediency of the amounts

6.3 Without prejudice to the above, the learned ACIT and the Honble DRP have failed to appreciate the fact that as a consequence of the said disallowance of the amount in AY 2012-13 under section 37(1) of the Act, the Assessee is to be allowed a deduction in the current year, since the reversal of provision has been credited to the profit and loss account

7. Disallowance of depreciation on leased assets

7.1. The learned ACIT and the Hon'ble DRP have erred in law and on facts in disallowing the depreciation on leased assets (net of lease rental and interest) amounting to INR 24,60,33,070 by not following the decision of the Hon'ble Supreme Court of India in ICDS Ltd v. CIT [2013] 350 ITR 527 (SC) and other judicial precedents.

8. Disallowance under section 14A of the Act

8.1. The learned ACIT and the Hon'ble DRP have erred in law and on facts in disallowing expenditure amounting to INR 78,54,075 without appreciating that the Appellant has not earned any exempt income during the year.

8.2. The learned ACIT has erred in law and on facts, by not discharging the onus of establishing the incurrence of some expenditure in relation to earning exempt income, before invoking the provisions of Rule 8D read with section 14A of the Act.

8.3. The learned ACIT and the Hon'ble DRP have erred in law and on facts in not considering the evidence on record and by not following the judicial precedents.

9. Restriction of depreciation on computer software from 60 per cent to 25 per cent

9.1. The learned ACIT and the Hon'ble DRP have erred in law and on facts in restricting depreciation claim to a lower rate of 25% as against the Appellant's claim for depreciation on computer software at 60% under section 32 of the Act, resulting in disallowance of INR 24,44,33,932.

9.2. The learned ACIT and the Hon'ble DRP have erred in law in concluding that only software purchased along with the computer is eligible for depreciation at the rate of 60%.

9.3. The learned ACIT and the Hon'ble DRP have erred in facts and in law in not taking into cognizance the submissions including judicial precedents made by the Appellant during the assessment proceedings of the subject AY

10. Initiation of Penalty Proceedings

10.1. The learned ACIT has erred in initiating penalty proceedings under section 271 of the Act.

11. Other grounds

11.1. The learned ACIT has erred in law and on facts in levying interest of INR 409,68,25,501 under section 234B of the Act.

11.2. The learned ACIT has erred in law and on facts in not granting credit for foreign taxes paid by the Appellant.

12. Relief

12.1. The Appellant prays that directions be given to grant all such relief arising from the preceding grounds as also all reliefs consequential thereto.

12.2 The Appellant craves leave to add to or alter, by deletion, substitution or otherwise, any or all of the above grounds of appeal, at any time before or during the hearing of the appeal.

Brief facts of the case are as under:

2. Assessee is a company, engaged in the business of trading, leasing and financing of computer hardware, maintenance of computer equipments and export of software services to associated enterprises. It filed its return of income for year under consideration on 30/11/2013, for an income of Rs.1732,49,84,290/- and claimed deduction under section 10AA amounting to Rs.303,16,58,824,. Ld.AO noted that assessee computed MAT u/s.115JB, payable at Rs.363,67,96,390/-.

2.1 Ld.AO passed draft assessment order making various additions under Transfer Pricing issue as proposed by Ld.TPO and corporate tax issues in the hands of assessee.

2.2 Aggrieved by draft assessment order, assessee filed objections before DRP. DRP its order dated 28/09/2017, upheald the observations of Ld.AO in draft assessment order.

2.3 Based on DRP direction, Ld.AO passed impugned final assessment order, by making total addition of Rs.2437,17,33,376/- in the hands of assessee.

2.4 Aggrieved by additions made by Ld.AO in final assessment order dated 08/01/2018, passed under section 143(3) r.w.144C(1) and 92CD of the Act, assessee is in appeal before us now.

We shall consider observations of authorities below, and submissions advanced by both sides in respect of each ground raised by assessee as under.

3. It has been submitted that **Ground No.1** raised by assessee is general in nature and therefore do not require any adjudication.

4. Ground No.2 raised by assessee, challenges reliance of Ld.AO/DRP on draft assessment order for assessment year 2009-10, which is set aside by *Hon'ble Karnataka High Court* in assessee's own case, by order dated 18/07/2016.

Ld.Counsel submitted that, authorities below failed to appreciate settled legal principles of *res judicata*, not applying to income tax proceedings, and that claim should be analysed, having regards to evidences filed by assessee for year under consideration. Before DRP, assessee raised preliminary issue in respect of validity of draft assessment order dated 29/12/2016 passed by Ld.AO.

4.1 Before DRP, similar arguments were raised by assessee. It was submitted that, said order was set-aside, since it was passed

without application of mind, and without taking cognizance of submissions/arguments put forth during assessment proceedings for year under consideration.

4.2 DRP, while dealing with this issue, observed that, similar objection was raised by assessee before DRP for assessment years 2010-11 2011-12 and 2012-13 which was rejected by observing as under:

> *".....We are of the view that the evidences gathered during the proceedings for earlier assessment years can be used for proceedings for subsequent assessment years, if such evidence is a relevant to the issue in assessment year under consideration. It is also noticed by is that assessing officer before arriving on the conclusions in respect of relevant issues for assessment year has independently examined the issues by issues of various notices and hearing the assessee and only thereafter, use materials gathered during the proceedings for assessment year including the material available on records which were relevant to the assessment years under consideration. Further each of the objections raised by assessee in respect of various disallowances of expenses and deductions resulted in addition to the income, have been adjudicated in subsequent paragraphs after hearing the assessee and allowing the sufficient opportunity and therefore, in our view, the assessee should not have any grievance on this account, the objections are accordingly rejected."*

4.3 Ld.Standing Counsel for revenue, placed reliance on observations of DRP.

4.4 We have considered submissions advanced by both sides in respect of this issue, and perused order passed by *Hon'ble Karnataka High Court (supra).*

4.4.1 It is noted that Ld.AO/TPO referred to enquiries conducted in draft assesse order for AY:2009-10 and final assessment order for AY:2008-09, since issues were common. However, it is also noted that, Ld.AO issued show cause notice dated 21/11/2016 to verify genuineness of various claims by assessee, for year under consideration.

4.4.2 At the outset, Ld.Counsel submitted that, Ld.AO placed reliance on draft assessment order for A.Y.2009-10 which is *non est* in law, as it was set aside by *Hon'ble Karnatake High Court(supra).* It is noted that, *Hon'ble Karnataka High Court,* by consent of both parties, set aside the issue with a direction to pass fresh orders within specified period mentioned therein. On perusal of draft assessment order dated 29/12/2016 passed for year under consideration, Ld.AO recorded that, various enquiries were made in the backdrop of draft assessment order is for assessment year 2009-10 and 2010-11. Ld.AO also note that, assessee has been claiming deduction of its profits under section 10 AA since assessment year 2008-09, and the same has been denied by concerned assessing officers on account of one or more violations. We noted that, assessee was called upon to establish its claim for year under consideration. Assessee was also called upon to furnish

evidences for export of computer software and evidences in support of eligible profit claimed u/s 10AA in computation of income.

4.4.3 In fact, Ld.CIT.DR submitted that, all issues should be restored to Ld.AO, since details filed by assessee pursuant to show cause notice issued during the year has not been carefully verified.

4.4.4 We note that, this *Tribunal* considered this preliminary objection while considering similar issue for assessment years 2006-07. This *Tribunal* set aside claim u/s.10AA to Ld.AO for fresh decision, following its order for AY:2008-09 in *IBM India (P) Ltd vs JCIT* reported in *(2014) 46 Taxmann.com 129*. It is noted that, for asst. year 2008-09, this *Tribunal* dismissed various objections raised by Ld. AO to deny claim u/s.10AA and directed Ld.AO to verify, whether convertible foreign exchange was brought into India and that, they represented consideration received for export of computer software.

4.4.5 We note that, this *Tribunal* for assessment year 2008-09(supra), dealt with all objections raised by authorities below, which are common for year under consideration to deny deduction u/s.10AA. Ld.AO for year under consideration, has referred to final assessment order passed for AY:2008-09. Therefore, in our view, it will be a futile exercise to set aside the issue to Ld.AO for fresh decision as suggested by both sides, when the issue stands squarely covered order of this *Tribunal* in great detail, for AY:2008-09*(supra)*.

Accordingly this objection raised by assessee stands rejected.

5. Ground No.3 is raised against denial of claim under section 10AA of the Act, amounting to Rs.303,16,58,824/-.

Ld.AO observed that, assessee has been claiming deduction of its profits under section 10A/10AA of the Act, since assessment year 2008-09, and, assessing officers in preceding assessment years denied the claim for following violations:

- Violation of SOFTECH regulations under the scheme of STPI;
- Violation of section 10A(2), for not having submitted the software development agreement entered into by assessee with STPI/SEZ authorities, without filing the statement of work as specified by CBDT in circular dated 17/01/2013;
- Violation of section 10A(3), for not obtaining approval of foreign currency account from RBI
- for not maintaining unit wise profit and loss account.

5.1 Ld.AO observed that, export proceeds from sale of computer software services were received in foreign currency account maintained by assessee outside India with HSBC, USA during the year under consideration, for which assessee did not have permission in accordance with section 10A(3) from RBI.

5.1.1 Ld.AO, issued notice to assessee to verify genuineness of the claim of deduction under section 10AA for year under consideration. Ld.AO was of the opinion that, as far as deduction under section 10A and 10AA is concerned, procedure and laws are interlinked, and it has to be studied together, to understand entire issue in a comprehensive manner. Ld.AO called for submissions and replies regarding claim under section 10AA of the Act, for year

under consideration. Ld.AO also reproduced submissions made by assessee vide letter dated 07/12/2016. Thereafter, Ld.AO discussed reasons/observations recorded in draft assessment order for AY:2009-10, and held that, violation under section 10AA are identical, even for year under consideration. Ld.AO after reproducing submissions and statements recorded during assessment for assessment year 2009-10 under section 131 of Sh.T Ravindra CA, came to following conclusion for year under consideration:

- MSA (Master Service Agreement) submitted with SEZ/STPI Authority was entered on 01/01/2004 between assessee and IBM related companies, which does not reveal any specific details regarding the software development activity carried on by assessee.
- That, DOU (Document of Understanding) was not registered with SEZ Authority, and hence, it was not verifiable whether the software activity developed was carried out from eligible units.
- Ld.AO was of the opinion that the MSA and ICA (Inter Company Agreements) revealed fact that undertaking commenced its activity after 2004-05 and were not new undertaking that began to manufacture or produce computer software and rather all such undertakings have continued the business, already in existence, which was in violation of section 10A(2).

- Ld.AO was also of the opinion that assessee did not submit invoices corresponding to SOFTEX to SEZ authority, and therefore it was impossible to match accounting invoices. Ld.AO also observed that the inter-company agreements were not registered with SEZ authority, and therefore were not reliable. He was of the opinion that, intercompany agreements furnished before Ld.AO, referred to miscellaneous services and not to software development services, against which income was received that was subjected to claim under section 10 AA of the Act;
- Ld.AO was of the opinion that, purpose of remittance mentioned in FIRC, was software consultancy, technical fee, system maintenance etc being miscellaneous services and not software development services;
- Ld.AO was of the opinion that, unit wise P&L account was not reliable as CA's who issued certificate about the true and correct nature of unit wise P&L account admitted in their statement that it did not reflect true and correct profit

5.1.2 Ld.AO, thus denied deduction of Rs.303,16,58,824/- claimed under section 10AA of the Act for year under consideration.

5.2 Aggrieved by proposed addition in draft assessment order, assessee raised objection before DRP.

5.2.1 On perusal of DRP order, it is observed that DRP denied relief claimed by assessee under section 10AA of the Act for following reasons:

- since document of understanding/statement of work (DSWD) are not registered with SEZ authorities, the requirement of section 10AA of the Act are not met.
- DRP concluded that various obligations and procedures prescribed under SEZ scheme and regulations have not been adhered to for claiming benefit under section 10AA of the Act.
- DRP held that undertaking was not independent and they were formed by splitting up and reconstruction of business already in existence.
- DRP concluded that assessee failed to match the accounting invoices with the SOFTEX forms.
- DRP also held that assessee failed to produce invoices for verification.

5.3 Before us, following were the submissions advanced by both sides.

5.3.1 It has been submitted that, deduction was denied to assessee on the ground of alleged non-compliances under section 10A/10AA of the Act, though for year under consideration assessee claimed deduction under section 10AA of the Act. Ld.Counsel referred to provisions of relevant section as under:

> ***Special provisions in respect of newly established Units in Special Economic Zones.***
>
> ***10AA.*** *(1) Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause (j) of section 2 of the Special Economic Zones Act, 2005, from his Unit, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2006, but before the first day of April, 2021, the following deduction shall be allowed—*

(i) hundred per cent of profits and gains derived from the export, of such articles or things or from services for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the Unit begins to manufacture or produce such articles or things or provide services, as the case may be, and fifty per cent of such profits and gains for further five assessment years and thereafter;

(ii) for the next five consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re-investment Reserve Account") to be created and utilized for the purposes of the business of the assessee in the manner laid down in sub-section (2).

[22][Explanation.—For the removal of doubts, it is hereby declared that the amount of deduction under this section shall be allowed from the total income of the assessee computed in accordance with the provisions of this Act, before giving effect to the provisions of this section and the deduction under this section shall not exceed such total income of the assessee.]

(2) The deduction under clause (ii) of sub-section (1) shall be allowed only if the following conditions are fulfilled, namely :—

(a) the amount credited to the Special Economic Zone Re-investment Reserve Account is to be utilised—

(i) for the purposes of acquiring machinery or plant which is first put to use before the expiry of a period of three years following the previous year in which the reserve was created; and

(ii) until the acquisition of the machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India;

(b) the particulars, as may be specified by the Central Board of Direct Taxes in this behalf, under clause (b) of sub-section (1B) of section 10A have been furnished by the assessee in respect of machinery or plant along with the return of income for the assessment year relevant to the previous year in which such plant or machinery was first put to use.

(3) Where any amount credited to the Special Economic Zone Re-investment Reserve Account under clause (ii) of sub-section (1),—

(a) has been utilised for any purpose other than those referred to in sub-section (2), the amount so utilised; or

(b) has not been utilised before the expiry of the period specified in sub-clause (i) of clause (a) of sub-section (2), the amount not so utilised,

shall be deemed to be the profits,—

(i) in a case referred to in clause (a), in the year in which the amount was so utilised; or

(ii) in a case referred to in clause (b), in the year immediately following the period of three years specified in sub-clause (i) of clause (a) of sub-section (2),

and shall be charged to tax accordingly :

Provided *that where in computing the total income of the Unit for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (7B) of section 10A, the undertaking, being the Unit shall be entitled to deduction referred to in this sub-section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in clause (ii) of sub-section (1).*

Explanation.—For the removal of doubts, it is hereby declared that an undertaking, being the Unit, which had already availed, before the commencement of the Special Economic Zones Act, 2005, the deductions referred to in section 10A for ten consecutive assessment years, such Unit shall not be eligible for deduction from income under this section :

Provided further *that where a Unit initially located in any free trade zone or export processing zone is subsequently located in a Special Economic Zone by reason of conversion of such free trade zone or export processing zone into a Special Economic Zone, the period of ten consecutive assessment years referred to above shall be reckoned from the assessment year relevant to the previous year in which the Unit began to manufacture, or produce or process such articles or things or services in such free trade zone or export processing zone:*

Provided also *that where a Unit initially located in any free trade zone or export processing zone is subsequently located in a Special Economic Zone by reason of conversion of such free trade zone or export processing zone into a Special Economic Zone and has completed the period of ten consecutive assessment years referred to above, it shall not be eligible for deduction from income as provided in clause (ii) of sub-section (1) with effect from the 1st day of April, 2006.*

(4) This section applies to any undertaking, being the Unit, which fulfils all the following conditions, namely:—

(i) it has begun or begins to manufacture or produce articles or things or provide services during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence:

Provided *that this condition shall not apply in respect of any undertaking, being the Unit, which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;*

(iii) it is not formed by the transfer to a new business, of machinery or plant previously used for any purpose.

