IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

IT(**TP**)A No.370/Bang/2021
Assessment year : 2016-17

M/s. Wipro Limited 76R & 80P, Doddakannellii, Sarjapur Road, Bangalore 560 035 **PAN: AAACW 0387R**	Vs.	The Assistant Commissioner of Income-tax, Circle-7(1)(2) Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Sandeep Huilgol, Advocate
Respondent by	:	Dr. Manjunath Karkihallli, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	03.04.2023
Date of Pronouncement	:	14.06.2023

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

The appeal filed by the assessee is directed against the order dated 28-05-2021 passed by the Assessing officer, National Faceless Assessment Centre, Delhi [NFAC], Delhi u/s 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income-tax Act,1961 ['the Act' for short] for assessment year 2016-

17 in pursuance of directions given by Ld Dispute Resolution Panel (DRP) dated 29.03.2021.

2. The brief facts of the case are that the assessee filed his return of income on 30.11.2016 declaring at income of Rs. 57,51,34,75,210/- after claiming deduction under section 80G of Rs. 4,05,98,408/- and 80IAB of Rs. 585,09,09,819/-. The case was selected for scrutiny and notice u/s 143(2) was issued and other statutory notices were issued to the assessee and assessee also responded to the notices. The assessee claimed exemption u/s 10AA being profit of SEZ units. The total income also comprises income of short term capital gain amounting to Rs. 2,64,33,89,767/- on sales of Mutual Fund and Bonds units and other investments. The assessee had also Long Term Capital gain on sale of bonds and NCDs of Rs. 16,74,12,034/-after setting off of brought forward losses of earlier years. Further the assessee had disclosed loss from other sources of Rs. 9,21,99,128/- being interest expenses on ECB loan taken to invest in foreign subsidiaries company, viz, Wipro Cyprus. The assessee is engaged in different types of business activities, viz., software development services and IT services; manufacture of Vanaspati/Hydro generated oils; toilet soaps; lighting products; pharmaceuticals & Neutraceutical products; leather products; computers, hydraulic and pneumatic equipment; water treatment systems and solutions etc. It is also engaged in trading of servers, routers, networking equipments, spare parts, etc. The assessing officer passed final assessment order on 28.05.2021 in conformity with the directions given by the Ld DRP. The assessee is aggrieved by the order so passed by the AO and hence it has filed this appeal before the Tribunal. The assessee has raised several grounds in a detailed manner. However, the Ld Senior Counsel appearing

for the assessee has advanced his arguments on issue-wise on the basis of abridged grounds of appeal. Accordingly, we find it convenient to dispose of the issues, which would, in turn, dispose of relevant grounds of appeal.

3. The ground No. 01,02,and 03 are general in nature and does not require adjudication.

4. The fourth issue relates to the capitalisation of Salaries and Wages. The back ground for making this addition is described as under by the AO:-

> "During the course of assessment proceedings, for AY 2016-17 it was found that the assessee has designed some software tools for undertaking IOT, Block Chain and Machine Learning work. These are futuristic technologies and speculated to be disruptive in nature. Once such sufficiently advanced technologies come into operation, Artificial Intelligence and Machine Learning are expected to take over coding , This will be a major challenge for software service providers. When computers start coding new algorithms on an automated basis, the only requirement for a company that needs such new algorithms, will be to design the software architecture. The labour-intensive work of coding is, as of now, outsourced to Software suppliers in India, Philippines etc. With the advent of these disruptive technologies, India-based Software suppliers will face a steep fall in demand. . Fearing competition from Al bots, many India-based Software exporters, including the assessee company have started developing their own AI bots and Machine Learning Tools."

5. The AO noticed that the assessee herein has developed certain technologies and software platforms based on AI, IOT and Machine learning. He also noticed that the assessee has not capitalised any such asset in its books of account. During the course of assessment

proceedings for the AY 2015-16 a similar issue was raised in the case of the assessee and the ground of addition made by the AO has been upheld by the DRP. In the impugned assessment year the DRP also upheld the addition made by the AO in the same line of assessment for the AY 2015-16. The assesse preferred in appeal before the Income Tax Appellate Tribunal, The facts and observations of the co-ordinate bench are as under:-

> "6.1 ……. The AO noticed from the Chairman's message given in the Annual report of the assessee that it has developed an Artificial Intelligence Plat form named "Wipro HOLMES". He also noticed that the assessee has already received trade mark for the above product. In this regard, the AO observed as under:-
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> "3 Assessee describes Wipro Holmes as "Wipro HOLMES Artificial Intelligence Platform ™". The platform is ready and it has already received trademark also. One does not have to be a Sherlock Holmes to realize that Wipro Holmes is a capital asset. So where is this platform recognized in fixed asset schedule? Where are the other platforms for lnternet of Things and Blockchain reported? ln the course of hearing on 15.11.2018, this was confronted to the AR. AR argued that it is an industry practice to claim all employee expenses as revenue expenditure. The AR was asked to furnish details of (a) number of man-days of the company in the year, (b) number of man-days that have been utilized in in-house projects, and (c) number of man-days that have been characterized as 'bench'. 'Bench' is an industry nomenclature. An employee who is on the 'bench' is not working on any client project at a given time (she might have completed one client project and is awaiting another client project). But companies generally keep these employees busy by giving them some in-house projects. Assessee was also asked to furnish some sample timesheets of persons working on the 'bench', so as to verify this fact"
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> The AO noticed that the assessee has claimed all expenses incurred in development of these software products as revenue expenditure.

The AO took the view that a portion of expenses relating to these software products should have been capitalised. From the explanations furnished by the assessee, the AO noticed that these software products are developed under the leadership of "Chief Technology Officer" (CTO). He also took the view that the assessee should have used services of 'bench' employees also at times in connection thereto. Since salary expenses constitute major portion of expenses in development of software, the AO called for details of man days of employees working under the CTO and also the bench employees.

6.2 The AO noticed that the 726343 mandays were spent under CTO. The AO took the view that above said salary expenses should be capitalised. Since services of "bench" employees are also utilised at time, the AO took the view that 25% of bench employees mandays could be taken as used for development of above said software and the same worked out to 24,82,972 mandays. Both the above said mandays constituted 7.96% of the total amount of mandays. Accordingly, the AO took the view that the salary expenses to the extent of 7.96% should be capitalised, which worked out to Rs.1496.67 crores. The assessee contended that these software products have been put to use and hence depreciation @ 60% should be allowed. Since the details of actual date of putting the software to use were not available, the AO agreed to allow depreciation @ 30%, which worked out to Rs.449.00 crores. In view of variation proposed in the total income, the AO issued draft assessment order to the assessee.