Explanation.—The provisions of Explanations 1 and 2 to sub-section (3) of sec-tion 80-IA shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(5) Where any undertaking being the Unit which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another undertaking, being the Unit in a scheme of amalgamation or demerger,—

(a) no deduction shall be admissible under this section to the amalgamating or the demerged Unit, being the company for the previous year in which the amalgamation or the demerger takes place; and

(b) the provisions of this section shall, as they would have applied to the amalgamating or the demerged Unit being the company as if the amalgamation or demerger had not taken place.

(6) Loss referred to in sub-section (1) of section 72 or sub-section (1) or sub-section (3) of section 74, in so far as such loss relates to the business of the undertaking, being the Unit shall be allowed to be carried forward or set off.

(7) For the purposes of sub-section (1), the profits derived from the export of articles or things or services (including computer software) shall be the amount which bears to the profits of the business of the undertaking, being the Unit, the same proportion as the export turnover in respect of such articles or things or services bears to the total turnover of the business carried on by the undertaking :

***Provided** that the provisions of this sub-section [as amended by section 6 of the Finance (No. 2) Act, 2009 (33 of 2009)] shall have effect for the assessment year beginning on the 1st day of April, 2006 and subsequent assessment years.*

(8) The provisions of sub-sections (5) and (6) of section 10A shall apply to the articles or things or services referred to in sub-section (1) as if—

(a) for the figures, letters and word "1st April, 2001", the figures, letters and word "1st April, 2006" had been substituted;

(b) for the word "undertaking", the words "undertaking, being the Unit" had been substituted.

(9) The provisions of sub-section (8) and sub-section (10) of section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purposes of the undertaking referred to in section 80-IA.

(10) Where a deduction under this section is claimed and allowed in respect of profits of any of the specified business, referred to in clause (c) of sub-section (8) of section 35AD, for any assessment year, no deduction shall be allowed under the provisions of section 35AD in relation to such specified business for the same or any other assessment year.]

Explanation 1.—For the purposes of this section,—

(i) "export turnover" means the consideration in respect of export by the undertaking, being the Unit of articles or things or services received in, or brought into, India by the assessee but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things outside India or expenses, if any, incurred in foreign exchange in rendering of services (including computer software) outside India;

(ii) "export in relation to the Special Economic Zones" means taking goods or providing services out of India from a Special Economic Zone by land, sea, air, or by any other mode, whether physical or otherwise;

(iii) "manufacture" shall have the same meaning as assigned to it in clause (r) of section 2 of the Special Economic Zones Act, 2005;

(iv) "relevant assessment year" means any assessment year falling within a period of fifteen consecutive assessment years referred to in this section;

(v) "Special Economic Zone" and "Unit" shall have the same meanings as assigned to them under clauses (za) and (zc) of section 2 of the Special Economic Zones Act, 2005.

Explanation 2.—For the removal of doubts, it is hereby declared that the profits and gains derived from on site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.

5.3.2 It has been submitted by Ld.Counsel that, on similar facts and circumstances, deduction under section 10A/AA was denied by authorities below in preceding assessment years, by raising identical objections. He submitted that, most of the objections have been addressed by coordinate bench of this *Tribunal* in assessee's own case for assessment year 2008-09 reported in *IBM India (P) Ltd vs JCIT* reported in *(2014) 46 Taxmann.com 129.* Ld.Counsel, submitted that, eligibility criteria are to be tested in the 1st year of claim. In support, he placed reliance upon decision of *Hon'ble Karnataka High Court* in case of *CIT vs Nippon Electronics (India) (P) Ltd* reported in *(1990) 51 Taxman 187,* and decision of *Hon'ble Delhi High Court* in case of *CIT vs Tata Communications Internet services Ltd.,* reported in *(2012) 17 Taxmann.com 241*.

5.3.3 At the outset Ld.Counsel submitted that, authorities below also referred to section 10A of the Act, as the term 'computer software' for purposes of section 10 AA, has been defined in *Explanation 2 to Section 10A(8).* He submitted that authorities below have looked into deduction claimed by assessee under section 10AA, having regard to various conditions stipulated under section 10A/10AA jointly. At the outset, he submitted that, some of the conditions are not required to be fulfilled by assessee, for eligibility of claim under section 10AA, vis-a-vis section 10A of the Act.

5.3.4 Submissions advanced by both sides regarding objections raised by authorities below for year under consideration to deny claim under section 10AA, are dealt with as under:

A. MSA does not reveal any specific details regarding software development activity:

A.1. At the outset, Ld.Counsel submitted that, Section10A/10AA of the Act, does not require DOU's to be registered with SEZ authorities. He submitted that non-registration of DOU's with SEZ authorities, does not have any bearing on the claim under section10A/10AA of the Act. However, he submitted that, copies of MSA and DOU's have been submitted before authorities below, which is the part of record. Referring to page 430-434 being IBM agreement for Services between and among related companies and 435-508 of paper book Volume 2, between assessee and IBM US, it is submitted that, all agreements inter alia reveals assessee to be engaged in business of development of computer software for exports and maintenance of computer equipments. Ld.Counsel further referred to 'Globally Integrated Delivery Document of Understanding for Managed Service Engagement,' placed at page 509 between assessee and IBM Italy that gives scope of work to be rendered by assessee under the said agreement. It is submitted that, these documents establish software development activities were carried out by assessee.

A.2. He submitted that assessee operates from software technology parks in India/special economic zone units, for export of software development services, predominantly to overseas group entities.

Referring to submissions dated 07/12/2016 filed before authorities below placed at page 416 of paper book volume 2, Ld.Counsel submitted that MSA dated 01/01/2004 is an umbrella agreement, that provides basis, on which each transaction is carried out by assessee, which has been registered with STPI unit. He submitted that MSA refers to transaction documents, which provides additional terms for inter-company services. It has been submitted that each project/transaction could have one or more transaction documents (such as invoice project, project, into company agreement, work item, statement of work, supplement or document of understanding), that determine nature of services rendered by assessee. It was submitted by Ld.Counsel that, these documents are to be referred in conjunction with MSA, to determine scope of work performed by assessee, for its related AE's globally. Ld.Counsel submitted that assessee cannot be denied exemption for the reason that separate scope of work contract was not filed with STPI/SEZ authority.

A.3. On the contrary, Ld.Standing Counsel for revenue submitted that, SOW is not registered with SEZ authority, and therefore, contentions of assessee have been rightly rejected by authorities below. He submitted that MSA dated 01/01/2004 available on record does not reveal any specific detail about nature and scope of work. Ld.Standing Counsel emphasised that, none of the DOU's/ICA's were registered with STPI/SEZ authority admittedly. Referring to Circular No.1 dated 17/01/2013 he submitted that issues relating to export of computer software have been clarified by

CBDT in this circular, wherein particular attention was drawn to the requirement of establishing direct nexus with development of software done abroad, with eligible unit, set up in India, pursuant to a contract between AE client and eligible unit of assessee. He submitted that as per Section 2(j) of SEZ Act 2005, assessee has to establish that manufacture/ produce of articles or things or provide any services commenced on or after 1.04.2006. He submitted that assessee has continued the business already in existence without having any new contract/agreement of alleged exports of computer software.

A.4. He submitted that in present facts of the case, assessee failed to submit any such details of work order issued to assessee in connection with any work assigned, and that, no evidence has been produced by assessee of any nature like communications made, manual or otherwise, where assessee has been instructed to carry out software development work or for that matter any other work. Ld.Standing Counsel submitted that, onus of proving that, work carried out by assessee was software development, entirely depended on these documents, and absence of these basic documents, shows that, assessee had only carried out miscellaneous work like server management, technical services, providing financial services, software consultancy etc. He submitted that these are evident from several FIRC's placed in paper book, and therefore claim of assessee under section 10AA, remains unsubstantiated.

A.5 We have perused submissions advanced by both sides in light of records placed before us.

Objection raised by authorities below is that, assessee did not establish by way of documentary evidences regarding services rendered to its AE's globally, and that, these were in the nature of software development services. It has been alleged by revenue that, MSA dated 01/01/2004, was the only document registered with STPI/SEZ authorities, which do not specify the scope of work.

We place reliance upon Circular no.01/2013, dated 17/01/2013 issued by CBDT, wherein, necessity to have separate master service agreement for each work contract and to what extent it is relevant has been dealt with as under:

"(2)……..
(i)……..
(a)……
(b)……
(ii). Whether it is necessary to have separate master service agreement (MSA) for each work contract and to what extent it is relevant.
As per the practice prevalent in the software development industry, generally two types of agreement entered into between the Indian software developer and the foreign client. Master Service Agreement (MSA) is an initial general agreement between a foreign client and the Indian software developers setting out the broad and general terms and conditions of business under the umbrella of which specific an individual Statement of Work (SOW) are formed. These SOW, is in fact, enumerate the specific scope and nature of the particular task or project that has to be rendered by a particular unit under the overall ambit of the MSA. Clarification has been sought whether more than one SOW can be executed under the ambit of a particular MSA and whether SOW should be given preceded and over MSA.
The matter has been examined. It is clarified that the tax benefit under section 10 AA, 10 AA and 10 B would not be denied merely on the ground that a separate and specific MSA does not exist for each SOW. The SOW would normally prevail over MSA in determining the eligibility for tax benefits unless the assessing officer is able to establish that there has been splitting up or reconstruction of an existing business or non-fulfilment of any other prescribed condition."

From the above, it is clear that, benefit under section 10A,10AA and 10 B cannot be denied as separate and specific MSA does not exist for each SOW. Be that as it may, from SOFTEX forms placed in paper book at page 536 onwards, columns 7 specifically reveals, export contract/purchase order, being filed with SEZ. We also note that, each form consist enclosures, like copies of export contract, royalty agreement, communication from foreign customers.

Submissions by Ld.Standing Counsel for revenue is thus found to be contrary to SEZ approvals placed at page 782 onwards of paper book volume 3. Ld.Standing Counsel for revenue also placed reliance on Circular no.1/2013 dated 17/01/2013 issued by CBDT, which addresses various requirements for being eligible to claim deduction under section 10AA of the Act, but did not bring to our notice, anything contrary except for saying that assessee did not file separate SOW with SEZ.

Ld.Counsel submitted that, assessee claimed deduction under section 10AA of the Act for year under consideration, however, for purposes of definition of 'computer software', one has to refer to *Explanation 2* to *Section 10A(8)* of the Act. Ld.Counsel submitted that 'computer software' for purposes of section 10AA would mean:

" (i) "computer software" means,-

(a) any computer program recorded on any disk, tape, perforated media or other information storage devices; or

(b) any customised electronic Data or any product or service of similar nature, as may be notified by the board,

which is transmitted or exported from India to any place outside India by any means."

We note that transfer pricing adjustment proposed by Ld.TPO was in respect of payments received on account of services rendered by assessee under software development segment. Therefore, it cannot be held that services rendered by assessee, does not fall under software development service segment. So, to allege that, assessee was providing miscellaneous services, is like blowing hot and cold at the same time. Revenue has not been able to prove anything contrary by way of documentary evidences on this aspect before us. Therefore, this objection raised by revenue does not hold good in eyes of law and is rejected.

B. No evidence of data transmission and export of software outside India:

B.1. Ld.Counsel submitted that, authorities below erred in concluding that, assessee did not transmit or export computer software outside India from its SEZ units. He submitted that, various details were filed before authorities below to prove, manner in which data was transmitted/exported. Ld.Counsel relied on, copies of royalty agreement, export contract and communication with foreign customers, placed in paper book Volume 2 at page 416-696 & 697-834, filed with authorities below, vide submissions dated 7/12/2016. He submitted that, assessee works on various technical platforms to transmit software from its various unit, and that, one such platform is, world wide IP-based wide area network, referred to as "Power 9", provided by AT&T to assessee globally.

B.2. He submitted that, strategic network designed by AT&T meets assessee's data communication requirement globally. He submitted that, these network are cost-effective architecture and flexible as per assessee's needs, as it is built on a global Multi-Protocol Switched Shared Backbone, that provides foundation for the logical, any to any IP connectivity, among all IBM sites, that are connected to the Mighty Protocol Switched backbone, in the AP region. He further submitted that in terms of global connectivity, each geographical area is a self-contained network with a high-speed backbone and carrier aggregation of individual sites and sub-networks. This enables assessee to transmit data to its group companies across the globe through multiprotocol switched shared backbone.

However, Ld.Counsel also emphasized that, this is not a requirement to be satisfied for being eligible to claim deduction under section 10AA of the Act.

B.3. On the contrary, Ld.Standing Counsel appearing for revenue submitted that, replies filed by assessee with SEZ Authority regarding details of service provider who rendered services for transmission of data exported by assessee is inconsistent with submissions made by assessee for year under consideration. He vehemently supported observations of authorities below.

B.4. In rejoinder, Ld.Counsel for assessee submitted that, authorities below have relied on replies filed by assessee, relating to export of software for year 2008-09. He submitted that, authorities below reproduced replies filed by assessee and notice issued by SEZ

authorities calling for details of service provider who assisted assessee for transmission of data. Referring to letter dated 10/10/2013 filed by assessee before Ld.AO reproduced at page 28 of impugned order, Ld.Counsel submitted that, for year under consideration, datacom service provider for international link was AT&T, whereas local link was Tata Tele Services and Bharathi.

B.5. Ld.Counsel referring to the said letter, submitted that during initial days AT&T and VSNL had an arrangement to jointly offer Multiprotocol Switched Networking Services in India, as infrastructure of AT&T was co-located with VSNL. VSNL was therefore considered to be the parent service provider and was consistently mentioned in SOFTEX form. He submitted that though VSNL was being mentioned in SOFTEX form, the international traffic for software development export services was always being supported through AT&T. For assessee in India most of WAN links are owned and managed by AT&T and, access links where international traffic is carried out was also through AT&T. . Ld.Counsel submitted that all these evidences/details have been held to be inconsistent by authorities below. However, he again submitted that, for purposes of eligibility under section 10 AA of the Act, this alleged deficiency pointed out by Ld.AO is not of any relevance.

B.6. Ld.Standing Counsel for revenue, placed reliance on, observations authorities below.

B.7. We have perused submissions advanced by both sides in light of records placed before us.

It is observed that, coordinate bench of this *Tribunal* for assessment year 2008-09 (supra) has already taken a view that declaration on STPI forms should be held to be sufficient in this regard. Further, we agree with Ld.Counsel that, for purpose of eligibility of claim under section 10AA of the Act, this objection does not have any relevance.

Therefore, respectfully following the same, this objection raised by authorities below is rejected at the thrushold.

C. Non submission of accounting invoices to STPI/SEZ authorities, Non approval of units by SEZ authority:

C.1. Ld.Counsel submitted that accounting invoices raised on associated enterprises and SOFTEX invoices are submitted to STPI/SEZ authorities. It has been submitted that the work contract received from group entities, are executed through STPI unit's and finished work are exported there from, as evidenced in SOFTEX Forms. Referring to page 536 of paper book Volume 2, being SOFTES Form Ld.Counsel submitted that in Column-9, under 'Type of software exported', assessee selected, 'Software development'. Referring to page 539 being part of SOFTEX form.

C.2. Ld.Counsel at this juncture, took us through written submission dated 7/12/2016, filed in paper book at page 416 of paper book, to demonstrate that, invoices raised could not be co-related with work carried out for a particular overseas client by assessee. Extract of procedure adopted by assessee as submitted in written submission dated 7/12/2016 are reproduced as under:

- Ld.Counsel submitted that, IBM group entities across the globe, procure businesses from various end customers. Part of the contractual commitments of IBM group entity is sub contracted to assessee on need basis. Services rendered by assessee based on nature of work assigned, could be carried either from offshore or on-site. He submitted that IBM overseas entities sub-contracts work in a composite form and assessee determines the basis of servicing the project.
- Ld.Counsel submitted that assessee uses common intercompany accounting system and Internet Labour Clocking System, to record time utilised for software development work, person went to DOU's with other IBM group entities and to generate invoices for services rendered to IBM group companies.
- Ld.Counsel submitted that, when IBM overseas entity enters into an ICA/SOW/DOU with assessee, a unique Account ID is created for assessee. For each Account ID created by IBM overseas entity, sub ID's in the form of work items are created based on nature of work items assigned and work deliverables for each project. He submitted that employees are assigned to each of these Account ID's and work items, wherein labour time is recorded via Internet labour clocking system.
- Ld.Counsel further submitted that employees performing export activity are tacked to particular building/license (STPI/SEZ unit). All resource/work performed by such employees are tacked to respective license to which the

employee is tagged. Seat verification tool is used as a framework, in order to control, identify and tag employees to particular STPI/SEZ license for purpose of software development work.