6.3 The assessee filed objections before Ld DRP against the draft assessment order. The Ld DRP called for a remand report from the AO and also reply from the assessee for the remand report. The Ld DRP determined the cost of mandays for employees under the control of CTO at Rs.314.11 crores and the cost of mandays of bench employees at Rs.287.66 crores. Accordingly, the aggregate amount to be capitalised was determined at Rs.601.77 crores by Ld DRP. With regard to allowability of depreciation, the Ld DRP noticed that the AO has changed his stand in the remand report and observed that the new software/application produced by the assessee are in the nature of "intangibles" and accordingly suggested depreciation @ 25% instead of 60%. Further, since the details of nature of asset created and the details of their usage were not available, the Ld DRP

declined to grant depreciation. The relevant observations made by the Ld Dispute Resolution Panel are extracted below:-

"2.g With respect to the classification of assets and resultant treatment for applying correct rates the information is not sufficient. The AO initially took the stand that the assets created are software and applied 60% rate (restricted to less than 182 days). However as per the remand report the AO raised alternative argument that the depreciation may be restricted to 25%, as the assessee was creating intangible assets. The information with regard to the nature of assets created and put to use is not made available to the Panel. Hence, it is not possible to grant depreciation to the assessee in the given circumstances."

6.4 The assessee raised an alternative contention that the above said disallowance would result in increasing the profits of undertakings, which are eligible for deduction u/s 10AA of the Act and hence enhanced amount of deduction should be given to the assessee. The Ld DRP accepted the same with the following observations:-

"2.11 The Panel has considered the grounds, the submissions of assessee and the Report of the AO. At the outset it is seen that the assessee made a claim that all revenue expenses including CTO cost and bench cost are proportionately allocated to all units, including 10AA units. Another Remand Report was called from the AO on 11.07.2019 seeking the actual allocation of CTO cost and bench cost among the l0AA units. The Remand Report of AO dated 20.08.2019 is reproduced as under:

"6. In point 3, the Ld Panel has asked the AO to verify whether the CTO cost and Bench cost are actually distributed to l0AA units. The AO called for segmental. Same was furnished as Annexure-3 to assessee's reply dated 9.08.2019. As regards the veracity of the figures, the CA's certificate has been relied upon.

2.12 The Panel has carefully considered the submissions of the assessee as well as the Reports of the AO. The AO admitted that the claim for additional deduction under l0AA is made by the assessee before the AO during assessment proceedings. The claim made by the assessee is only consequential to the addition proposed. The

critical aspect is to examine whether the cost of bench employees and CTO cost is allocated to l0AA units in the first place. This was the specific issue on which the remand report was sought from the AO. The AO states that he obtained information from the assessee including certificate of chartered accountant based on which it can be seen that the bench cost and CTO cost is allocated to various l0AA units. Hence any alteration in the cost would affect the profits of l0AA units. The assessee provided a letter dated 09/08/2019 before the AO along with annexures. Annexure 3 of the letter provides the breakup of unit wise allocation of bench cost. Further a certificate from chartered accountant is produced stating that bench cost and CTO cost were allocated to l0AA units. The panel after careful consideration is of the view that the assessee should be granted additional benefit of l0AA on re-computation of profits of eligible units, consequent to partial capitalization of employee cost. It is seen that some of the 10AA units are eligible for 100% exemption and some units are eligible for 50%o of exemption. Hence AO is directed to recompute the eligible profits of l0AA units and accordingly compute the eligible benefit under l0AA. Directed accordingly."

6.5 The assessee also raised a new claim before Ld DRP contending that, if the development of software products mentioned above are considered to be capital in nature, then the same is allowable as deduction u/s 35(1)(iv) of the Act, since it is in the nature of Scientific Research expenses. In this regard, the assessee placed its reliance on the decision rendered by Hon'ble Karnataka High Court in the case of Talisma Corporation P Ltd (ITA 515/2007). The Ld DRP called for a remand report from AO, who opined that the assessee has only created "intangible assets" in the nature of "Software platform" and "software codes" and it cannot qualify as Scientific research activity. He also expressed the view that the decision rendered in the case of Talisma Corporation is distinguishable and cannot be taken support of by the assessee. The assessee strongly refuted the remand report given by the AO and contended that the provisions of sec.35(1)(iv) should be allowed in assessee's case and accordingly entire expenditure should be allowed. The ld DRP did not accept the contentions of the assessee and accordingly rejected the claim for deduction u/s 35(1)((iv) with the following observations:-

“2.14 The contention of the assessee are carefully considered. In this regard it is relevant to examine the statutory provisions of Sec 35(1)(iv) reads as under:

"in respect of any expenditure of a capital nature on scientific research related to the business carried on by the assessee, such
deduction as may be admissible under the provisions of subsection (2) "

The expenditure is initially claimed by the assessee u/s 37(1) as business expenditure. Sec. 37(l) reads as under:

"Any expenditure (not being expenditure of the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profit and gains of business or profession."

2.15 As seen from above, any expenditure which is not covered by section 30 to 36 and which is not capital expenditure is claimed under section 37(l). This shows that even as per the assessee this was not an expenditure covered by Sec. 30 to 36 of the Act. That is the reason why assessee chose to make a claim under Sec. 37(1). Hence, the assessee had no intention to claim the expenditure under the head "scientific research."

2.16 Section 35 relates to allowance of expenditure towards scientific Research. The Act permits the claim of expenditure of scientific research for both inhouse R&D and institutional R&D. For inhouse R&D by the assessee the provisions of 35(1)(i) and 35(1)(iv) provide for revenue expenditure and capital expenditure respectively. Where the assessee is engaged in "scientific Research" the assessee is eligible to claim revenue expenditure u/s 35(1)(i) and capital expenditure u/s 35(l)(iv).

2.17 The claim of the assessee under section 35(1)(iv) is made first time before DRP as an alternative claim. No concrete evidence is provided to prove that assessee is engaged in scientific research. Even before the AO during remand proceedings assessee has not substantiated the claim.

2.18 Section 35(1)(i) and Section 35(1)(iv) relate to revenue and capital expenditures in conducting scientific research related to a business carried on by the assessee. The reference to "scientific research related to a business" in section 43(4)(iii)(a) is to include the cases of scientific research which may lead to or to facilitate an extension of that business. Section 35 relates to cases where assessee exclusively carries on "scientific research, as business activity and cases where assessee carries on a business as well as scientific research as two distinct activities. Board's circular No. 281 dated 22.9.1980 states that the deductions u/s 35 are aimed at providing incentives to encourage scientific research in India and to encourage assessee who need the output of scientific research for their business. Hence the activities of the assessee need to be examined in the light of these provision if assessee has a stream of activity called scientific research related to the business carried on by it. Whether the activities of the assessee are in the nature of scientific research or commercial activities in development of new products not amounting to scientific research needs to be addressed as per the provisions of the Act. The assessee has never made any claim for conducting scientific research in the past. The returns of income do not show any claim to that effect. Section 35 is special incentive provision where both revenue and capital expenditure are allowed fully. It is also observed that assessee has not maintained separate books of account relating to the activities of scientific research. ITAT Mumbai, B Bench in the case of M/s Nivo controls Pvt Ltd vs. CIT-l (ITA No.3533/Mum/20l4 AY 2009-10) held that for claim u/s 35(l)(iv) the assessee is expected to maintain separate books of account. Hence the claim of the assessee cannot be accepted without audited books of account evidencing the expenditure towards scientific research.