- Ld.Counsel further submitted that a global rate card to capture hourly cost on an absorption costing principle for India is agreed and finalised on an annual basis. He submitted that the rate card contains details of hourly, employee band wise charge out rates and this so is from the Project and Accounts Controlled Table for purpose of invoice generation.
- Finally, he submitted that, the System Service Costing Ledger Bridge, calculates labour cost, based on input from, labour hours and rate card of employees in India from project and Accounts Controlled Tables. Other cost elements also flow into the System Service Costing Ledger, which are in the nature of employee reimbursements and project specific expenses. The data from System Costing Ledger then feeds into common intercompany accounting system that generates invoices.

C.3. Ld.Counsel submitted that, such common intercompany accounting system/accounting invoices, are for specific country and is composite in nature, which means that it may contain multiple Account IDs and billing referred for multiple STPI/SEZ. He submitted that accounting invoices may contain revenue of different STPI/SEZ locations, and revenues for both offshore and on-site services. It is also submitted that, such invoice would also include reimbursement of project specific cost if any.

C.4. Ld.Counsel submitted that, SOFTEX forms are required to be submitted for each STPI/SEZ locations separately, but is not applicable for on-site revenues. In view of composite nature of system generated accounting invoices, a split in composite invoices into offshore/on-site raised on STPI/SEZ location for filing of SOFTEX forms are carried out. Ld.Counsel thus submitted that SOFTEX invoices are separate and derived as a subsection of accounting invoices, but separately maintained for filing with STPI/SEZ authorities, with respect to offshore services only.

On the basis of above complex procedure for invoicing, Ld.Counsel submitted that, it would not be possible to identify each invoices *qua* services rendered by assessee.

C.5. On the contrary, Ld.Standing Counsel for revenue, submitted that, there may be no denying of fact that, whatever work assessee carried out, may have been done at various units, but, the main question still remains is, whether, such work was software development work or other works. He also contended that, none of the units were registered with SEZ Authority, and therefore eligibility of such units has also not been established by assessee.

C.6. In rejoinder, Ld.Counsel for assessee submitted that assessee submitted relevant documents to establish granting of approval by SEZ Authorities in respect of units for which relief was claimed under section 10AA of the Act. He referred to pages 782-783, 791, being extension received or fresh approval and various other letters from authorities for setting up of new unit placed at pages 784-790 and 792-807 of paper book volume 3.

C.7. Ld.Counsel, without prejudice, submitted that, compliance with SEZ regulations is not a mandatory condition for eligibility of benefit under section 10AA of the Act. In support of this contention, he referred to decision of *Mumbai Tribunal* in case of *M/s.HDFC Property Fund vs ITO in ITA No. 7472/MUM/2017 for assessment year 2014-15* by *order dated 28/02/2019*. Placing reliance on para 10 of the order, Ld.Counsel submitted that, in the absence of any adverse action by SEZ authority, it is incorrect to assume that assessee has not complied with requirements under SEZ Act, 2005. Placing reliance upon decision of *Hon'able Supreme Court* in case of *Gestentner Duplicators Pvt.Ltd vs CIT* reported in *117 ITR 1*, it has been emphasised that, it was not open for authorities below to assume any violation under SEZ Act, 2005 so long as the certificates of approval/renewal of a unit is not withdrawn by a process known to law.

C.8. We have perused submissions advanced by both sides in light of records placed before us.

C.8.1. Upon a query being raised by the bench regarding producing invoices for verification before authorities below, Ld.Counsel on instructions, submitted that, these are huge voluminous documents, which are difficult to compile. However he submitted that, assessee would be in a position to file documents as far as possible to co-relate invoices with SOFTEX forms.

C.8.2. Ld.Standing Counsel for revenue placed reliance upon decision of *Hon'ble Supreme Court* in case of *DCIT vs ACE Multi Axis systems Ltd.*, reported in *(2017) 88 Taxmann.com 69*. Ld.Standing

Counsel by relying on this decision, proposed that, eligibility/satisfaction under the section 10A/10AA has to be established every year by assessee for claiming deduction. On perusal of the decision, it is noted that the ratio laid down by *Hon'ble Supreme Court* is in the context of section 80 IB, which is a separate code in itself. Further *Hon'ble Supreme Court* upheld denial of exemption for the reason that, section 80 IB is available to an undertaking that remains a small scale industry for the period when deduction is claimed and assessee therein ceased to be a small scale industry. It was for this violation that the claim u/s 80IB was denied.

C.8.3 In the present facts of the case assessee placed on record approvals obtained by SEZ authorities which has not been rejected. It is noticed that nothing has been brought on record by Ld.Standing Counsel to show that alleged units ceases to be an eligible unit registered with SEZ authority. Further we refer to the decision relied upon by Ld.Counsel in case of *CIT vs Nippon Electronics (supra)* by *Hon'ble Karnataka High Court* and *CIT vs Tata Communications Internet services Ltd (supra)* by *Hon'ble Delhi High Court*.

C.8.4. Respectfully following aforestated decision we agree with submissions of Ld.Counsel that, in absence of any adverse action by SEZ Authorities, no presumption could be drawn that assessee violated any requirements under the scheme. We refer to decision of *Ahmedabad Tribunal* in case of *ITO vs E-Infotech Ltd* reported in

(2009) 124 TTJ 176, to support the aforestated view. This *Tribunal* in the said case has held as under:

> *"As regards violation of norms of STPI, we are of the view that unless violation of conditions of approval, impinge on conditions for grant of deduction under the relevant provisions of the Act, there is no ground for denial of deduction. In this case the status of tax bear as hundred percent EOU and under STPI scheme continues. For the default, already penalty has been imposed by concerned authorities"*

Facts in present case is more stronger than facts based upon which Hon'ble *Ahmedabad Tribunal.* Nothing has been placed on record by Revenue to show that approvals relied upon by Ld.Counsel referred to herein above has been rejected by SEZ authority. Therefore, respectfully following ratio laid down by *Hon'ble Supreme Court* in case of *Gestentner Duplicators Pvt.Ltd vs CIT (supra),* it was not open for authorities below to assume any violation under SEZ Act, 2005 so long as certificates of approval/renewal of units are not withdrawn by a process known to law.

We are therefore of opinion that this objection raised by Ld.AO does not hold good in test of law.

D. RBI Approval for bank account maintained outside India with regard to export earnings not obtained:

D.1. At the outset, Ld.Counsel vehemently urged that, this condition is not a requisite to claim deduction under section 10AA of the Act, and therefore deduction cannot be denied on this basis.

Be that as it may, referring to submissions dated 07/09/2015 filed before Ld.AO during assessment proceedings under section 144C

(1), Ld.Counsel submitted that, section 10A(3), allow assessee to either;

(i) directly receive export proceeds in India, or

(ii) bring export proceeds to India after the same is received outside India.

D.2. Ld.Counsel submitted that, as per *Explanation 2* to *Section 10A(3)*, sale proceeds referred to therein, shall be deemed to have been received to India, where such sale proceeds are credited to a separate account maintained for the purpose, by assessee, with any bank outside India, with approval of RBI.

D.3. It has been submitted that, even otherwise, an unapproved bank account maintained by assessee outside India, in which export sale proceeds are deposited, still assessee would be entitled to benefits of section 10A, to the extent that, it is brought into India in convertible foreign exchange as per section 10A(3)(i) of the Act.

D.4. However, Ld.Counsel submitted that, vide letters dated 24/08/2012 and 04/01/2013, RBI granted permission to assessee, to hold and maintain foreign currency account outside India, which was placed before authorities below.

D.5. It is submitted that assessee received part of export proceeds from sale of computer software into foreign currency account maintained outside India with approval of RBI and accordingly company is eligible to claim tax holiday as per section 10A of the Act. It has been also submitted that amount of export proceeds from sale of computer software received into foreign currency

account maintained outside India, being HSBC (USA), is to be treated as sale proceeds deemed to have been received in India.

Ld.Counsel submitted that authorities below do not dispute satisfaction of conditions laid down in section 10 A (1) and (2) of the Act. It is also been submitted that, Ld.AO do not dispute that assessee derived profits from export of computer software and that, export turnover in respect of such activity has also not been disputed by Ld.AO in Transfer Pricing Proceedings. Ld.Counsel thus, submitted that, under such circumstances, Ld.AO cannot reject claim of assessee in totality under section 10A/10AA of the Act.

D.5. Ld.Counsel referred to and relied upon date wise events, showing reinstatement of approval by RBI vide letter dated 28/02/2014 which is reproduced as under:

Date	**Particulars**
22 Jan1998	Approval granted by the RBI to open and maintain a FCA with HSBC (erstwhile Midland Bank or City Bank), New York, USA (copy enclosed as Annexure 10)
1998 0nwards	Annual certifications/ approvals from the RBI was received by IBM India -latest approval being received vide letter dated 10 November 2001.
June 2002	RBI issued Circular No 54 dated 29 June 2002 pertaining to maintenance of FCA abroad by a company/ firm/ body corporate registered or incorporated in India (copy enclosed Annexure 11). The circular provided for liberalization in approvals and delegation process in connection with FCA opened for normal business operations subject to certain conditions. IBM India was of the bonafide belief that it did not require to obtain renewal of its RBI approval on the basis of the above- mentioned circular.
2011-12	IBM India approached RBI and requested for ratification to

	maintain the FCA for the period 2002-2011.
Aug 2012 and Jan 2013	RBI grants approval to hold and maintain the FGA for one year. Further,RBI condoned the lapse on part of IBM India in not obtaining the renewal of RBI approval to maintain FCA at regular intervals after the last renewal given in November 2001 (copy of letters enclosed as Annexure 12).
April 2013	RBI requested additional information following notices issued/ enquiries conducted by the erstwhile Assessing Officer.
8 May 2013	RBI revoked the approval granted vide letters in August 2012 and January 2013 (copy enclosed as Annexure 13).
23/26 August 2013	Deutsche Bank ('DB) received a letter (copy enclosed as Annexure 14) from RBI instructing it to conduct a transactional audit of export transactions undertaken by IBM India by the DB officers or by an external statutory auditor. Pursuant to this, DB appointed Deloitte Haskins and Sells ('DHS') as the independent auditor to perform the transactional audit, the scope of which was us follows: a. Transactional audit highlighting transparently the trail of each and every export transaction pertaining to the exporter from 2001 to 2012; b. Contract wise matching of repatriation of 30% onsite revenue for the period till February 2007) / profit (February 2007 onwards); and C. Certify that the actions of the Company are in accordance with FEMA and relevant guidelines issued by Reserve Bank of India.
Oct 2013	DB submitted DHS audit report (copy enclosed as Annexure 8) to RBI on the process review, sample testing, transaction audit and FEMA guidelines review.
Dec 2013	DB submitted a letter to RBI stating, inter-alia, that IBM has largely complied with the provisions of FEMA and other guidelines issued by RBI in this regard (copy enclosed as Annexure 15).
28 Feb 2014	Letter from RBI stating, inter-alia, that after a careful analysis of the audit report submitted by DHS and subsequent clarifications, the FCA facility has been restored (copy enclosed as Annexure 9).

D.6. Ld.Counsel submitted that Ld.AO did not agree with submissions by observing as under:

"…….. The submissions made by assessee have been considered. It is seen from the submission that the DB had submitted a letter to RBI stating that IBM has largely complied with the provisions of FEMA and other guidelines issued by RBI. In view of the details available it is clear that assessee has not fully complied with the requirements of income tax act as per RBI approval has been taken only after specific findings made by the assessing officer."

D.7. It has been submitted that this issue stands concluded by coordinate bench of this *Tribunal* in assessee's own case for assessment year 2008-09 (supra) in para 3.84-3.86.

D.8. On the contrary, Ld.Standing Counsel for revenue submitted that, RBI has to grant approval to hold and maintain foreign currency account, outside India, as a requirement, for eligibility to claim deduction under section 10A/10AA under scheme of SEZ. In the present facts of the case, RBI has not approved bank account outside India, in which sale proceeds were deposited. He submitted that, assessee violated condition required 10A (3) of the Act. He vehemently supported observations of authorities below for denial of claim, due to relation of the specific condition.

D.9. We have perused submissions advanced by both sides in light of records placed before us.

D.9.1. We note that, deduction U/s.10AA is denied for violating Explanation 2 to secoion 10A(3), as, it is alleged by authorities below that, bank account outside India in which sale proceeds were deposited was not approved by RBI.

As rightly submitted by Ld.Counsel, this would be material only for claiming benefit of *Explanation 2* to *Section 10A(3)* of the Act. At the outset we also note that this is not a requirement to be fulfilled under section 10AA of the Act. Even otherwise, considering this objection, assessee is anyways not barred from claiming deduction under main provisions of section10A(3) of the Act, whereby, it can satisfy Ld.AO regarding receipt of sale proceeds out of India being brought into India in convertible foreign exchange within the period stipulated in the provisions of the Act.

D.9.2. At this juncture, we understand the apprehension of revenue regarding the question as to whether, foreign exchange remittances were in relation to export of computer software outside India. Assessee has placed on record SOFTEX forms at pages 536 of volume 2. Category mentioned in Column 9 in the form indicates that proceeds have been received for software exported under. However, from the reasoning by authorities below, it is noted that it has not verified, as to whether, convertible foreign exchange brought into India, represents consideration received towards export of computer software.

D.9.3. We note that, *Hon'ble Bench* of this *Tribunal* in assessee's own case for AY:2008-09 dealt with this objection in light of identical argument raised by Ld.Counsel therein as under:

> ***"3.84.*** *We now take up the question with regard to the absence of an RBI approved bank account in which the export sale proceeds have to be deposited outside India. On this aspect, we find that the assessee has been depositing the export proceeds in HSBC account in New York. It was also seen that this bank account had approval only for the period up to 2001, Thereafter, the approval was required to be renewed, but had not been renewed by the assessee. We have also seen that if there had been a RBI*

approved bank account in which the export proceeds were deposited outside the country, than under Exptanation-2 to -section 10A(3) of the Act the assessee would satisfy the requirements of section 10A(3) of the Act viz., bringing into India the sale proceeds of computer software exported out of India In convertible foreign exchange.

3.85 *We have also seen that even before the AO, the assessees put forth a claim that even in the absence of a RBJ approved bank account maintained by the assessee outside India in which the sale proceeds of computer software exported out of India are deposited, still the assessee would be entitled to benefits of section 10A deduction to the extent it brings into India the sale proceeds in convertible foreign exchange. We have also seen that the assessee in this regard has filed details before the AO. These are detailed in the earlier part of this order in which the submission of the ld counsel for the assessee with regard to the various documents filed by the assessee before the AO are discussed. We have also admitted as additional evidence the letter dated 12.07.2013 addressed by the Deutsche Bank to the RBI, certifying the inward remittances received by the assessee on account of export of computer software.*

3.86 *As rightly submitted by the ld. counsel for the assessor, the AO as well as the DRP projected the claim of the assessee far deduction u/s 10A of the Act only on the ground that there was no RBI approved bank account outside India In which the sale proceeds of computer software exported out of India were deposited This would be material only for taking the benefit of Explanation to section 10A(3) of the Act The assessee is not barred from claiming deduction under the main provisions of section 10A(3) of the Act, whereby it can satisfy the AO about the receipt of sale proceeds of computer software exported out of India being brought into India in convertible foreign exchange within the period stipulated in the provisions u/s 10A(3) of the Act. As rightly submitted on behalf of the assesses, deduction u/s. 10/10AA of the Act cannot be totally denied. The fact that the assessee has exported computer software out of India and brought convertible foreign exchange into the country is not disputed. The quantum has lo be arrived at on the deduction which the assessee is entitled to has to be allowed.*

3.87 *We are therefore of the view that it would be just and appropriate to set aside the order of the DRP and remand the issue to the DRP for fresh consideration and direct the DRP to examine the claim of the assessee on the basis of evidence that the assessee may lead to prove the receipt of sale proceeds of computer software exported out of India being brought into India in convertible foreign exchange. The DRP will be at liberty to examine as to whether the convertible foreign exchange was brought Into India and that they represent consideration received for export of computer software. The AO in the set aside proceedings before the DRP will be at liberty to rebut such claim of the assessee including the claim that the foreign exchange brought in does not represent safe proceeds of computer software*

exported out of India. As mentioned in para 3.56 of this order, the assessee should produce before the AO all documents referred to in the letter dated 12.07.2012 of Deutsche Bank to RBI. We give liberty to the assesses to file such documents as may be necessary to establish its claim for deduction u/s. 10A/10AA of the Act Thus, ground Nos. 3 1 to 3.4 raised by the assessee are treated as allowed for statistical purposes."

D.9.4. Respectfully following the same, we remand this issue to DRP to verify receipts if sale proceeds of computer software exported out of India, being brought into India in convertible foreign exchange. DRP is at liberty to examine whether, convertible foreign exchange brought into India represents consideration received for export of computer software.

Accordingly, this objection is remanded to DRP.

E. Analysis of books of account and unit wise P&L account

At the outset, we note that this is not a requirement u/s 10AA of the Act.

E.1. Ld.Counsel submitted that authorities below has erred in holding that unit wise P&L account submitted by assessee in relation to eligible unit was not reliable. He submitted that this observation is based on assessment order passed for assessment year 2008-09 and statement recorded under section 131 of the Act, during assessment proceedings for assessment year 2009-10, of CA Sh.J.Majmudar who conducted statutory audit, and Sh.T.Ravindra who issued certificate of claim under section 10A/10AA,.

E.2. Ld.Counsel submitted that coordinate bench of this *Tribunal* in assessee's own case for assessment year 2008-09(supra) held that, no separate books of account have to be maintained. He placed

reliance upon observations recorded by this *Tribunal* in respect of this objection in para 3.75 to 3.83.

E.3. On the contrary, Ld.Standing Counsel for revenue placed reliance upon observations recorded in draft assessment order for assessment year 2009-10. He submitted that, statements of CA's recorded therein establish that, assessee could not demonstrate the basis of unit wise expenses allocation between SEZ and non-SEZ units. Ld.Standing Counsel for Revenue submitted that, by relying on observations of his predecessor for assessment year 2009-10 reproduced in assessment order, Ld.AO projected his grievance that, assessee could not establish any system of allocation of expenses. He thus submitted that unit wise P&L account cannot be relied for allowing the claim.

E.4. We have perused submissions advanced by both sides and observations of authorities below on record.

E.4.1. In this connection, we refer to and rely upon findings of coordinate bench of this *(Tribunal)* in assessee's own case for assessment year 2008-09 (supra) wherein, *Hon'ble Bench* after analysing various rulings of *Hon'ble Supreme Court* in case of *CWT vs Kripashankar Dayashankar Worah* reported in *(1971) 81 ITR 763*, *Philip John Plasket Thomas vs CIT* reported in *(1963) 49 ITR 97* and *Smt. Tarulata Shyam vs CIT* reported in *(1977) 108 ITR 345, Hon'ble Karnataka High Court* in case *of CIT vs Fusion Software Engineering Pvt. Ltd.,* reported in *(2012) 18 Taxmann.com 57* observed as under:

> *"3.77. Apart from the above, we find that that this issue has already been concluded by ITAT Bangalore bench in assessee's own case for assessment*

year 2000-01 in ITA No. 3464/Bang/2004 by order dated 31/10/2007. One of the issues dealt with by the Tribunal in the aforesaid decision was as to whether there was requirement of assessee in maintaining separate books of account with regard to each STPI unit. This Tribunal after elaborate discussion on the issue held that, there was no requirement of maintenance accepted separate books of account for various STPI units. At page 23 of Tribunal's order revenue has accepted the identification of sales turnover of various STPI unit was possible. This decision of Tribunal has been followed in assessee's own case for assessment year 2002-03 in ITA No. 1151/B Angel/2009 by order dated 24/06/2011.

.....

3.81 . Another basis given by the AO in para 3.4 of his order is that there is no system of identifying expenses and revenues and that books of accounts are written without primary documents being in existence. On the various books of account maintained by the assessee, we have already elaborated as to how the assessee has explained before the AO its method of maintaining books of account and arriving at the profits of various STP units. The order of assessment as well as the order of the DRP is absolutely silent on the plea put forth by assessee in this regard. We have to therefore proceed on the basis that the revenue has found no fault whatsoever with the various system of accounting maintained by the assessee."

E.4.2. For year under consideration, Ld.AO at page 36 of impugned order accepts that, assessee maintained books of accounts in the same manner as in past.

We note that Ld.AO sought to rely on statements of CA Sh.J.Majmudar and Sh.T.Ravindra even for asst. year 2008-09. This *Tribunal* while considering the objection for assessment year 2008-09 (supra) observed as under:

"3.82. The AO has also sought to rely on statement of Mr T Ravindra, partner of Krishnaswamy and Co., Who have given reported in form 50 6F certifying the claim of the assessee for deduction under section 10 A of the act. We observe that the deduction under section 10A of the act is dependent on fulfilment of conditions laid down in that section, the statement of auditor cannot alter the claim for deduction under section 10A of the act, if otherwise the conditions laid down in the said section are fulfilled by an assessee. Besides the above, the CA has given a detailed explanation as to how profitability of various STP units have been arrived at. The AO has also referred to the fact that audited financial statements of statutory auditors was relied upon by Krishnaswamy and Co., While certifying form 53F of the act. We have already explained the various documents filed by assessee before the AO on the method of maintaining books of account. There is neither a discussion not errors pointed out by the AO or the DRP on the claim of the assessee that the documents maintained by it sufficiently enables determination of profits of each of the STPI units"

E.4.3. Admittedly, facts and circumstances for year under consideration is identical and similar to assessment year 2008-09. We refer to page 835 of paper book volume 3, wherein, assessee filed unit wise profit and loss account and cost identification/allocation methodology between exports and domestic operation. It is apparent that Hon'ble Bench for asst. year 2008-09 also noted that, view taken by coordinate bench of this *Tribunal* for assessment year 2000-01 and 2002-03, has not been disputed by revenue. Further, it is also a matter of fact, that, authorities below have not disputed sale proceeds claimed by assessee against each SEZ units, and therefore, we have to proceed on the footing that

bifurcations of profits of various SEZ units as given by assessee are correct.

E.4.4. In view of the above, respectfully following observations by this Tribunal in asst. year 2008-09, we are of the view that there is no requirement for maintaining separate books of account for claiming deduction under section 10A/10AA of the Act, and books of account maintained by assessee is sufficient to enable computation of profits of various SEZ units. Further the circular issued by CBDT dated 17/01/2013 (supra) also clarifies that there is no requirement in law to maintain separate books of account and the same cannot be insisted upon.

We therefore do not find any merit in this objection raised by Ld.AO.

F. AO held that assessee continued existing business through SEZ units

F.1. Ld.Counsel submitted that, authorities below relied upon draft assessment order for AY:2009-10, in which, one of the reason recorded for denial of deduction claimed was that, assessee merged with IBM Global Services India Pvt.Ltd.(IGS), and therefore, the same business of IGS was continued by only changing the name of company.

F.2. Ld.Counsel referring to submissions placed at page 1032 of paper book volume 4, submitted as under:

> *"10.39. IBM WTC established its presence in Indian market in the early 1990's as a joint venture company with the Tata Group, Tata IBM Ltd.,(Tata IBM) persuant to the liberalisation of Foreign Direct Investment*

Policy in India, the stake of the Tata's in IBM was diluted over a period of time and eventually, Tata IBM was entirely owned by IBM WTC and Tata IBM was renamed as IBM India Ltd. The operations of IBM India Ltd., comprised of manufacturing and distribution of IBM products and provision of marketing support services to associated enterprises. IBM India Ltd., manufactured desktop computers and servers and distributed a range of hardware and software products of IBM India. In the late 1990's, IBM WTC set up a subsidiary in India, IGS with the objective of being engaged in software development and related services.

10.40. Thereafter, it was proposed to consolidate operations of IBM India Ltd into IGS w.e.f. 01/04/2002 and therefore an approval of Hon'able Karnataka High Court was obtained for amalgamation vide order dated 25/09/2004. Pursuant to this amalgamation, IBM India Ltd stood dissolved and IGS was left as surviving entity. Subsequently, IGS was renamed as IBM India Private Limited.

10.41. Therefore, there has been no splitting or reconstruction of the business of IGSI (now IBM India) which continues to render software development services."

F.3. Ld.Counsel also submitted that DRP during proceedings for assessment year 2010-11, examined this issue and accepted assessee's view that, issue of splitting and reconstruction of business can be examined only in 1st year of commencement of undertaking.

F.4. On the contrary, Ld.Standing Counsel for revenue submitted that, as per section 10AA of the Act, an enterprise, referred in clause (j) of Section 2 of SEZ Act 2005, is, who begins to manufacture or produce articles or things or provide any services during previous year relevant to any assessment year commencing

on our after 01/04/2006, shall be entitled for deduction of their profit. He submitted that in the present case, assessee continued the business already in existence, without having any new contract agreement of alleged export of computer software, and hence, claim of assessee under section 10AA of the Act was rightly denied.

F.5. We have perused submissions advanced by both sides in light of records before us.

F.5.1. It is submitted by by assessee that, there was only a change in name of assessee. Ld.AO has not been able to establish by way of any material evidences that such change in name, resulted in formation of a new undertaking for denial of exemption, otherwise entitled to assessee. In present case, Assessee started claiming exemption under section 10A from assessment year 2000-01. Ld.Counsel placed reliance upon decision of *Hon'ble Delhi High Court* in case of *CIT vs Tata communication Internet services Ltd (supra)*, wherein, *Hon'ble Court* upheld the view taken by thins *Tribunal* that, conditions mentioned in section 80IA(3) of the Act, which is *pari materia* to section 10 AA (4) of the Act, cannot be considered for every year of the claim of deduction under section 80 IA of the Act, but can be considered only in the year of formation of business. This preposition has been accepted by DRP in assessment year 2011-12 in assessee's own case. It is also noted that the amalgamation took place during the year 2004 as approved by *Hon'ble Karnataka High Court,* by order dated 25/09/2004, and accordingly, units stood already transferred. We also draw support from decision of *Mumbai Tribunal* in case of *Piramal Health Care*

Ltd., vs.DCIT in ITA no.1257/Mum/2014 by order dated *07/05/2019*, wherein ,*Honble Bench* decided an identical issue under section 80 IC(4), which is *pari materia* to section 10AA(4).

We have perused decision of *Hon'ble Supreme Court* in case of *DCIT, Bangalore vs.ACE Multi Axes Sysrems Ltd.,* reported in *(2018) 400 ITR 141,* relied by Ld.Standing Cousel for revenue. Hon'ble Supreme Court in this case was considering claim u/s.80IB(2). Hon'ble Court observed as under:

> ***"12.*** *The scheme of the statute does not in any manner indicate that the incentive provided has to continue for 10 consecutive years irrespective of continuation of eligibility conditions. Applicability of incentive is directly related to the eligibility and not de hors the same. If an industrial undertaking does not remain small scale undertaking or if it does not earn profits, it cannot claim the incentive. No doubt, certain qualifications are required only in the initial assessment year, e.g. requirements of initial constitution of the undertaking. Clause 2 limits eligibility only to those undertakings as are not formed by splitting up of existing business, transfer to a new business of machinery or plant previously used. Certain other qualifications have to continue to exist for claiming the incentive such as employment of particular number of workers as per sub-clause 4(i) of Clause 2 in an assessment year. For industrial undertakings other than small scale industrial undertakings, not manufacturing or producing an article or things specified in 8th Schedule is a requirement of continuing nature."*

Hon'ble Supreme Court, categorically observed in above referred paragraph that, condition regarding formation are required to be established in the initial year alone.

On the basis of above discussions, that the satisfaction of conditions in section 10AA(4) are required to be satisfied in the year of formation, we hold, this objection raised by Ld.AO does not hold good for the year under consideration.

G. Conclusion:

Based upon arguments advanced by both sides and discussions, in respect of each objection raised by authorities below, we observe that exports proceeds declared by assessee in SOFTEX forms, has not been considered by authorities below, though, assessee filed voluminous details. We are of the view that, Ld.AO failed to verify whether, revenue received by assessee was on account of computer software exported out of India. Coordinate bench of this *Tribunal* in assessee's own case for assessment year 2008-09 (supra), in this context observed as under:

> ***3.86*** *As rightly submitted by the ld. counsel for the assessee, the AO as well as the DRP rejected the claim of the assessee far deduction u/s 10A of the Act only on the ground that there was no RBI approved bank account outside India in which the sale proceeds of computer software exported out of India were deposited. This would be material only for taking the benefit of Explanation to section 10A(3) of the Act The assessee is not barred from claiming deduction under the main provisions of section 10A(3) of the Act, whereby it can satisfy the AO about the receipt of sale proceeds of computer software exported out of India being brought into India in convertible foreign exchange within the period stipulated in the provisions u/s 10A(3) of the Act. As rightly submitted on behalf of the assesses, deduction u/s. 10/10AA of the Act cannot be totally denied. The fact that the assessee has exported computer software out of India and brought convertible foreign exchange into the country is not disputed. The quantum has to be arrived at on the deduction which the assessee is entitled to has to be allowed.*
>
> ***3.87*** *We are therefore of the view that it would be just and appropriate to set aside the order of the DRP and remand the issue to the DRP for fresh consideration and direct the DRP to examine the claim of the assessee on the basis of evidence that the assessee may lead to prove the receipt of sale proceeds of computer software exported out of India being brought into India in convertible foreign exchange. The DRP will be at liberty to examine as to whether the convertible foreign exchange was brought Into India and that they represent consideration received for export of computer software. The AO in the set aside proceedings before the DRP will be at liberty to rebut such claim of the assessee including the claim that the foreign exchange brought in does not represent sale proceeds of computer software exported out of India. As mentioned in para 3.56 of this order, the assessee should produce before the AO all documents referred to in the*

letter dated 12.07.2012 of Deutsche Bank to RBI. We give liberty to the assesses to file such documents as may be necessary to establish its claim for deduction u/s. 10A/10AA of the Act Thus, ground Nos. 3 1 to 3.4 raised by the assessee are treated as allowed for statistical purposes"

G.1. Assessee is thus directed to file all relevant documents to substantiate the exports proceeds, brought into India, claimed as deduction under section 10AA. Assessee is directed to file all requsite information, as far as possible, mentioned in paragraph D..6.9.4, hereinabove. Ld.AO is directed to verify these documents and allow deduction to assessee relatable to sale proceeds from export of software development services.

Accordingly this ground raised by assessee stands allowed for statistical purposes as indicated hereinabove.

6. Ground no.3.1:

Brief facts to be considered for this ground are as under:

The case was selected for scrutiny and notice under section 143 (2) was issued to assessee. In response to statutory notices, assessee filed various details. Assessee filed Form 3CEB, which revealed international transaction entered into by assessee with its associated enterprises. Ld.AO accordingly, referred the case to transfer pricing officer on 24/08/2015 to determine arm's length price of such international transactions.