2.19 Even otherwise, if the assessee at any stage of its business is of the opinion that it conducting scientific research, then the appropriate course of action u/s 35 read with Rule 5D to apply to Central Government and get the approval of the prescribed authority. In the present case the fresh claim is made by the assessee with regard to conducting scientific research. Hence the burden is on the assessee to refer the matter to the prescribed authority for certificate. The assessee informed the Panel vide letter dated 24/09/2019 that it filed an application for approval from Department of Scientific and Industrial Research (DSIR) for recognition of its in-house development activities under section 35 of the Income Tax Act on

31/03/2015 but no approval is granted till date. Considering the fact that the assessee has applied for recognizing its activities as "scientific research" and DSIR has not granted the approval even after four and half years clearly show that the assessee is not eligible for deduction under Sec 35. Hence this contention of the assessee is rejected."

6.6 Before us, the Ld A.R reiterated the assessee's contentions that these expenses are revenue in nature. He submitted that

(i) the assessee is engaged in the business of providing software services, wherein the employee cost is the major portion of the expenditure. All the expenses have been claimed as revenue expenditure in all these years and the said claim has been accepted by the assessing officer.

(ii) The AO has taken the view that the expenses spent on development of certain internal tools titled as "internal intangible assets" by AO should be capitalised. They consisted of Artificial intelligence software named "Wipro Holmes", other tools named as Wipro Accelerate, Rapids etc. The primary contention of the assessee is that there is no requirement of capitalising any of the salary expenses. Since the AO had taken different view, the assessee also made following alternative plea of allowing depreciation on the amount so capitalised, which was accepted by AO in the draft assessment order. Before Ld DRP, the assessee raised another alternative plea to allow the capital expenditure as deduction u/s 35(1)(iv) of the Act. However, Ld DRP rejected both the alternative pleas, viz., claim for depreciation and also claim for deduction u/s 35(1)(iv) of the Act.

(iii) The Ld A.R submitted that these software products/applications/software tools/platforms, which have been developed are part of its regular business operations and the products used for inhouse only enable enhancing its capabilities and efficiencies in newer technological areas. These are normal research expenses incurred on certain futuristic and disruptive technologies in order to stay competitive and relevant in market place. The assessee has intended to use them in-house and was not meant to exploit it commercially in order to facilitate its business activities. Hence these expenses are revenue expenses only.

(iv) He submitted that the intangible assets (as named by AO) are only tools and solutions deployed along with other IT services to differentiate, facilitate and have effective delivery of services.

(v) Due to fast technological obsolescence in software industry, these products shall have short life only. Hence these products, in practical and real sense, cannot be expected to give enduring benefits to the assessee.

(v) He submitted that these expenses have been incurred to facilitate extension of existing business of Information Technology carried on by the assessee and hence they are revenue in nature.

6.7 The Ld A.R also advanced his arguments on the alternative pleas put forth by the assessee. He submitted that

(i) software development shall fall under the category of 'applied science' and hence the tax authorities are not justified in rejecting the contention of the assessee that the assessee has carried out scientific research in applied science and hence, even if the expenses are considered to be capital in nature, it is allowable as deduction u/s 35(1)(iv) of the Act. In this regard, the Ld A.R invited our attention to the detailed submissions made before Ld DRP.

(ii) The Ld A.R submitted that the Ld DRP was not justified in rejecting the claim for allowing depreciation @ 60% on the amount capitalised. He submitted that the AO had allowed deduction of depreciation in the draft assessment order, but the Ld DRP has rejected the claim. He submitted that the AO had taken the view in the draft assessment order that these software/application/tools/platforms are in the nature of 'software' eligible for depreciation at higher rate. However, before the Ld DRP, the AO expressed the view in his remand report that these products are to be considered as "internal intangible assets", which may be eligible for depreciation @ 25%. Thus, there is no clarity in the stand of the AO. The Ld DRP has rejected the claim for depreciation for the reasons that the details of 'nature of asset created' and the date on which they are put to use are not available. He submitted that the view so taken by Ld DRP is contrary to the facts discussed in the assessment order and the remand report.

6.8 The Ld D.R, on the contrary, supported the order passed by AO/DRP. He submitted that the assessee has developed many new applications, which are in the nature of intangible assets. Hence the expenses incurred on development of those applications have been rightly capitalised by the AO.

6.9 We heard rival contentions and perused the record. We notice that the primary contention of the assessee is that the expenses incurred by it on development of software/applications/tools/platforms, which were meant to be used for internal purposes, are revenue in nature. These group of products have been titled as "internal intangible assets' by the AO. We noticed that the AO has, however, taken the view that cost of developing these internal intangible assets are required to be capitalised, as according to him, these internal intangible assets are capital in nature.

6.10 We notice that the assessee has furnished the details relating to the above said applications/tools etc before the AO. In the details furnished before the AO, the assessee has described these items as "Tools/Solutions/Platforms". The relevant details are available at pages 235 to 240 of paper book filed by the assessee. The break-up details of expenses capitalised by Ld DRP are given below:-

(A) CTO PROJECTS:-	(Rs. In crores)	
(i) CTO projects		94.81
(ii) Customer future projects	24.17	
(iii) Domain Projects	109.79	
(iv) Internal Projects		34.52
(v) Platform/tools/solutions		74.98
		338.27
Less:- Customer future projects		24.17
Total of CTO projects		314.10
(B) Allocation of Bench employees cost		287.67

Total amount capitalised	601.77
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We notice that the assessee has furnished details of nature of work carried out in each of the projects grouped under "CTO Projects". In our view, critical analysis of the relevant details thereof would help us to adjudicate the present issue. Accordingly, the relevant details are discussed in brief in the ensuing paragraphs. We noticed earlier that the allocation of bench employees cost has been made on adhoc basis on the presumption that their services would have been used for the projects falling under "CTO Projects". Since this disallowance is made on adhoc/estimated basis, it does not require any specific adjudication, i.e., the decision taken by us on disallowance of CTO projects will apply mutatis mutandis to the disallowance made out of salary expenses of bench employees.

6.11 The assessee has explained nature of work carried out/projects undertaken in each of the items mentioned above, which are discussed hereunder in brief.

(A) CTO Projects:- The nature of work carried out/projects undertaken under CTO has been explained as under by the assessee:-

(a) Wipro Accellerate :- It is prepaid cable broad band solutions. This project has been completed.

(b) RAPIDS :- It is digital BSS solution. It enables service provider to integrate and charge multiple services on a single platform. This project has been completed.

(c) Assure Health :- It enables medical professions to deliver patient centric care at anytime and anywhere. Healthcare solutions include 'Remote fetal monitoring' and 'Remote cardiac care'. This project has been completed.

(d) Lab as Service :- It is Wipro's Technovate centre and caters to the digital requirement services to the customers/partners. This project has been completed.

(e) Man Machine interface (WIPRO IMAGINE):- The acronym "IMAGINE" stands for 'Interfaces to Machine Ambient Gamified Immersive New-age Experience'. It provides near human abilities of

multi-model interactions through voice, vision and haptic leading to personalised experiences. The application includes Customer service, Self service, In store interaction, Product-solution user manuals etc. It involves continuing development of the product.

(f) Multiple Harizone 2 to Harizone 3 projects. It also involves continuing development.

(B) **Customer funded projects** – These projects have been undertaken by CTO for customers. We noticed earlier that the expenses relating to this project has not been capitalised. Hence it is outside ambit of this issue.

(C) **Domain projects**:- These are expenses incurred as investment in 'Centre of Excellence' (CoE) to do research in specific domain solutions. It is stated that any outcome, which qualifies for development' will go to CTO projects for development and for further funding under CTO. As the name suggests, these expenses have been incurred to do research and improve domain specific solutions. Some of the work carried out under this heading are Digital CoE, Energy & Utilities CoE, Business Application Service CoE, Insurance CoE, Healthcare CoE, Financial Solutions CoE, Testing CoE etc.

(D) **Internal Projects** :- These expenses have been incurred for internal use of Wipro, i.e., it is Enterprise specific projects for internal use and it is not meant to sale or use in customer's projects. These are regular upgrades, support and maintenance of existing process, solutions, tools etc. It is stated that no significant new development has taken place in FY 2014-15 relevant to AY 2015-16.

(E) **Platforms/tools/solutions**:- These are Wipro specific solution on third party Platform and Tools customization to meet domain and customer needs for faster and efficient service delivery

We notice that the "D-Internal Projects" alone constitutes applications/projects for internal use. Other items falling under A to C and E are meant for sale/service to customers etc.

6.12 The question that arises is whether the expenses incurred in all of the above nature is capital or revenue in nature. We shall also

examine as to whether these expenses have resulted into any product, which requires to be capitalized. The assessee herein is one of the reputed information technology company. The business of the company, inter alia, is to develop software for its clients and also develop domain specific softwares, which shall be sold/licensed to the public. The development of software, being the core business activities of the assessee company, the revenue generated from sale/licensing of software or in providing software development services constitute its income and accordingly, the expenditure incurred on development of relevant software should constitute revenue expenditure under revenuecost matching principle.

6.13 The case would be different in the case of purchasers of software licenses/products. In their hands, it may constitute capital expenditure. We can take an example of Car manufacturing company/dealer. In the hands of that company/dealer, it is a revenue item, while in the hands of the purchaser, it may become capital item. Sometimes, the present assessee might purchase any software, which are going to be used for its business of development of software products or providing software services, then such kind of purchases may constitute Capital expenditure.

6.14 We shall now refer to some of the judicial decision rendered on this aspect. The Hon'ble Karnataka High Court has held that the purchase of application software shall still continue to he revenue expenditure, in the case of CIT vs. IBM India Ltd (357 ITR 88. The relevant observations made by Hon'ble Karnataka High Court are extracted below:-

"The Tribunal, on consideration of the material on record and the rival contentions held, when the expenditure is made not only once and for all but also with a view to bringing into existence an asset or an advantage for the enduring benefit, the same can be properly classified as capital expenditure. At the same time, even though the expenses are once and for all and may give an advantage for enduring benefit but is not with a view to bringing into existence any asset, the same cannot be always classified as capital expenditure. The test to be applied is, is it a part of the company's working expenses or is it expenditure laid out as a part of the process of profit earning. Is it on the capital layout or is it an expenditure necessary for acquisition of property or of rights of a permanent character, possession of which

is condition on carrying on trade at all. The assessee in the course of its business acquired certain application software. The amount is paid for application of software and not system software. The application software enables the assessee to carry out his business operation efficiently and smoothly. However, such software itself does not work on stand alone basis. The same has to be fitted to a computer system to work. Such software enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself. Thus, for payment of such application software, though there is an enduring benefit, it does not result into acquisition of any capital asset. The same merely enhances the productivity or efficiency and, hence, to be treated as revenue expenditure. In fact, this court had an occasion to consider whether the software expenses is allowable as revenue expenses or not and held, when the life of a computer or software is less than two years and as such, the right to use it for a limited period, the fee paid for acquisition of the said right is allowable as revenue expenditure and these softwares if they are licensed for a particular period, for utilizing the same for the subsequent years fresh licence fee is to be paid. Therefore, when the software is fitted to a computer system to work, it enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself. Though certain application is an enduring benefit, it does not result into acquisition of any capital asset. It merely enhances the productivity or efficiency and, therefore, it has to be treated as revenue expenditure. In that view of the matter, the finding recorded by the Tribunal is in accordance with law and does not call for any interference. Accordingly, the second substantial question of law is answered in favour of the assessee and against the Revenue."

One of the important principles expressed by the Hon'ble jurisdictional Karnataka High Court is that the purchase of "application software" may not always be capital expenditure. It has held that, if the software works as an aid in manufacturing process rather than tool itself, then the software does not result into acquisition of any capital asset, even though there is enduring benefit. The High Court further opined that the application software only enhances the productivity and efficiency and hence should be treated as revenue expenditure. Thus, the test of enduring benefit was rejected in this case.