6.1. Upon receipt of reference, Ld.TPO called for economic details of international transactions, entered into by assessee with its associated enterprises. Ld.TPO observed that assessee categorised itself to be software development service provider. It is recorded in TP documentation that, export of service segment by assessee was

as a global delivery Centre on service request from its associated enterprises globally. TP documentation also refers to distribution segment, wherein, assessee offers broad range of products from entry level, mid-range to high end servers and mainframes to support e-business infrastructure requirements. Ld.TPO noted that assessee selected 7 comparables in respect of software development services, with average of 11.90% margin. Ld.TPO disagreed with comparables selected by assessee and shortlisted final set of comparables consisting certain comparables also selected by assessee having total average margin of 20.90%.

6.2. Ld.TPO proposed adjustment at Rs.1054,96,94,224/- being shortfall in the margin computed by assessee under software development service segment.

6.3. Be that as it may, assessee had preferred application under Rule 10I and 10MA respectively, of Income tax Rules 1962, on 22/03/2013 and 29/06/2015 respectively, proposing to enter into unilateral Advanced Pricing Agreement(APA) with CBDT to determine arm's length price of international transaction, pursuant to provisions under section 92ML and 92CD of Income tax Act 1961 read with Rule 10F and Rule 10T. Transactions covered under APA dated 29/12/2016, between CBDT and assessee were, export of services and recovery of expenses pertaining to export of services. Export of services for purposes of APA were categorised under 3 segments being:

- software and support services
- I T enabled services

- KPO services
- India software labs
- India research labs

6.4. First three segments were classified as IT services and last two segments as research and development services.

It may be mentioned at the outset that, in present appeal, we are only concerned with IT services rendered by assessee to its AE, which was also subject matter of transfer pricing adjustment proposed by Ld.TPO by order dated 14/10/2016.

Ld.AO while passing draft assessment order observed that assessee originally claimed deduction under section 10AA amounting to Rs.303,16,58,824, (page 322 of paper book) in respect of profits earned from following SEZ units:

- SEZ-Bangalore - Rs.120,13,50,087/-
- SEZ-Chennai - Rs. 48,55,84,345/-
- SEZ-Hydrabad - Rs. 31,23,49,065/-
- SEZ-Pune - Rs. 82,85,97,835/-
- SEZ-Kolkata - Rs. 12,62,33,445/-
- SEZ-Gurgaon - Rs. 5,24,69,048/-
- SEZ-Mumbai - Rs. 2,50,74,999/-

6.5. Subsequently, due to increase of export income in the hands of assessee due to APA dated 29/12/2016, claim under section 10AA was revised by sum of Rs.459,81,15,229 (page 329 of paper book), details of which are as under:

- SEZ-Bangalore - Rs.1,84,27,60,543/-

- SEZ-Chennai - Rs. 72,97,71,716/-
- SEZ-Hydrabad - Rs. 46,44,58,385/-
- SEZ-Pune - Rs.1,25,36,40,014/-
- SEZ-Kolkata - Rs. 18,44,50,860/-
- SEZ-Gurgaon - Rs. 8,22,33,583/-
- SEZ-Mumbai - Rs. 4,08,00,128/-

6.6. After entering into APA, income of assessee from export of IT services increased by sum of Rs.7,74,21,28,914/-, thereby, increasing income in the hands of assessee by Rs.23,73,23,41,974/-(being sum of net profit before taxes as per profit and loss account, Rs.15,99,02,13,060/- {page 323 of paper book} that gave rise to incremental income of Rs.7,74,21,28,914/-). Assessee modified its return of income on 22/03/2017, and it was intimated to DRP vide letters dated 17/03/2017 and 13/09/2017. Copies of said letters are placed at paged 1223 and 1225 respectively in paper book volume 4.

6.7. Ld.Counsel submitted that, DRP/Ld.AO did not accept claim of assessee for enhanced deduction on additional income for purposes of computing deduction under section 10AA of the Act, though there was sufficient time to pass respective orders as per section 92CD(5)(b). We note that, Ld.AO in impugned order failed to consider incremental income pursuant to APA dated 29/12/2016 for purposes of deduction under section 10AA.

6.8. Ld.Standing Cousel for revenue, placed reliance on observations of Ld.AO.

6.9. We have heard rival submissions by both sides in this regard.

Admittedly, assessee originally claimed deduction u/s.10AA, based on transfer pricing adjustment. In preceding paragraphs, we have discussed in great detail regarding, eligibility of assessee to claim deduction under section 10AA of the Act. We have dealt with various objections raised by authorities below and has remitted the issue to DRP for verifying such documents, in respect of foreign currency account, and, amount that was brought to India in convertible foreign exchange, that is relatable to export of software development services.

6.9. Be that as it may, assessee entered into APA with CBDT on 29/12/2016 in respect of transactions pertaining to export of IT services. The APA agreement, along with invoices in respect of incremental income are placed before us. We note that, year under consideration is covered under Rollback period as per Clause 2 of the agreement. It is also noted in Clause 6 that, assessee settled arms length margin at 16% for IT Services covering APA years and rollback years that includes year under consideration. It is submitted that assessee in transfer pricing study computed its margin at 10% and OP/OC as PLI for SWD & ITES segment. In consonance with APA, assessee filed its modified return for year under consideration with 16% operating profit margin and raised further invoices amounting to Rs.774,21,28,914/- that gave rise to incremental profits amounting to Rs. 1,5664,56,405/-. Assessee filed revised return on 2/03/2017.

6.10. It is brought to our notice that, coordinate bench of *Pune Tribunal* in *Dal Al Handasah consultants (Shair & partners) India Pvt*

Ltd vs DCIT in *ITA No.1413/Pun/2019* for *assessment year 2010-11 by order dated 02/12/2019,* addressed identical issue. He placed rrliance on following paragraphs:

> *"**4.** The foundation of the action of the authorities below for the denial of deduction is premised on the understanding that the modified return cannot breach the mandate of the APA, which, in turn, restricts its scope only to the determination of the ALP and nothing more than that.*
>
> *5. In order to appreciate the rival contentions, it would be apposite to have a glance at the relevant provisions in this regard. Section 92CC with the caption "Advance Pricing Agreement" provides through sub-section (1): `The Board, with the approval of the Central Government, may enter into an advance pricing agreement with any person, determining the arm's length price … in relation to an international transaction …'. Sub-section (2) gives the manner of determination of the ALP referred to in sub-section) by stating that it: `may include the methods referred to in subsection (1) of section 92C or any other method, with such adjustments or variations, as may be necessary or expedient so to do.' Sub-section (3), which starts with the non obstante clause qua sections 92C/92CA, states that the ALP of any international transaction in respect of which the APA has been entered into:*
>
> *`shall be determined in accordance with the advance pricing agreement so entered.' The crux of the above referred provisions dealing with the advance pricing agreement is that the arm's length margin or price is settled as per the terms of the APA; the manner of determination of such ALP may be by any of the methods referred to in section 92C(1) or any method de hors the prescription of section 92C(1); and the provisions of section 92C (Computation of ALP) and section 92CA (Reference to the TPO) shall not apply in respect of the determination of the ALP under the APA.*
>
> ***6.** Section 92CD deals with giving ` Effect to the advance pricing agreement'. Sub-section (1) requires filing of the modified return by the*

assessee in accordance with the APA. Sub-section (3) states that if the assessment etc. for an assessment year relevant to a previous year to which the agreement applies has been completed before the expiry of period allowed for furnishing of modified return under sub-section (1), which is a case under consideration, the Assessing Officer shall: `proceed to assess or reassess or recompute the total income of the relevant assessment year having regard to and in accordance with the agreement.' Sub-section (4) deals with a situation in which the assessment etc. for an assessment year relevant to the previous year to which the APA applies are pending on the date of filing of modified return. It lays down that :

`the Assessing Officer shall proceed to complete the assessment or reassessment proceedings in accordance with the agreement taking into consideration the modified return so furnished.' On going through the prescription of sub-sections (3) and (4) of section 92CD, it becomes explicitly clear once an assessee has filed modified returns under sub-section (1) of section 92CD, the AO is obliged to make/complete the already completed or pending assessments u/s.92CD itself afresh having regard to or in accordance with the terms of the APA. Not only that, sub-section (5) of section 92CD also enshrines period of limitation for making/completing such assessments. It, therefore, follows that the Act contains a separate designated procedure for dealing with the assessments pursuant to the APA, which also contains distinct time limits in this regard.

7. *Having taken an overview of the relevant provisions of the APA, which are germane to the issue under consideration, let us proceed to examine the question as to whether the assessee, in the given facts and circumstances and as per law, is entitled to deduction u/s 10A in assessment u/s 92CD of the Act on the additional income offered in the modified return? The precise answer to the question can be found out by answering the following three sub-questions:-*

i.Whether proviso to 92C(4) debars deduction u/s 10A on additional income in assessment u/s 92CD?

ii.If no, whether assessment u/s 92CD provides for granting deduction u/s 10A?

iii. If yes, whether the assessee has satisfied the conditions of deduction u/s 10A?

i. Whether proviso to 92C(4) debars deduction u/s10A on additional income in assessment u/s 92CD?

8. *The case of the AO is that the assessee cannot be allowed deduction u/s 10A in respect of the incremental income offered in the modified return, which as per the AO, is eloquently proscribed by the proviso to sub-section (4) of sections 92C/92CA of the Act. In this regard, it is seen that section 92C deals with the computation of ALP by the AO. Sub-section (4) provides that where an ALP is determined by the AO under sub-section (3): "the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined". Proviso to this sub-section, which is the bedrock for the denial of the assessee's claim, states that ".... no deduction u/s.10A . . . . . shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section".*

Section 92CA, through which a reference is made by the AO to the TPO for determination of the ALP and thereafter the assessment is completed by the AO in terms of the TPO's order, provides through sub-section (4) that on receipt of order from the TPO, `the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C' in conformity with the ALP determined by the TPO. Thus, notwithstanding the ALP determination by the AO or the TPO, the assessment is finalized by the AO in terms of the mandate contained in sub-section (4) of section 92C, which specifically provides that no deduction u/s.10A shall be allowed in respect of the amount of income by

which the total income is enhanced after computation of income under this sub-section. A close scrutiny of the crucial words in the proviso decodes that the denial of deduction is permissible only when, first there is computation of income under sub-section (4) of sections 92C/92CA of the Act and second, the total income is enhanced because of such computation, namely, by virtue of the transfer pricing adjustment. Thus, it is vivid that the proviso restricting the granting of deduction u/s.10A on enhanced income applies only where the computation of income is made under the sub-section (4) of sections 92C/92CA, which talks of making some transfer pricing addition by the AO. If the computation of income is neither u/s.92C nor 92CA, namely, no transfer pricing addition is made by the AO,then it is obvious that the proviso shall have no application and the fortiori is that there will not be any denial of deduction under the sections given in the proviso.

9. *We have noted above the scheme of assessment u/s 92CD pursuant to the APA, under which the assessee is mandated to file modified returns in consonance with the APA. Thereafter, the assessment is made by the AO u/s. 92CD(3)/(4) in accordance with the APA. As the incremental income is offered by the assessee itself in the modified return in accordance with the APA, it cannot be equated with the computation of income u/ss. 92C/92CA of the Act, as the later provisions talks of making some transfer pricing addition by the AO. The suo motu offering of additional income by the assessee pursuant to the APA is of the same nature as the assessee itself offering some transfer pricing adjustment in the original return of income. In that case also, deduction u/s 10A, if otherwise permissible, would be allowed and not curtailed as it will not be a case of transfer pricing addition made by the AO. In the same manner, deduction u/s 10A cannot be disallowed in respect of additional income offered in the modified return as it is not a transfer pricing addition made by the AO but the additional*

transfer pricing income offered by the assessee in consonance with the APA with the CBDT.

10. *The second component for magnetizing the proviso is that the `total income of the assessee is enhanced'. An enhancement of income in this context pre-supposes some action of the authorities after the filing of the return of income by the assessee, which has the consequence of increasing the total income from the one declared by the assessee. Filing of the modified return u/s 92CD of the Act with the income as agreed between the assessee and the CBDT under the APA is an act of the assessee in offering the additional income and not an act of the AO in making the enhancement of the total income.*

11. *Instantly, we are dealing with a situation in which the assessee itself has filed a modified return of income at the mutually agreed rate of 17% under the APA. As such, there cannot be any question of the AO making any enhancement in the income as a result of transfer pricing adjustment so as to attract the proviso to section 92C(4) of the Act.*

12. *Thus the first sub-question is answered by holding that proviso to section 92C(4) does not per se debar deduction u/s 10A on additional income in assessment u/s 92CD.*

ii. Whether assessment u/s 92CD provides for granting deduction u/s 10A?

13. *Having answered the first question in negative, it remains to be decided as to whether the assessee is entitled to deduction u/s.10A within the framework of the APA provisions. In this regard, it assumes significance to note the mandate of sub-section (2) of section 92CD of the Act, which provides that: "Save as otherwise provided in this section, all other provisions of this Act shall apply accordingly as if the modified return is a return furnished under section 139". A careful circumspection of sub-section (2) deciphers and delineates that in the computation of total income by the AO pursuant to the filing of the modified return by the assessee in*

terms of the APA, all other provisions of this Act shall apply accordingly. In other words, if an assessee is otherwise eligible for deduction under any other appropriate provision in respect of the income offered in the modified return, there cannot be any embargo on granting deduction under such relevant provision. The saving clause contained in sub-section (2), making all other provisions of the Act applicable in the assessment of the modified return, ostensibly includes the applicability of section 10A as well, of course, subject to the fulfillment of others conditions as set out in the section. It, therefore, follows that if an assessee is otherwise entitled to deduction u/s.10A, or for that matter under any other provision of the Act, in respect of the income offered in the modified return, the same cannot be denied. As such, the view of

the authorities below that in the absence of any specific provision in section 92CD for granting of deduction u/s.10A, no deduction can be allowed, is sans merit. Such stipulation is contained in subsection (2) of 92CD itself. It is, ergo, held that the assessment u/s 92CD provides for granting deduction u/s 10A of the Act.

iii. Whether the assessee has satisfied the conditions of deduction u/s 10A?

14.*Now we turn to the view canvassed by the AO that the assessee failed to comply with the mandate of sub-section (3) of section 10A, which provides that: "This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into India,*

by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or within such further period as the competent authority may allow in this behalf". A perusal of sub-section (3) of section 10A transpires that the condition for bringing into India the requisite convertible foreign exchange within a period of six months from the end of the previous year is not be all end all of the issue.

It also extends to "such further period as the competent authority may allow in this behalf". In other words, if the competent authority has allowed further period for bringing into India the convertible foreign exchange, the assessee will be entitled to deduction u/s.10A. Explanation 1 to section 10A(3) states that: `For the purposes of this sub-section, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.'

15. *Sub-section (1) of section 92CC provides that "The Board, with the approval of the Central Government, may enter into an advance pricing agreement with any person . . . . . ". It is thus clear from the mandate of sub-section (1) of section 92CC that the CBDT enters into an APA with the approval of the Central Government. The APA is a package deal aimed at reducing litigation. If the APA contains some clause relaxing the rigor of any provision or to facilitate its workability, such a clause will prevail over the normal provisions of the Act. It is mandated by the legislature itself through sub-section (2) of section 92CD, which opens with a saving clause by providing: `Save as otherwise provided in this section', all other provisions of the Act shall apply. Sub-section (1) of section 92CD provides that: `.... such a person shall furnish .... a modified return in accordance with and limited to the agreement.' A corollary which follows on a harmonious construction of sub-sections (1) and (2) of section 92CD is that if the APA contains a clause departing from the normal provisions, it is such clause which shall prevail upon the normal provision.*

16. *We have gone through the APA entered between the assessee and the CBDT. Clause 7 of the APA discusses the "Critical assumptions". It provides that: `the critical assumptions (as referred to in the Rules) shall, for the purposes of this Agreement, be as specified in Appendix II.' Clause 5 of the Appendix II deals with 'Invoicing and Credit terms'. The material part of such a clause, which is relevant for the year under consideration,*

states that: `... the Applicant shall show the difference between the invoiced amount for the previous year/rollback years and the ALP as agreed, as tax adjustment in the modified tax returns for Assessment year 2010-11 to Assessment year 2014-15 and will also raise an invoice (and realise it) for the equivalent amount in the month following the month in which the Agreement is signed'. On going through the relevant parts of clause 5 of the Appendix II, it clearly emerges that the CBDT provided for raising the invoice for the additional amount and also 'realise it' in the month following the month in which the APA is signed. To put it simply, the CBDT not only stipulated for raising of the invoice for the additional income but also for the realization of the additional amount within the month following the month in which the Agreement is signed. Thus, it is overt that the APA contains a clause for realizing the amount or bringing into India convertible foreign exchange for the additional amount of invoice within one month's period. There can be no other reason for mandating in the APA for bringing into India convertible foreign exchange within one month following the month in which the APA is signed except for the granting the consequential benefits of such realization, even though sub-section (1) of section 92CD gives time of three months for filing the modified return. The sequitur is that the APA has made it mandatory for the assessee to bring in convertible foreign exchange in India within one month. But for granting the relevant deductions connected with the realization of convertible foreign exchange in India, there was no purpose to stipulate it in the APA. This stipulation is, thus, a direction to grant deduction u/s 10A only if the assessee succeeds in bringing in convertible foreign exchange in India within one month, bringing the case within the saving clause of sub-section (2) of section 92CD.