6.15 The Bangalore bench of Tribunal was considering an issue in the case of Sasken Technologies Ltd, wherein the "sale of source code of software" (referred as "IPR") was claimed by the above said company as sale of capital asset and accordingly claimed that the profit arising therefrom should be assessed as Capital Gains. The AO treated the same as business income and the view of the AO was upheld by the Tribunal in its decision rendered in ITA 2546/Bang/2019 order dated 16.03.2012. The reasoning given by the Tribunal is relevant here:-

"20. We have carefully considered the rival submissions. The subject matter of the Settlement Agreement dated 21.03.20216 was independently owned IPR and Foreground Information that both the parties were privy to in the course of joint development of Foreground IPR but excluding Foreground IPR. We have already reproduced clause 3.1 and 3.2 of the Settlement Agreement in the earlier part of this order. The assessee and Spreadtrum were recognized as joint owners of the independently owned IPR and Foreground Information. In this regard, we may recollect that when the assessee and Spreadtrum entered into Agreement dated 30.05.2005, for joint development of Foreground IPR, the assessee agreed to contribute its WCDMA Source Code together with technical and testing documents in addition to deputing engineers to Shanghai, China, to work with Spreadtrum engineers on the project. This was the independently owned IPR that was recognized as joint property of assessee and Spreadtrum under the Settlement Agreement. This is clear from the term "Independently Owned IPR" as understood under the Settlement Agreement which means background IPR which in turn means that is owned or controlled by a party existing prior to the beginning of the joint development project or resulting from activities which are independent from and concurrent with the joint development project. This source code was not a capital asset of the assessee and was clearly in the nature of stock-intrade consumable stores or raw material held for the purpose of business or profession of the assessee's falling within clause (i) of exception to section 2(14) of the Act that defines capital asset. The same reasoning would be applicable to the Foreground Information which the assessee was privy to in the course of joint development of Foreground IPR.

21. The contention of the learned Counsel for assessee was that the assessee was not in the business of buying and selling IPR's and was only engaged in creating and exploiting IPRs. This argument is devoid of any merit. The business of the assessee is developing software for telecom companies. The revenue that the assessee derives in its business is from software services, product and technology licensing and commissioning services. In the course of its business, it develops software and becomes owner of the copyright therein, depending on the contract with its customer. The assessee licenses software and derives income in the form of license fee or sells software and derives income from sale of software. This would be clear from the revenue recognition policy of the assessee as would be evident from Note 2(j) of the Notes to financial statement.....

22. The revenue received by the assessee from licensing the IPR to Spreadtrum was at all times earlier offered to tax by the assessee as license fee / royalty and declared as business revenue. The sum received under the Arbitration award was also offered to tax as business income. It is only the sum received under the Settlement Agreement that was claimed as not taxable. It is therefore clear that the independently owned IPR and Foreground Information which partakes the character of stock-in-trade for companies like that of the assessee was not a capital asset within the meaning of section 2(14) of the Act and therefore the sum received by the assessee cannot fall within the ambit of the head of "Income from Capital Gain". The assessee did not receive the sum in question for giving up any source of income as the assessee was free to exploit independently owned IPR as well as Foreground information and therefore the argument that the sum received is capital receipt for losing a source of income and therefore not chargeable to tax, is devoid of any merits."

It can be noticed that the Tribunal has expressed the view that the software product developed by an Information Technology company constitutes its revenue asset (akin to stock in trade) and hence the revenue generated on its sale or licensing, constitutes business income. In respect of the software product so developed, the said information technology company may be holding IPR and the transfer of IPR was also held to business receipt. The business model of an information technology company is such that it would retain source code of the software product with itself and would be issuing

licenses for using the said software. Once source code is retained, the company could issue "n" number of licenses to its customers, whenever it receives orders from its customers. This is the peculiar feature of the software products. In the above said decision, the Tribunal has used the expression "stock in trade", only to mean that it is a revenue asset and hence would fall under the exceptions given in the definition of Capital asset u/s 2(14) of the Act, since the issue agitated by the above said assessee required consideration of sec.2(14) of the Act.

6.16 There is one more reason to treat the software applications/tools etc., as revenue in nature, i.e., the software industry is prone to fast technological obsolescence and hence the assessee has submitted before the tax authorities that whatever tools, it has developed may have short life. Further, it was submitted that the assessee should be required to continue to do its research on developing new tools in order to be afloat in the software industry. Hence the very purpose of developing tools for its internal use is to expedite the software development/ providing of software services in tune with current practices, which would mean that they facilitate and enhance not only the productivity, but also the efficiency. The effect of technological obsolescence, in the context of allowing cost of certain assets as revenue expenditure, was well explained by Hon'ble Supreme Court in the case of Alembic Chemical works (177 ITR 377) in the following words:-

"It would, in our opinion, be unrealistic to ignore the rapid advances in researches in antibiotic medical microbiology and to attribute a degree of endurability and permanence to the technical know- how at any particular stage in this fast changing area of medical science. The state of the art in some of these areas of high priority research is constantly updated so that the know-how cannot be said to be the element of the requisite degree of durability and non-ephemerality to share the requirements and qualifications of an enduring capital asset. The rapid strides in science and technology in the field should make us a little slow and circumspect in too readily pigeonholing an outlay, such as this as capital. The circumstance that the agreement insofar as it placed limitations on the right of the assessee in dealing with the know- how and the conditions as to non-partibility, confidentiality and secrecy of the know-how incline towards the

inference that the right pertained more to the use of the knowhow than to its exclusive acquisition.

* * *The improvisation in the process and technology in some areas of the enterprise was supplemental to the existing business and there was no material to hold that it amounted to a new or fresh venture. The further circumstance that the agreement pertained to a product already in the line of assessee's established business and not to a new product indicates that what was stipulated was an improvement in the operations of the existing business and its efficiency and profitability not removed from the area of the day to day business of the assessee's established enterprise."

The above said observations were made by Hon'ble Supreme Court in the context of deciding the issue whether the expenditure incurred by a pharma company for acquiring technical knowhow is revenue expenditure or not. The Hon'ble Calcutta High Court took support of the above said decision to hold that the expenditure incurred on purchase of software by a mining company is revenue expenditure. The relevant observations made by Hon'ble Calcutta High Court in the case of Indian Aluminium Company Ltd vs. CIT (ITA 278 of 2007 dated 18-032016) are extracted below:-

"The Apex Court in Alembic Chemicals has recognized the fact that in a field where advancements are taking place rapidly and where technology which was once the state of the art becomes obsolete in a short time, the test of enduring nature cannot always reliably be applied. Software industry is one such field where advancements and changes happen at a lightning pace and it is difficult to attribute any degree of endurability even to system software let alone application software."

The Hon'ble Calcutta High Court accordingly allowed the cost of purchase of software by M/s Indian Aluminium Company Ltd as revenue expenditure. It has also expressed the view that the test of endurability cannot be applied to System Software also. Hence improvisation in the process and technology is supplemental to the existing business of Information Technology companies also. It would result in improvement in the operations of the existing business, its efficiency and profitability. Thus, the observations made by Hon'ble Supreme court in the case of a Pharma Company,

in our view, equally applies to an Information Technology company also.

6.17 The jurisdictional Hon'ble Karnataka High Court had an occasion to decide the issue relating to expenditure incurred on development of software product in the case of CIT vs. Tejas India Network P Ltd (52 taxmann.com 513). In this case, The assessee before the High Court develops and sells leading edge optical networking products for worldwide customers. It has developed software differentiated, next generation products that enable telecommunication carriers to build converged networks that support traditional voice based services as well as new data dominated services. Their product line is marketed under the brand name TJ100. It claimed all material cost and salary expenses incurred in development of single product line as revenue expenditure on the plea that the machinery imported for preparation of Printed Circuit boards (PCBs) for the equipment are not reusable. The AO noticed that the PCBs and the machineries are lying with the assessee and hence he treated the expenses incurred by the assessee as capital expenditure. The ld

CIT(A) confirmed the disallowance, but the Tribunal reversed it.
The Hon'ble High Court has discussed the reasoning given by the Tribunal as under:-

"The Tribunal on reconsideration of the entire material on record, taking note of the various judgments on which reliance was placed by both the parties, by a detailed order came to the conclusion that the technology in telecommunication is developing at a very fast speed and new products are to be developed in case one has to remain in the business. The product developed is marketed for one year only, as the next product will come before the end of first year of the introduction of an earlier product. A number of prototypes are developed but all such prototypes are not used as model for the new product. The prototypes, which are not finally approved for commercial production, are rejected and such prototypes are of no use. Only those prototypes are retained, for which, the Company manufactures the product. Such prototype is kept for four to five years, so that the assessee Company is able to redress the complaint of any customer in case any complaint is received. Such prototype is model of the product, which is marketed and, therefore, it was of the view that the benefit is not derived for a period of more than five

years, the benefit is not of enduring nature and expenses cannot be treated as capital and, therefore, ultimately it recorded a finding that the expenditure on prototype development is to be treated as revenue and not as capital. It also held that the expenditure in the alternative as allowable under Section 35 (1) (iv) of the Act without any discussion."

Following questions were posed before the Hon'ble High Court in one of the several appeals filed before it and the Hon'ble Karnataka High Court decided this issue in favour of the assessee taking note of technological obsolescence and also following the decision rendered by Hon'ble Supreme Court in the case of Alembic chemical works:-

"(1) Whether the Tribunal was correct in-holding that a sum of Rs.5,82,21,211/- incurred for developing a product TJ-100 having a utility value for period of 5 years cannot be treated as a capital expenditure and depredation allowed as held by the Assessing officer and confirmed by the Appellate Commissioner but should be allowed as a revenue expenditure?
(2) Whether the Tribunal was correct in holding that the expenditure allowable should be alternatively allowed u/s.35(1)(iv) of the Act, as the same had been incurred on scientific research related to the business carried on by the assessee?"

8. We have heard the learned counsel appearing for the parties.

9. Learned counsel for the revenue relying on the statements of the officials as set out in the order of the assessing authority contended that, the components are retained by the Company for use by the Company in Product Development of other products, they are lying in the office, they are not scrapped as contended by the assessee and, therefore, the expenses incurred towards these components is of enduring nature and it is in the nature of capital expenditure and the Tribunal was in error in holding it otherwise.

10. Per contra, the learned counsel for the assessee submitted that, the expenses are incurred for upgrading their product every year. It is in the nature of product development expenses and, therefore, it cannot be treated as a revenue expenditure. The Tribunal was right in treating it as a revenue expenditure.

11. In the light of the aforesaid facts and the rival contentions, it is clear that the assessee is in the business of developing and selling leading edge optical networking products for worldwide customers. It has developed software differentiated, next generation products that enable telecommunication carriers to build converged networks. The life span of this product is hardly a year. Because of competition in the market, the assessee has to come out with new features every year if they want to be in the field. Therefore, there is a constant upgradation of the original product. It is in that context substantial amount is spent towards employees cost and the upgradation also includes use of components purchased every year. In fact, those components are used for manufacturing Printed Circuit Boards. Every year these Circuit Boards under go modification, changes. Therefore, the expenses incurred in this regard is in the nature of revenue expenditure.

12. The Apex Court in the case of Empire Jute Co. Ltd. v. CIT [1980] 124 ITR 1/3 Taxman 69 has held that, the decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. Further they held that, there may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that makes it a capital expenditure. What is material to consider is the nature of the advantage in a commercial sense. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically

without regard to the particular facts and circumstances of a given case.

13. In fact, the Apex Court in the case of Alembic Chemical Works Co. Ltd. v. CIT [1989] 177 ITR 377/43 Taxman 312 held that, it would be unrealistic to ignore the rapid advances in research in antibiotic medical microbiology and to attribute a degree of endurability and permanence to the technical know how at any particular stage in this fast-changing area of medical science. The state of the art in some of these areas of high priority research is constantly updated so that the know how cannot be said to be the element of the requisite degree of durability and nonephemerality to share the requirements and qualifications of an enduring capital asset. The rapid strides in science and technology in the field should make us a little slow and circumspect in too readily pigeon-holing an outlay such as this as capital. The improvisation in the process and technology in some areas of the enterprise was supplemental to the existing business and there was no material to hold that it amounted to a new or fresh venture. The further circumstance that the agreement pertained to a product already in the line of the assessee's established business and not to a new product indicates that what was stipulated was an improvement in the operations of the existing business and its efficiency and profitability not removed from the area of the day-to-day business of the assessee's established enterprise.

14. We are of the view the aforesaid statement of law equally holds good in the area of telecommunication, may be with more force. Having regard to the facts of this case, the expenditure that is claimed is for upgrading the existing product. Therefore, the product so upgraded goes on changing as time progresses, keeping in mind the requirement and the competition in the market. The Tribunal rightly held that the expenditure is not in the nature of capital expenditure but is revenue expenditure. Therefore, the first substantial question of law is answered in favour of the assessee and against the revenue.

15. In so far as the second substantial question of law is concerned, in fact the Tribunal has not given any reasons and as the assessee succeeds on the first substantial question of law, we are not going into the said question and that question is left open

to be agitated at an appropriate time in an appropriate forum. On the ground that no reasons are given, we set aside the said finding."

The Hon'ble jurisdictional Karnataka High Court has followed the decision rendered by Hon'ble Supreme Court in the case of Alembic Chemical works Co Ltd (supra) and held that the principles laid down by the Hon'ble Supreme Court shall equally apply to the area of telecommunication also, may be with more force.

6.18 In the case of CIT v. Carborandum Universal Ltd [2009] 177 Taxman 347 (Madras), it has been held that, it is well-settled that it is not only permissible, but it is also necessary for any business to update its own knowledge and adopt better ways of organising its business, if it is so to survive in the market. The expenditure so incurred for such purpose cannot be regarded as capital expenditure and it is only a revenue expenditure. Further, in the following decision it was held that study undertaken in relation to an existing business is revenue in nature. [CIT v. Manganese Ore India Ltd [2016] 67 Taxmann.com 268

(Bombay), ITO v. Dodsal Mfg P Ltd [1984] 19 Taxman 27 (Ahmedabad), CIT v. Priya Village Roadshows Ltd [2009] 185 Taxman 44 (Delhi).

6.19 The purchase cost of application software has been held to be revenue in nature by the jurisdictional High Court. The test of enduring benefit is also held to be not a deciding factor. The expenditure incurred in updating its capabilities and improvisation are held to be revenue in nature. The above said principles, even though laid down for purchase of software for the purpose of business, the same should, in our view, be applied with more force for software developed in house, since they are meant to improve efficiency of the existing system of development of software/provision of software services. In this view of the matter, the tools/applications/platforms developed for the "internal use" of the assessee company (Item D - Internal projects), in our view, cannot be capitalised and should be allowed as revenue expenditure.

6.20 We understand that the common practice followed by information technology companies is to expense all the expenses incurred on development of a software mean for sale/license/rent. We noticed earlier that, in the instant case, the applications

developed under CTO projects are the products developed by the assessee for sale/license. These products are revenue assets. We also noticed that the development was complete in respect of first four products and the development work was continuing for the remaining two products. We noticed that the business of the assessee itself is development of software products or providing of software services and hence the revenue generated on their sales or providing of services is its income, in which case, the expenditure incurred on development of those applications shall constitute related expenditure. Even if the expenditure does not result in creation of any successful software product/ application/tool etc., considering the business nature of the assessee, those expenses shall constitute revenue expenditure in the hands of the assessee, as it is necessary for the assessee to keep updating itself and keep trying new products to be afloat in the competitive market. Accordingly, apart from the principles discussed in the earlier paragraphs, applying above said rationale, the expenses incurred on CTO projects (Item A), Domain projects (Item C) and Planform/tools/solutions (Item D) are required to be allowed as revenue expenditure.

6.21 Accordingly, we hold that the impugned expenses incurred by the assessee are allowable as revenue expenditure and accordingly, the disallowance made by the assessing officer could not be sustained."

6. Considering the arguments from both the sides a similar issue has been decided by the co-ordinate bench of the Tribunal, therefore, respectfully following the above judgment in assessee's own case for the AY 2015-16 cited supra in which the expenses incurred by the assessee have been held that "these expenses are revenue in nature, the question of allowability of depreciation or the question of allowing it u/s 35(1)(iv) as Scientific research expenses shall become academic and we are not adjudicating them". Accordingly we partly allow the ground No. 4 to 4.4 raised by the assessee.

7. The fifth ground relates to the transfer pricing adjustment made by TPO/AO. In the original grounds of appeal that were filed before the Tribunal on 27.07.2021, the five aspects or items of the transfer pricing adjustment were set out in the following manner:-

(a) Adjustment for difference in price in Software Development Segment
(b) Adjustment for interest on advances given to overseas subsidiaries
(c) Adjustment made for Corporate guarantee commission
(d) Adjustment for Specified Domestic Transaction(SDT)
(e) Adjustment for interest on delayed trade receivables

8. The first item in the above said list pertains to the adjustment made to the software development segment ('SWD' in short) of the assessee. In this regard, the assessee has a two-fold submission. Firstly, the Assessee contends that although the TPO has finally set out only 2 companies in the list of comparables to this segment at page 29 of the TPO's order, there are 2 more companies which had been accepted by the TPO as being comparable to the Assessee's SWD segment but ultimately, not included in the TPO's final list of comparables. We note from page 21 of the TP order that there is substance in the assessee's aforesaid submission, since there are, in fact, 2 companies that have admittedly held by the TPO to being comparable to the assessee's SWD segment. These 2 companies are CG Vak Software and Exports Ltd. and RS Software (India) Ltd., as has been noted in page 21 of the TP order. Despite the clear finding of the TPO that these 2 companies are "Accepted. Passed all the filters applied by the TPO", however, they have not been included in the final list of comparables in page 29 of the TP order. We note that the TPO has not assigned any reasons for not

including these two companies in the final list despite his clear finding that they are comparable. Assessee did not raise this issue before the ld.DRP.

9. The assessee submitted that it had filed an application dated 31.05.2022 under S.154 of the Act seeking rectification of the TP order by recomputing the TP adjustment, if any, after reckoning the margins of these 2companies as well. However, we note from the order dated

24.02.2023 passed by the TPO on this application u/s. 154 that the said request for inclusion of these 2 comparable companies has not been considered by the TPO. Hence, we deem it fit and proper to restore this issue to the TPO / AO with a direction to the TPO / AO to re-compute the TP adjustment, if any, to the assessee's SWD segment after including CG Vak Software and Exports Ltd. and RS Software (India) Ltd. in the final list of comparables to this segment.

10. The second aspect of the Assessee's submissions on the TP adjustment to its SWD segment is that while computing the ALP of the SWD services segment, the TPO has not considered the segmental date pertaining to the SWD segment. The Assessee's case is that the TPO has, on the contrary, reckoned the figures for the entire company and not only of this SWD segment. In this regard, on examining the TP order, we note that the Assessee has given a break-up of the various segments in which it operated during the relevant previous year and the figures for each segment. However, we note at pages 30-31 of the TP order that while benchmarking the SWD segment, the TPO has used the entity-level data of the company which appears to be unfounded and erroneous.

11. The Assessee submits that it had also filed an application dated 31.05.2022 under S.154 of the Act seeking rectification of the TP order by recomputing the TP adjustment, if any, after reckoning the segmental level data only. However, we note from the order dated 24.02.2023 passed by the TPO on this application u/s. 154 that the said request for recomputing the TP adjustment has not been considered by the TPO. Hence, we deem it fit and proper to restore this issue to the TPO / AO with a direction to the TPO / AO to recompute the TP adjustment, if any, to the Assessee's SWD segment after taking into consideration only the amounts pertaining to the Assessee's SWD segment and not to take into account the entity-level data as has mistakenly been done in the TP order.

12. The second and third items on the list relates to the transfer pricing adjustments made to the following items:

(i) Adjustment for interest on advances given to overseas subsidiaries; and

(ii) Adjustment made for Corporate guarantee commission

13. In this regard, during the course of the hearing on 03.04.2023, the assessee has brought to our notice that the correctness of the adjustments made to the above two issues need not be gone into by the Tribunal in the light of the fact that the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India and the Appellant have entered into an Advance Pricing Agreement ('APA') dated

24.03.2023 under S.92CC and 92 CD of the Act which specifically covers these 2 international transactions. A copy of the APA is placed on record.

14. On an examination of the APA, it is noticed that as per Clause 2 of the APA, the same is applicable to the instant AY, i.e. AY 2016-17. Further, we note that Clause 6(a) provides for the rate at which the ALP of the international transaction of receipt of commission towards provision of corporate guarantees to AEs is to be determined. We further note that Clause 6(b) provides for the rate at which the ALP of the international transaction of receipt of interest on inter-corporate advances to AEs is to be determined. The Appellant submits that as per Section 92CC(5) of the Act, the APA shall be binding on the Appellant and the Respondent–Revenue authorities for these international transactions, which we concur with.