As the assessee brought into India the convertible foreign exchange within the stipulated one month's period, it became entitled to deduction u/s 10A.

17. *What is further pertinent to note from para 2 of the Clause 6 of the APA is that: "The determination of ALP for Rollback years is subject to the condition that the ALP would get modified to the extent that it does not result in reducing the total income or increasing the total loss, as the case may be, of the applicant as already declared in the return of income of the said year". Reverting to facts of the extant case, it is seen that the assessee declared total income of Rs.45,21,431/- in the original return. After the increase in the income due to the APA and with the simultaneous claim of deduction u/s.10A, the total income of the assessee as declared in the modified return remained at the same level. Thus, it is neither a case of reducing the total income nor increasing the total loss. Ex consequenti, it is held that the assessee has satisfied the condition of deduction u/s 10A(3) read with section 92CD(2) of the Act.*

18. *To sum up, we hold that the proviso to section 92C(4) does not debar deduction u/s 10A on additional income in assessment u/s 92CD; assessment u/s 92CD provides for granting deduction u/s 10A; and the assessee has satisfied the requirement of section 10A(3) read with section 92CD(2), thereby entitling it to deduction u/s.10A on the additional amount of Rs.20,36,023/-. The impugned order is overturned and deduction is granted."*

6.11. As observed in detail by coordinate bench of *Pune Tribunal*, following ratio laid down therein, we hold that assessee is eligible to claim deduction under section 10AA, on incremental income arisen pursuant to APA dated 29/12/2016. We direct DRP to grant deduction under section 10AA of the Act, to the extent of sale proceeds received from export of software services, brought into India in convertible foreign exchange within stipulated period.

Accordingly, this issue is set aside to DRP for verification verify and to allow claim of assessee as directed hereinabove, r.w., our observations in para D.9.4 hereinabove.

At the outset, both sides submitted that, issue alleged in Ground 4 &6 interlinked with each other. Based on this submission, for sake of convenience, we consider Ground 4 & 6 together as under.

7. Ground No.4 is in respect of disallowance of sum of Rs.345,65,64,364/- under section 37 (1) of the Act.

7.1. Ld.AO observed that, assessee debited various expenditure in P&L account like rent, professional charges, sub contract charges, interest, commission, advertisement, recruitment expenses, royalty etc., that attracted provisions of TDS. It was observed that sum of Rs.345,65,64,364/- was quantified and then disallowed under section 40(a)(ia) of the Act, by assessee in computation for year under consideration. Ld.AO also noted that, provisions created, were reversed on 1st April of subsequent year. Ld.AO called for details in respect of expenses and TDS compliances vide notice dated 21.11.2016 and called upon assessee, to show cause as to why, the amounts disallowed under section 40(a) of the Act, should not be disallowed under section 37(1) of the Act, for year under consideration, on account of the fact that, provisions were reversed as on 1st April.

7.2. Assessee submitted that year-end provision are created for various types of expenses, like rent, professional charges, sub contract charges, interest, commission, advertisement, recruitment expenses, royalty etc., based on estimation. Assessee submitted that, such provisions are created taking into account information from various personnel, which include inter alia, financial analyst

for project specified accruals, department heads and accounting personnel. It was submitted that, each provisions under different expense head, has a basis for estimation, and the same is created on a scientific methodology, in order to ensure that, appropriate expenditures are provided within same financial year. It was submitted that, year-end provisions are then reversed by crediting the same to profit and loss account, when actual invoices are received from the vendors, and expenses are booked by debiting profit and loss account. It was submitted that taxes are deducted at source at the time of payment in subsequent year(2014-15), even though credit to provision account accrued in current assessment year.

7.3. It was submitted that, this procedure is consistently followed by assessee and that, such deduction of taxes are reported in quarterly returns, which is filed in respect of quarters in which tax was deducted.

7.4. Assessee submitted that, reversal in subsequent year had no bearing on income of that year(2014-15), as reversal of provision appears on credit side of profit and loss account to take care of expenses related to that year, being charged to profit and loss account.

7.5. Ld.AO relying on observation recorded by assessing officer in draft assessment year 2009-10, was of the opinion that, assessee reversed provision created on 1st April of next year, and that, expenditure disallowed does not pertain to year under consideration, and therefore, does not qualify to be claimed as

deduction under Section 37 of the Act. And once expenditure goes out of ambit of Section 37 of the Act, provisions of Section 40(a)(ia) of the Act, would not apply. Ld.AO, thus rejected assessee's contention of reversal of provision, and disallowed sum of Rs.345,65,64,364/-.

7.6. Aggrieved by proposed addition in draft assessment order, assessee raised objection before DRP.

7.6.1. DRP after considering submissions advanced by assessee and observations by Ld.AO, was of opinion that, Ld.AO did not examine in detail, so as to make disallowance under section 37(1) of the Act. DRP also noted that assessee did not furnish complete details of such expenses. Accordingly, DRP directed assessee to furnish details of expenses with a direction to Ld.AO to verify the claim on basis of details filed by assessee to ascertain, whether expenses were made for purposes of business. DRP also noted that similar direction was given for assessment year 2012-13 by the then DRP.

7.7. Before us, both parties submitted as under:

7.7.1. Ld.Counsel submitted that vide notice dated 21/11/2016, Ld.AO called upon assessee to show cause, as to why, amounts disallowed under section 40(a) *suo moto* by assessee, should not be disallowed under section 37(1) of the Act, on account of the fact that, year-end provisions are reversed in subsequent year. It was submitted that, provisions are business liabilities arisen/been incurred in current year, and therefore, the same cannot be disallowed under section 37(1) of the Act. He submitted that,

subsequent reversal in immediate subsequent year (2014-15), does not mean that, liability has not accrued to assessee in current year.

7.7.2. Ld.Counsel submitted that, assessee follows mercantile system of accounting and as per AS-1 on disclosure of accounting policies, and that concept of 'accrual' is a fundamental concept that, is to be followed by companies. Ld.Counsel submitted that, amount has been *suo moto* disallowed u/s.40(a) by assessee for year under consideration. Assessee has also furnished receipts of invoice to prove that expenses were genuine business expenses.

7.8 Ground No.6 is in respect of disallowance of claim under section 40 (a) in respect of payments that were reversed as on 1st April 2012, pertaining to provisions disallowed by assessee u/s.40(a) in AY 2012-13.

7.8.1. Ld.AO in computation of income for year under consideration, observed that, assessee claimed deduction of Rs.429,89,38,0342, on the ground that, it pertained to disallowance made under section 40(a), in computation for AY:2012-13, as tax was not deducted on the provisions made for business expenditures**.** It was submitted by assessee that, these were provisions created in assessment year 2012-13, which was offered to tax under section 40 (a) of the Act,, and the same was reversed as on 01/04/2012(financial year relevant to assessment year under consideration). It was submitted that, based on invoices received by assessee during the year under consideration, TDS was deducted in respect of such payments. It was submitted that, assessee claimed it as expenditure for year under consideration, to the extent

payment was made and TDS been deducted and deposited in relevant quarters.

7.8.2. Ld.AO noted that similar disallowance u/s.40(a) in AY:2012-13. Ld.AO observed that, assessee had filed objections with DRP against draft assessment order for assessment year 2012-13 and DRP was yet to give direction in respect of the same. Similarly, Ld.AO was of the view that, as the amount was disallowed under section 37 for assessment year 2012-13, assessee was not eligible to claim the same as deduction under section 40(a) of the Act, for year under consideration. Ld.AO thus disallowed the claim of Rs.429,89,38,034, made under section 40(a) of the Act.

7.9. Aggrieved by proposed addition in draft assessment order, assessee raised objection before DRP.

7.9.1. DRP directed Ld.AO to examine, whether TDS was effected on these payments, and if so, assessee was to be allowed relief in respect of the amount.

7.10. Before us, Ld.Counsel submitted that assessee filed voluminous details in support of its claim, like copies of invoices, to substantiate the expenses incurred to be genuine, basis of creation of provision of expenses and submission on remand report issued by Ld.AO, vide letters dated 10/11/2016 and 19/12/2016 respectively. Ld.Counsel also submitted that as the disputed amount has been *suo moto* disallowed by assessee in A.Y:2012-13 under section 40(a), the same amount cannot be again disallowed on reversal in the year under consideration. Assessee must be given

benefit in respect of payments on which TDS has been deducted and deposited with Government.

7.10.1. On the contrary, Ld.Standing Counsel for revenue, in resprct of both issues submitted that, procedure followed by assessee was contrary to accounting policy, because, once expenditure was booked in profit and loss account, it could not be reversed. Assessee had to deduct tax on the provision so created in the books of account. However, the assessee could not produce the details of payment of TDS. Alternatively, he suggested that the issues may be remanded for verification.

7.11. We have perused submissions advanced by both sides on these issues, in light of records placed before us.

7.11.1. The claim of assessee is that, it created provision in books of account on estimation in current year(issue raised in ground no.4). Authorities below concluded that, assessee has full knowledge of what is due to its vendors, sub-contractors, commission agents etc., therefore there was no necessity to create provision and disallowance was justified in facts and circumstances of the instant case.

7.11.2. We note that assessee has submitted following details before authorities below, in support of its claim:

SI. No	Supporting Evidence / Details submitted	Date of Filing

1.	Listing of transactions with foreign entities for which Form 15CBs have been issued along with sample copies of invoices and corresponding Form 15C8 certificates. Explanation for non-deduction of taxes on the payments	07 December 2016 ***(Exhibit 3)***
2.	Detailed write-up on basis of creation and submissions on why amounts disallowed under section 40(a) of the Act should not be disallowed under section 37(1) of the Act on account of the fact that year-end provisions are reversed in the subsequent year	16 December 2016 (Exhibit 4)
3.	Summary of entries passed in the professional and consultancy charges ledger providing details of TDS compliance and supporting documents for amounts on which taxes have not been deducted at source Copies of invoices substantiating that the expenses in	23 December 2016 (Exhibit 5)
4.	Extract of ledgers with summary of TDS compliance (along with sample invoices on which taxes have not been deducted) accompanied with details of tax deducted and deposited at source: • Recruitment	23 December 2016

5.	Details of mapping to subsequent receipt of invoices and tax deducted and deposited (where applicable) on the amounts disallowed in AY 2013-14 along with sample copies of invoices to substantiate that the expenses incurred are genuine in nature.	26 December 2016

7.11.3. In respect of issue raised in **Ground 6,** we note that assessee filed following details before authorities below:

SI. No	**Supporting Evidence / Details submitted**	**Date of Filing**
6.	Reliance was place on the following submissions in support of the claim in the current year's return of income • Details of mapping of tax deducted and deposited (where applicable) on the amounts disallowed in AY 2012-13 along with sample copies of invoices to substantiate that the expenses incurred were genuine in nature	26 December 2016 ***(Exhibit 6)***

submitted to the learned AO during the DRP proceedings for AY 2012-13 *vide* submission dated 19 September 2016

- Basis for creation of provision of expenses and submissions on the remand report issued by the learned AO submitted *vide* letters dated 10 November 2016 and 19 December 2016 respectively

Plea for alternate claim to grant relief to the extent of mapping and evidences provided, in the event the learned AO does not agree with the submissions was made.

7.11.4. It is noted that, following were the provisions *suo moto* disallowed by assessee in A.Y:2012-13 under section 40(a), which were reversed as on 01/04/2012,(financial year relevant to assessment year under consideration) and claimed as allowance in computation for year under consideration:

SI. No.	Particulars of Payment	Amount disallowed u/s 40 (a)(i)/(ia) (Amount in INR)
1	Professional Fees	56,047,434
2	Amounts payable to contractors /sub-contractors	2,972,548,455
3	Commission	379,565,554
4	Foreign	4,619,777 3,936,182 35,747,826

5	Rent	846,472,807
	Total	**4,298,938,035**

7.11.5. It was submitted that, reversal is an accounting entry, passed to offset invoices received in subsequent year, to ensure matching principle is followed. Ld.Counsel submitted that, any provision in excess has been offered to tax in subsequent year. He placed reliance on computation of total income placed at page 322-324, in support of this submission. Ld.Counsel placed reliance on decision of *Hon'ble Supreme Court* in case of *Metal Box Co. of India Ltd., vs.Their Workman* reported in *(1969) 73 ITR 53* and *Bharat Earth Movers* reported in *(2000) 112 Taxman 61.*

7.12. We have perused these decisions.

7.12.1. Facts in case of *Metal Box Co. of India Ltd., vs.Their Workma(supra)* is that:

It was a case where, the appellant-company estimated its liability under two gratuity schemes framed by the company and the amount of liability was deducted from the gross receipts in the profit and loss account. The company had worked out on an actuarial valuation its estimated liability and made provision for such liability not all at once but spread over a number of years. The practice followed by the company was that every year the company worked out the additional liability incurred by it on the employees putting in every additional year of service. The gratuity was payable on the termination of an employee's service either due to retirement, death or termination of service - the exact time of occurrence of the

latter two events being not determinable with exactitude before hand.

Therein, *Hon'ble Court* laid down following principles:

(i) For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid;

(ii) Just as receipts, though not actual receipts but accrued due are brought in for the income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business;

(iii) A condition subsequent, the fulfilment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability; and

(iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if it can be satisfactorily estimated.

7.12.2. Facts in case of Bharat Earth Movers(supra) is that;

Provision was made for meeting liability to the extent of entitlement of the officers and staff to accumulate earned/vacation leave, subject to ceiling limit of 240/ 126 days as was applicable. Having accumulated leave in a particular year, in the succeeding year the employee may either avail the leave or apply for its encashment. If the employee avails the leave, then additional provision for encashment is not made in the reserve account. However, if he does not avail the leave and instead chooses to en-cash his entitlement, he becomes entitled to an additional number of days. *Hon'ble Court* observed that, Whether the amount is paid as salary by drawing upon from the current year's profit and loss account or from the reserve, it would not make any difference in practice, as there

would be no double payment and, hence, no double claim for deduction. In either case the liability is certain though the period in which the liability would be incurred is not certain, in as much as, the leave encashment can be sought for, by the employee either during the years of service or at the end of the service. Subject to the ceiling every employee would either avail the leave or seek encashment and, therefore, the liability is a certainty; it cannot be called a contingent liability.

On these facts, *Hon'ble Court* opined as under:

"The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied, the liability is not a contingent one. The liability is in presenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain."

7.12.3. From the above views expressed by *Hon'ble Supreme Court,* it is clear that, a business liability should be allowed as expenditure, although it may have to be quantified and discharged at a future date. It is also a settled principle that in mercantile system of accounting, as income accrued to assessee is brought to tax, expenditure/liability accrued also has to be considered.

7.13. Assessee follows mercantile system of accounting, and, it is to account for liabilities on accrual basis. It is submitted that since assessee does not know actual liability, it estimates liability accrued, on a scientific basis, depending on instruction received form respective administrative HR head for purpose of creating provisions.

7.13.1. It has been submitted that, at the time of making year-end provisions, the same was being *suo moto* disallowed by assessee in the computation and suffered tax, in the preceeding year (year in which the disallowance was made). It was under these circumstances, Ld.AO converted disallowance from section 40(a) to section 37 (1) thereby doubting genuineness of expenses. We also note that Ld. AO has not even looked into the nature of payments that has been provided for by assessee in its books of account for relevant year under consideration.

7.13.2. Further, Ld.AO disallowed under section 40(a), year-end provision (created in preceding year being AY:2012-13), that is reversed by crediting the same to profit and loss account of current year, as and when, actual expenses were booked under relevant TDS provisions. It has been submitted that TDS was deducted at the time of booking of actual expenses.

7.14. At the outset, we note that assessee was consistently following similar procedure of accounting even in preceding assessment years. In support, assessee placed before us order passed by this *Tribunal* in assessee's own case for assessment year 2006-07 to 2009-10, reported in *(2015) 59 Taxmann.com 107*, passed in context to section 201(1) and 201(1A). On perusal of the order passed *Hon'ble Bench*, we note that this *Tribunal* directed assessee to file various details before Income tax officer for verification.

7.14.1. From written submissions filed by assessee, we note that provisions in the books of account for assessment years 2012-13

and 2013-14 are towards sub contracting charges, commission, professional charges, contractor's charges, advertise meant and marketing expenses, recruitment expenses, repair and maintenance expenses, general expenditures, rent and others. It cannot be doubted that these are not related to day-to-day running of business of assessee. Thus, we are of the opinion that, these expenses cannot be disallowed under section 37 (1) of the Act. Assessee, *suo moto* disallowed these provision accounts under section 40(a) of the Act for non-deduction of TDS during the relevant year. All these aspects requires proper verification by DRP.

7.14.2. In our considered opinion, disallowance of provision account under section 40(a), and its subsequent reversal requires proper verification. Authorities below have not verified submissions of assessee, in light of financial accounts for A.Y:2012-13 and TDS returns filed for subsequent assessment years, AY:2013-14 & 2014-15, vis-à-vis, invoices raised by payee during assessment years AY:2013-14 & 2014-15.

7.14.3. We note that, assessee raised identical issue before this *Tribunal* in assessment year 2008-09 (supra). *Hon'ble Bench* in paragraph 6.1, set-aside the issue for fresh consideration to DRP, by observing that, DRP does not have power to set aside any proposed variation or issue with a direction under section 144C(5) of the Act, for further enquiry and passing of assessment order.

7.14.4. In the present facts for year under consideration, we note that, DRP while considering disallowance under section 40 (a) of the

Act (issue raised in ground 4& 6), directed Ld.AO to verify the claim of assessee.

7.14.5. We direct assessee to provide for the following:

I. assessee shall provide opening balance of provision accounts, and entries made relating to transactions during the year and closing balances.

II. Assessee is directed to submit year wise details of rental charges professional charges contract amount and other payments that has been considered for year-end provisions, disallowed under section 40 (a) of the Act, during AY:2012-13.

III. Assessee is directed to provide for details of payment made in year under consideration and the details of tax deducted at source on such payment along with proof of deposit of such TDS into government account

IV. Reconciliation statement in respect of expense provision accruals made which were disallowed under section 40 (a) with the subsequent vendor payments made against these provisions. These expenditures are to be matched based on description and period of services mentioned in the vendor invoices.

V. All the payments for services pertaining to preceding year (AY:2012-13) are to be traced into the TDS statement filed to identify and establish the TDS payments having done. Certificate issued by chartered accountant after ascertaining the compliance in respect of tax deducted at source to be

appropriate, in the year under consideration, in relation to various expenses that is reversed as on 01/04/2012.

7.14.6.DRP shall then verify the detaild filed by assessee, in respect of disallowances made under section 40 (a) for non-deduction of TDS:

I. DRP shall verify the nature of provisions created by assessee in preceding year (AY:2012-13), and year under consideration that is disallowed under section 40 (a) of the Act.
II. DRP shall verify if, TDS applies on amounts mentioned in provision account vis-a-vis the vendor invoice, and that, if, TDS has been complied with in accordance with the relevant provision in the year under consideration;
III. DRP shall verify if any vendor have provided for a 'NIL' withholding/lower withholding certificate from the Department as per section 197 of the Act.
IV. DRP shall verify there is any vendor invoice on which TDS provision doesn't apply.

7.15. Base on above discussions and observation for relevant year, respectfully following the view taken by *Hon'ble Bench* for AY:2008-09, we set aside for these issue to DRP for fresh consideration. Needless to say that, proper opportunity of being heard must be granted to assessee and these issues must be decided having regard to evidences/documents filed by assessee, in accordance with law. We also direct DRP to consider the alternate submission advanced

by Ld.Counsel of allowing the claim of assessee to the extent the payments are mapped with the provisions, invoices and TDS made and deposited with the Government.

Accordingly, we set aside Ground 4&9 back to DRP.

8. Ground No.5 is in respect of disallowance under section 40(a) of the Act, in respect of payments made to associated enterprises and non-associated enterprises, without TDS compliance.

8.1. Ld.AO observed that, assessee made payments to associated enterprises and non associated enterprises during the year under consideration. It was submitted that, these payments included, purchase of finished goods, purchase of capital goods payments for availing services etc. Assessee was called upon vide notice dated 21/11/2016 by Ld.AO to furnish details of TDS compliances with respect to various payments to AE& non AE.

8.2. Assessee, vide letter dated 07/12/2016 filed various submissions. Ld.AO upon verification, observed that, assessee did not deduct TDS:-

- on payments made to non-resident 3rd parties being insurance payments amounting to Rs.155,05,88,065;
- on payment of Rs.5,208,766,921 made to other AE's and non-AE's, on the basis of certificate issued by chartered accountants; and
- on payment of Rs.4,604,970,453 to IBM Singapore Pte.Ltd., a foreign company, for purchase of software, which was in the nature of distributed software. Ld.AO noted that software purchased from IBM Singapore Pte., was under distribution

software agreement namely, 'Software Remarket Agreement', between assessee and IBM Singapore, on which no TDS was deducted.

8.3. In regards to insurance payment made by assessee to third-party nonresidents, Ld.AO was of view that, no TDS was to be deducted.

8.3.1. In regards to payment made to other AE's and non-AE's, Ld.AO noted that TDS was not deducted based on certificate issued by CA's. Ld.AO referred to draft assessment order passed for assessment year 2009-10, wherein on similar issue, certificates under section 195 issued to IBM India on the basis of self-serving invoices by same CA'S, were held to be unreliable. Ld.AO for year under consideration noted that, same CA's, issued certificate under section 195 to assessee, for year under consideration. Ld.AO therefore, for year under consideration held certificates to be unreliable issued by the same CA's.

8.3.2. In regards to payment made by assessee to IBM Singapore, Ld.AO noted that, for assessment years 2006-07 to 2011-12 payment made to IBM Singapore constituted royalty under both section 9(1)(vi) and under DTAA between India and Singapore. Ld.AO referred to disallowance made on identical issue for assessment year 2009-10, wherein statements of chartered accountants who, issued certificate under section 195 to assessee, were recorded.

Ld.AO disallowed, sum of Rs.981,37,37,374/- under section 40(a) the details of which are as under:

AE(other than IBM Singapore)	Rs.5,246,403,860
IBM Singapore	Rs.4,604,970,453
Third Party non-residents	Rs. 62,363,061

8.4. Aggrieved by proposed addition in draft assessment order, assessee raised objection before DRP.

8.4.1. DRP upheld disallowance of payments made by assessee to non-resident amounting to Rs.981,37,37,374/- under section 40(a) of the Act, by following decision of *Hon'able Karnataka High Court in assessee's own case for assessment year 2012-13 in ITA No. 540/2008,* wherein, *Hon'able High Court* followed ratio laid down by coordinate bench in case of *CIT vs. Samsung Electronics Co.Ltd.,* reported in *(2009)185 Taxman 313.*

8.5. Before us, Ld.Counsel submitted that, sums were merely reimbursements, and hence cannot be considered as income. He submitted that some payments were reversal of provisions created in assessment year 2012-13, and hence expenditure claimed to that extent had been reduced, which has been disallowed by Ld.AO and in draft assessment order for assessment year 2012-13. Ld.Counsel submitted that, Ld.AO considered payment made to IBM Singapore under Software Free-market Agreement, constituted royalty, both under section 9(1)(vi) of the Act, and under DTAA between India and Singapore. Ld.Counsel submitted that, identical issue arose for assessment year 2008-09 in assessee's own case (supra), and *Hon'ble Bench* in para 6.12, remanded the issue to DRP, for fresh consideration and decision, after affording due and proper opportunity to assessee. Ld.Counsel also submitted that Ld.AO

relying on order passed under section 201(1) and (1A) disallowed the amount paid by assessee to IBM Singapore.

8.6. On the contrary, Ld.Standing Counsel for revenue submitted that, this issue requires detailed verification in regards to nature of payments made by assessee in order to ascertain applicability of TDS provisions. He has requested this issue to be set-aside the entity to Ld.AO.

8.7. We have perused submissions advanced by both sides in light of records placed before us.

8.7.1. Admittedly, assessee made certain payments to foreign entities, amongst which certain payments were subjected to TDS provisions and certain payments were not subjected to TDS. Details of which, as submitted by assessee in paper book volume 4 at page 1061 are as under:

S. No	Particulars	Payments to AE	Payments to non-AE	Total
1.	Transaction on which TDS is deducted	11,835,061, 796	3,213,728, 622	15,048,790, 418
2.	Transaction on which TDs is not deducted			
	Reimburse-ment	5,138,520, 108	8,131,330	5,146,651, 438
	Others	7,883,715	1,604,819, 797	1,612,703, 548

8.7.2. Ld.Counsel submitted that, assessee did not deducted tax on transaction in column 2, for following reasons:

- transactions being reimbursements not liable to tax at source and certain transaction pertains to purchase of spare parts, materials and components, miscellaneous services, insurance payments allied expenses etc which are not liable to tax at source
- sum of Rs.1,550,558,065/- is included under others category made by assessee to non-resident insurance providers that also do not attract provisions of TDS.

8.7.3. It was submitted that, copies of sample invoices and corresponding Form 15CB, for amounts on which, tax has not been deducted at source, were furnished by assessee, to authorities below.

8.7.4. Further sum of Rs.4,604,970,453 has been made to IBM Singapore based on Software Free-Marketers Agreement. From written submission placed in paper book Volume 2, it is noted that during relevant financial year, assessee made payment to IBM Singapore, for purchase of software, which was the nature of distributed software, and consisted primarily of middle software, on which, no tax at source was deducted.

8.7.5. In our opinion, we agree with submissions advanced by Ld.Standing Counsel for revenue that all these payments needs to be verified having regard evidences placed on record by in accordance with law. Similar observation was recorded by DRP. DRP directed Ld.AO to verify payments and to disallow such

payment, where assessee fails to furnish information's and details required for verification.

8.7.6. Ld.Counsel, however submitted that voluminous details were submitted by assessee, which has not been considered by Ld.AO, while passing impugned order. We have perused observations of this *Tribunal* for *assessment year 2008-09* wherein, *Hon'ble Bench* remanded the issue to DRP for fresh consideration and decision.

Respectfully, following the same, we remand the issue to DRP with similar direction to consider the claim of assessee in light of evidences filed, after affording opportunity of being heard in accordance with law. Assessee is directed to file invoices raised in support of payments made by assessee to relevant parties. Assessee is at liberty to file all relevant details/evidences to substantiate its claim. DRP is then directed to verify nature of payment in the light of invoices filed by assessee. DRP is also directed to analyse payment made to nonresidents on which tax has not been deducted at source in light of *Explanation 2* to *section 195*. DRP shall grant proper opportunity of being heard to assessee.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

9. Ground No.7 is in respect of disallowance of depreciation on leased assets.

9.1. Ld.AO observed that, assessee claimed depreciation on assets given on financial lease to the tune of Rs.327,02,87,758/-. In view of the claim, assessee was called upon to furnish details. Assessee vide letter dated 28/11/2016, furnished written submission.

Assessee submitted that, it is engaged in the business of lease of hardware products and same was treated as financial lease for accounting purposes. Assessee submitted that, leased assets were accounted for in accordance with AS 19 prescribed by Institute of Chartered Accountants of India. As a result of which, during the year under consideration, assessee claimed depreciation on leased asset as claimed in P&L account.

9.2. Ld.AO observed that to prepare P&L account for purpose of Companies Act, assessee followed AS-19, wherein, it did not capitalise assets in depreciation schedule. However, in depreciation schedule, prepared and filed for purpose of income tax, assessee capitalised the assets leased under finance lease, in balance sheet and claimed depreciation at 60% amounting Rs.327,02,87,758/-. Assessee placed reliance on decision of *Hon'able Supreme Court* in case of *ICDS Ltd vs CIT* reported in *(2013) 29 taxmann.com129,* in support of its contention. Ld.AO observed that, in assessment year 2009-10 identical contention raised by assessee was rejected, following decision of *Mumbai Special Bench* in case of *IndusInd Bank* reported in *135 ITD 165*. Ld.AO while passing draft assessment order therein, distinguished decision of *Hon'ble Supreme Court* in case of *ICDS Ltd vs CIT (supra)* on the basis that, decision by *Hon'ble Supreme Court* pertains to motor vehicles leased under finance lease and not equipments/computers sold under finance lease. Ld.AO for year under consideration, placed reliance on enquiries conducted under section 133(6) of the Act, during assessment year 2009-10, wherein erstwhile assessing officer

observed that, lessees have capitalised the assets in their books and claimed depreciation.

9.3. For year under consideration, Ld.AO observed that assessee failed to file certain specific details to substantiate its claim and did not produce sufficient documentary evidences. Ld.AO also inferred that, there is no change in accounting treatment of leased assets, as was in assessment year 2009-10, and therefore, depreciation claimed for year under consideration on leased assets was disallowed.

9.4. Ld.AO, noted that for assessment year 2010-11 assessee raised alternative claim before DRP, according to which difference in lease rentals was reduced from taxable income of assessee, subject to verification. Ld.AO, therefore for year under consideration, restricted addition being difference between depreciation claimed that was disallowed and lease rentals that was allowed, amounting to Rs.24,60,33,070/- in the hands of assessee.

9.5. Aggrieved by proposed addition in draft assessment order, assessee raised objection before DRP.

9.5.1. DRP, followed its own decision for assessment year 2011-12 and 2012-13, wherein, alternative claim of assessee was directed to be considered by Ld.AO, in the event assessee furnishes details of lease rentals on the assets reflected in depreciation schedule.

9.6. Before us, both sides submitted as under:

Ld.Counsel submitted that, Ld.AO disallowed depreciation on leased assets being (net of lease rental and interest) amounting to

Rs.24,60,33,070/-, by holding that assessee is not the legal owner of assets leased to customers.

9.6.1. Ld.Counsel submitted that, assessee is also engaged in business of lease of hardware products. The assets leased to lessee's, are treated as financial lease for accounting purposes. It has been submitted that, assessee is the legal owner of such assets leased to customers, and has accounted for leased assets in accordance with AS-19, prescribed by Institute of chartered accountants of India which is as follows:

- assets are not capitalised and they are reflected as debtor receivables
- out of the lease rentals received, principal component of lease rental is reduced from the debtor balance, that is the cost price and,
- finance charges are recognised as revenues.

9.6.2. He submitted that for purpose of computation of income as per provisions of Income tax Act, assessee treated these assets as follows:

- assets are capitalised and depreciation on the same is claimed in the return of income:
- entire lease rentals are offered as taxable income: and
- finance charges are reduced from taxable income since the same is already forming part of the lease rentals offered to tax and credited to the profit and loss account.

9.6.3. Ld.Counsel submitted that, assessee, in suppoet of the claim, filed details like assets leased (page 353 of paper book

volume 2), details of lessees, EMI description and value of assets along with relevant supporting documents such as Master Lease Agreement(MLA), supplement to the master lease agreement, invoice for purchase of assets and leave rentals invoices on sample basis.