15. However, we note that in terms of S.92CD of the Act, the Appellant is required to file a modified return of income for this AY in accordance with and limited to the transactions covered in this APA. The Appellant submitted during the course of hearing on 03.04.2023 that the said modified return of income shall be filed by it in due course and in accordance with law. Pertinently, we note that as per S.92CD(3), the AO is bound to pass an order modifying the assessed income of the Appellant having regard to and in accordance with the APA.

16. In the light of the above, we dispose of the grounds raised in this appeal pertaining to these two international transactions, viz. (i) Adjustment for interest on advances given to overseas subsidiaries; and

(ii) Adjustment made for Corporate guarantee commission; by directing the TPO / AO to pass an order in terms of the above provisions modifying the total income of the Appellant in terms of the aforesaid APA dated 24.03.2023 subject to the Appellant having filed a modified return of income as is required in law.

17. The next issue relates to the transfer pricing adjustment made in respect of Specified Domestic Transaction (SDT) made. The TPO has made adjustment to the tune of Rs.107.92 crores and it was confirmed by Ld DRP. This issue is covered by the decision rendered by the coordinate bench in the assessee's own case in AY 2015-16.The decision rendered by the co-ordinate bench on this issue are extracted below:-

> "7.5 The last item in this issue relates to the transfer pricing adjustment made in respect of Specified Domestic Transaction (SDT) made. The TPO has made adjustment to the tune of Rs.345.96 crores and it was confirmed by Ld DRP. This issue is also covered by the decision rendered by the co-ordinate bench in the assessee's own case in AY 2014-15. The decision rendered by the co-ordinate bench on this issue are extracted below:-
>
> "39.12 We heard Ld D.R and perused the record. We shall first have regard to various applicable provisions of the Act. The provisions of sec.92BA of the Act was introduced by Finance Act, 2012 w.e.f. 1.4.2013 to determine Arm's length price of Specified domestic transactions (SDT), when the aggregate value of such transactions exceeds the prescribed limit. Sec.92BA reads as under:-
>
> "92BA. For the purposes of this section and sections 92, 92C, 92D and 92E, "specified domestic transaction" in case of an assessee means any of the following transactions, not being an international transaction, namely:—

(i) any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of subsection (2) of section 40A;*

(ii) any transaction referred to in section 80A;
(iii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;

(iv) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;

(v) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or

(vi) any other transaction as may be prescribed, and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of (twenty crore)** rupees.

(* Omitted by Finance Act, 2017 w.e.f. 1-4-2017.

** Substituted for "five" by Finance Act, 2015 w.e.f. 1.4.2016)"

Section 92 of the Act mandates computation of income from international transaction or specified domestic transaction having regard to arm's length price. The said section 92 reads as under:-

"Section 92. (1) Any income arising from an international transaction shall be computed having regard to the arm's length price.

Explanation.-For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.

(2) Where in an international transaction or specified domestic transaction, two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense

allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.
(2A) Any allowance for an expenditure or interest or allocation of any cost or expense or any income in relation to the specified domestic transaction shall be computed having regard to the arm's length price.

(3) The provisions of this section shall not apply in a case where the computation of income under sub-section (1) or sub-section (2A) or the determination of the allowance for any expense or interest under sub-section (1) or sub-section (2A), or the determination of any cost or expense allocated or apportioned, or, as the case may be, contributed under sub-section (2) or subsection (2A), has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction or specified domestic transaction was entered into."

39.13 The different undertakings owned by the assessee have entered into inter unit transactions and many of those undertakings have claimed deduction u/s 10AA of the Act. The aggregate value of those transactions has also exceeded the threshold limit prescribed in sec.92BA of the Act. Accordingly, it is submitted that the provisions of sec.92BA(v) relating to Specified Domestic Transaction are applicable to the assessee. At the cost of repetition, we extract below clause (v) of sec.92BA:-

"(v) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of subsection (8) or sub-section (10) of section 80-IA are applicable;"

Hence, it is pertinent to refer to the provisions of sec.80IA(8), which read as under:-

"80IA(8) Where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does

not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section**,** the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date:

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

Explanation.—For the purposes of this sub-section, "market value", in relation to any goods or services, means—

(i) the price that such goods or services would ordinarily fetch in the open market; or

(ii) the arm's length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA."

The provisions of sub.sec (9) of sec.10AA specifically states that the provisions of sub-section (8) and sub-section (10) of section 80IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purpose of the undertaking referred to in section 80-IA. The provisions of sec. 80IA(8) mandates substitution of actual price with "market value" when there is transfer of goods or services

(a) from "eligible business" to "any other business" carried on by the assessee or

(b) from "any other business" to "eligible business" carried on by the assessee.

Section 10A/10AA/10B, 80IA etc., grants income tax concession by way of granting deduction to certain specified undertakings from gross total income (or) at the point of computation itself, meaning thereby, the same results in income-tax benefit to the assessee. It may so happen that an assessee may be having more than one

undertaking, out of which only some units may be eligible for deduction/benefit prescribed in those sections.
Hence, there may arise a tendency to shift profits from "noneligible" undertaking to "eligible" undertaking by under invoicing/over invoicing of transactions of transfer of goods or services, so that the assessee could avail higher tax benefits. Hence, sub-sec. (8) was introduced in sec. 80IA and the same was made applicable to other incentive provisions also. The purpose of introducing sub-sec. (8) was to prevent claim of excess deduction or benefit granted to certain "eligible undertakings". The modality adopted in se.80IA(8) is to substitute "market value" to the transactions of transfer of goods or services between eligible unit and non-eligible unit, if the said transfer of goods or services between the undertakings did not occur at "market value". The AO, for the purpose of computing deduction under respective section, shall compute the "profits and gains" of the eligible undertaking by substituting the "actual price" with "market value".

39.14 Though the above said provisions empowered AO to examine and determine the Fair Market Value of certain transactions mentioned therein, yet the Act did not prescribe any method to compute FMV of these transactions. Hence it has resulted in disputes between taxpayers and AO in determining FMV of transactions. The Hon'ble Supreme Court in the case of Glaxo Smithkline Asia (P) Ltd (supra) has examined the complications which arise in cases where fair market value is to be assigned to transactions between domestic related parties and suggested that Ministry of Finance should consider appropriate provisions in law to make transfer pricing regulations applicable to such related party domestic transactions. Accordingly sec.92BA was introduced along with corresponding amendment in sec.80IA of the Act. Under these provisions, the transfer pricing regulations were extended to cover