9.6.4. Ld.Counsel placed reliance on decision of *Hon'able Supreme Court* in case of *ICDS Ltd vs CIT* reported in *(2013) 29 Taxmann.com 129* in support of his claim. It has been submitted that on identical facts and circumstances *Hon'ble Supreme Court* was of the opinion that as long as assessee has a right to retain legal title of the leased assets, it would be the owner of such assets.

9.6.5. Ld.Counsel drew our attention to various clauses of agreement placed at page 352 of paper book volume 2, wherein, clause 19 at page 356, clause 24 at page 357, clause 13 to read with 33 and clause 34 at page 360, reveals that ownership of assets are with assessee. He submitted that, ratio by *Hon'ble Supreme Court* in case of *ICDS Ltd vs CIT (supra)* on identical facts, squarely covers assessee's case.

9.7. On the contrary, Ld.Standing Council for revenue, submitted that, ratio by *Hon'ble Supreme Court* in case of *ICDS Ltd vs CIT (supra)* are not applicable to present facts of the case. Ld.Standing Counsel placed emphasis on ownership being established for claiming depreciation of assets. He placed reliance on observations recorded in draft assessment order for assessment year 2009-10, reproduced at page 57 of impugned assessment order. He submitted that accounting treatment followed by assessee for year

under consideration is similar to assessment year 2009-10. He submitted that, Ld.AO, vide notice dated 26/07/2012 called for details and description of assets that was leased out, invoices raised, value of assets leased out, which were not submitted. He submitted that, under such circumstances the claim has been rightly denied by Ld.AO.

9.8. We have perused submissions advanced by both sides in light of records placed before us.

9.8.1. Ld.Counsel submitted that, Ld.AO erred in mentioning that nothing was filed before him, during final stage of assessment order. Ld.Counsel took us through documents placed at page 353 volume 2 of paper book being details of leased assets. We note that Ld.AO did not verify details filed by assessee. We note that this being a recurring issue a consistent approach has to be taken in this regard. Admittedly assessee has capitalised these assets. On one hand, Ld.AO accepts lease rentals received by assessee to be business income, and on the other hand disallowed depreciation. In our view, assessee is eligible for depreciation on leased assets, however the same has to be computed in accordance with law having regard to schedule of assets.

9.8.2. In the interest of Justice, we remit this issue too Ld.AO for proper verification of all details filed by assessee and to consider claim in accordance with ratio laid down by *Hon'ble Supreme Court* in case of *ICDS Ltd vs CIT (supra).* Needless to say that proper opportunity of being heard must be provided to assessee in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

10. Ground No.8 is in respect of disallowance under section 14 A.

10.1. Ld.AO observed that disallowance computed by assessee was under section 14A read with Rule 8D amounting to Rs.78,54,075/-. Aggrieved by proposed additions by Ld.AO in draft assessment order, assessee raised objections before DRP.

10.2. DRP disallowed sum of Rs.78,54,075/- under section 14A of the Act read with Rule 8D, by holding that it is not necessary that during the assessment year assessee should have earned exempt income.

10.3. Before us, both sides submitted as under:

10.3.1. Ld.Counsel submitted that, assessee has not earned any exempt income during the year and therefore provisions of section 14 A read with Rule 8D, cannot be appliied. He placed reliance upon decision of *Hon'able Delhi High Court* in case of *Cheminvest Ltd vs CIT* reported in *(2012) 317 ITR 33.*

10.3.2. On the contrary, Ld.Standing Counsel for revenue placed reliance upon orders passed by it is below.

10.4. We have perused submissions advanced by both sides in light of records placed before us.

10.4.1. It is noted that admittedly there is no exempt income earned by assessee during the year under consideration. Therefore respectfully following *Hon'able Delhi High Court* in case of

Cheminvest Ltd vs CIT, disallowance under section 14 A stands deleted.

Accordingly this ground raised by assessee stands allowed.

11. Ground No.9 is in respect of depreciation on computer software been restricted from 60% to 25%.

11.1. Ld.AO observed that assessee made addition of Rs.69,83,82,63 under the head computer software and claimed depreciation at 60% on the same. Ld.AO called upon assessee to submit details of software purchases.

11.1.1. Assessee, wide submission dated 26/12/2012 submitted that appendix 1 to income tax rules states that 60% depreciation is allowable on computers including computer software. It was submitted that the word, 'including', is to be interpreted as expanding the scope of the word 'computers', to bring within its ambit computer software.

11.1.2. On verification of the same, Ld.AO observed that software purchased by assessee was 'licence to use software'. Ld.AO, accordingly restricted depreciation at 25% by placing reliance on DRP restricted depreciation claimed to a lower rate of 25% by concluding that only software purchased along with the computer is eligible for depreciation at the rate of 60%.

11.2. Before us both sides submitted as under:

11.2.1. Ld.Counsel submitted that, authorities below have erred in restricting depreciation to lower rate of 25%, as against claim of assessee at 60% on computer software under, section 32 of the Act, thereby resulting in net disallowance of Rs.24,44,33,932/-.

11.2.2. Ld.Counsel submitted that, as per Appendix 1 to Income Tax Rules for year under consideration, 60% depreciation is allowable on computer, including computer software. He submitted that, computer software has been defined to mean any computer program recorded on any disk, tape, related media or other information storage devices. It has been submitted that said definition does not make a distinction between system and application software, and therefore, it is software falling within the definition are to be regarded as computer and accordingly eligible for depreciation at the rate of 60%.

11.3. On the contrary Ld.Standing Counsel for revenue, placed reliance upon orders passed by authorities below. He submitted that software purchased along with hardware is only eligible for depreciation @60%.

11.4. We have perused submissions advanced by both sides in light of records placed before us.

11.4.1. It has been submitted that the issue now stands settled by decision of coordinate bench of this *Tribunal* in case of *Infosys Ltd vs ACIT* in *ITA(TP)A No.102 and 233/Bang/2013* for *assessment year 2005-06,* by *order dated 10/11/2017*. This *Tribunal* held as under:

> *"**9.1.**This ground is raised with respect to the rate of depreciation on software expenses of Rs.97,84,35,963 which are treated as capital by the Assessing Officer and CIT (Appeals). The authorities below have allowed depreciation at 25% on software expenses held to be capital in nature, for the reason that the software expenditure resulted in right to use software licenses is an 'intangible asset' and therefore eligible for depreciation at 25%.*

9.2. *Per contra, the learned Authorised Representative of the assessee contends that as per Part A of Depreciation Schedule to IT Rules, 1962. 'Computers including computer software" are eligible for depreciation @ 60 %. As per Note 7 to the said Depreciation Schedule' . 'Computer software' means any software program recorded on any disc, tape, perforated media or other information storage device.*

9.3.1. *We have heard the rival contentions, perused and carefully considered the material on record. We have restored the issue of allowability of software expenses as capital or revenue to the file of the Assessing Officer. If the software expenditure is treated as revenue expenditure, then the quantum of claiming depreciation would not arise. The issue of depreciation remains only if the software expenses are held to be capital expenditure. We find from a perusal of the order of assessment that in para 7.4 thereof that the Assessing Officer himself has noted that depreciation of software expenses is to be allowed at 60%, but ultimately allowed the assessee depreciation at 25%. As per Sec. 32(1)(ii) depreciation @ 25% is applicable in respect of know-how, patents, copy rights, trademarks, licenses, franchises or any other business or commercial right of similar nature, being intangible assets, acquired on or after 1.4.1998. In the case of Amway India Enterprises Vs. DCIT (2008) 111 ITD 112 (SB) (Delhi), it was held that 'computer software' is eligible for depreciation @ 60% This decision of the ITAT, Delhi (SB) in the case of Amway India Enterprises (supra) has been upheld by the Hon'ble High Court of Delhi. In DCIT Vs. Datacraft India Ltd. (2010) 133 TTJ 377 (Mum) (SB) wherein it was held that when a device is used as part of the computer in its functions, like routers, switches, etc., they are eligible for depreciation @ 60%. In the light of the discussion above, we hold that if the software expenses are treated as capital expenditure by the Assessing Officer, then depreciation is to be allowed thereon at 60%. Needless to add, the assessee be afforded opportunity of being heard. Consequently, Ground No.3.2 of the assessee's appeal is allowed for statistical purposes."*

11.4.2. Based on above discussions and respectfully following decision of coordinate bench in case of *Infosys Ltd. vs ACIT(supra)*, we direct Ld.AO to consider the claim of assessee. Ld. AO is directed to verify if there is any software purchased that falls in the category of revenue expenditure, as then the question of granting depreciation would not arise. In respect of the other computer software that are capitalized, depreciation is to be granted to

assessee at 60%. Needless to say that proper opportunity must be granted to assessee in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

12. Ground No.10 is premature at this stage and do not require any adjudication.

13. Ground No.11 is in respect of levy of interest under section 234B of the Act.

13.1. It has been submitted by Ld.Counsel that as a consequence of APA entered into by assessee, income was increased vis-a-vis original computation at page 322. Referring to revised computation at page 328 of paper book volume 1, he submitted that, incremental increase in the income is Rs.7,74,21,28,914/- pursuant to APA on which interest under section 234B cannot be living.

13.2. Having said so, Ld.Counsel also admitted that 234B is a mandatory levy, by referring to decision of *Hon'ble Supreme Court* in case of *CIT vs. Anjum.M.H.Ghaswala* reported in *(2001)119 Taxman352*. However, he submitted that, interest under section 234B can't be casted, unless there is a default in making advance tax. And in the present case, there is an increase in the income of assessee, post APA. He placed reliance on decision of *Hon'ble Bombay High Court* in case of *Prime Securities vs ACIT* reported in *(2012) 20 taxman.com 757*, *Hon'ble Gujrat High Court* in case of *CIT vs. Rainbow* reported in *277 ITR 507* and decision of *ITAT* in case of JSW Steel Ltd

13.3. On the contrary, Ld.Standing Counsel for revenue, emphasised that, interest under section 234B is a mandatory levy, as the section defines levy of interest on the assessed tax. In the present facts of case, tax is assessed including incremental income due to APA and therefore the consequence should follow.

13.4. We have perused submissions advanced by both sides in light of records placed before us.

Relevant provision for consideration is as under:

234B.: Interest for defaults in payment of advance tax.

(1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax

Explanation 1.—In this section, "assessed tax" means the tax on the total income determined under sub-section (1) of section 143 and where a regular assessment is made, the tax on the total income determined under such regular assessment as reduced by the amount of,—

(i) any tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income;

(ii) any relief of tax allowed under section 90 on account of tax paid in a country outside India;

(iii) any relief of tax allowed under section 90A on account of tax paid in a specified territory outside India referred to in that section;

(iv) any deduction, from the Indian income-tax payable, allowed under section 91, on account of tax paid in a country outside India; and

(v) any tax credit allowed to be set off in accordance with the provisions of section 115JAA.

Explanation 2.—Where, in relation to an assessment year, an assessment is made for the first time under section 147 or section 153A the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 3. — In Explanation 1 and in sub-section (3) "tax on the total income determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.
(2) Where, before the date of determination of total income under sub-section (1) of section 143 or completion of a regular assessment, tax is paid by the assessee under section 140A or otherwise,—
(i) interest shall be calculated in accordance with the foregoing provisions of this section up to the date on which the tax is so paid, and reduced by the interest, if any, paid under section 140A towards the interest chargeable under this section;
(ii) thereafter, interest shall be calculated at the rate aforesaid on the amount by which the tax so paid together with the advance tax paid falls short of the assessed tax.
(3) Where, as a result of an order of reassessment or recomputation under section 147 or section 153A the amount on which interest was payable under sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the day following the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made as is referred to in sub-section (1) following the date of such regular assessment and ending on the date of the reassessment or recomputation under section 147 or section 153A on the amount by which the tax on the total income determined on the basis of the reassessment or recomputation exceeds the tax on the total income determined under sub-section (1) of section 143 or on the basis of the regular assessment aforesaid.
(4) Where, as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under sub-section (1) or sub-section (3) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and—
(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly;
(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.
(5) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years.

13.4. Assessee does not dispute that advance tax is payable on incremental income. Tax has to be paid on additional income, which did not form part of original return of income.

13.5. Ld.Counsel relied on following decisions:

Decision of *Hon'ble Gujarat High Court* in *Rainbow Industries (P.) Ltd.* (*supra*), relied on by Ld.Counsel is in respect of demand for interest on short payment of advance tax deleted by *Tribunal*.

In reference before *Hon'ble Court* at the instance of Revenue, it was held that,

> *"This Tribunal as a matter of fact had found that the advance tax liability was determined by the assessee therein on the basis of its method of valuing closing stock which it had followed even for the earlier assessment years. Therefore, in the absence of the Revenue pointing out that the figures adopted for computing the income was incorrect, the levy of interest could not be sustained."*

13.6. Reliance was also placed on decision of *Hon'ble Bombay High Court* in *Prime Securities (supra)* wherein, default was committed by assessee in payment of advance tax at the time when it was paid. On these facts, *Hon'ble Court* held that, at the time of making payment of Advance tax, it was not possible to anticipate events and make payment of advance tax on that basis.

13.7. In the present case, it is the case of the Revenue that there is default on part of the assessee in paying Advance tax on account of incremental income received during the year under consideration,

pursuant to APA dated 29/12/2016. In our view, these decisions therefore do not recue assessee.

13.8. We refer to decision of *Hon'ble Bombay High Court* in case of *E.Merk (India) Ltd vs CIT* reported in *(2017) 79 taxman.com21*, wherein this decision has been dealt with as under:

"(i) Moreover, both of the above decisions of Gujarat High Court completely ignore sub-section (4) of Section 215 of the Act, which provides for reduction or waiver of the interest payable by the assessee under Section 215 of the Act. Therefore, both the above decisions of the Gujarat High Court most respectfully in our view were rendered sub-silentio. It is this sub-section (4) of Section 215 which inter alia takes into account the circumstances beyond the control of the assessee for having paid less advance tax than that finally determined to be payable. The argument of hardship, bona fide conduct etc. would be appropriately considered when applying sub-section (4) of Section 215 of the Act while considering waiver/reduction of interest payable under Section 215 of the Act. These arguments of hardship etc. cannot be subject of consideration while interpreting a fiscal legislation. There is no place for any equity while interpreting a fiscal legislation. The Apex Court in CST v. Modi Sugar Mills, AIR 1961 (SC) 1047 has observed that "In interpreting a taxing statute, equitable consideration are entirely out of place." Therefore, the submission of the applicant assessee that non-payment of advance tax was on account of circumstances beyond the control of the assessee and for a reasonable cause, would not warrant deletion of interest payable on account of short payment/non-payment of the advance tax while considering the Sub-section (1) of Section 215 of the Act. The considerations may have been different if we were considering an application of waiver under Sub-section (4) of Section 215 of the Act. (j) In the above view the applicant assessee is liable to pay the interest under Section 215 of the Act as held by the Tribunal."

13.9. In our view, facts considered by Hon'ble Bombay High Court in case of E-Merk*(India) Ltd vs CIT (supra)* is identical to the fats of the case. Respectfully following the decision of *Hon'ble Bombay High Court* in case of *E.Merk(India) Pvt.Ltd(supra)*, and in particular decision of Hon'ble Supreme Court in case of *CIT vs. Anjum.M.H.Ghaswala(supra),* we do not find any merit in submissions of Ld.Counsel.

We thus hold that assessee is liable to pay interest under section 234B of the Act, on incremental income pursuant to APA.

Accordingly, we dismiss this ground of assessee.

In the result appeal filed by assessee stands partly allowed.

Order pronounced in open court on 31/7/2020

Sd/- Sd/-

(B. R. BASKARAN) (BEENA PILLAI)
Accountant Member Judicial Member

Bangalore,
Dated, the 31st July, 2020.
/Vms/*

Copy to:

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

By order

Assistant Registrar,
Income-Tax Appellate Tribunal.
Bangalore.

		Date	**Initial**	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author			Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS
7.	Date of uploading the order on Website			Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk			Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS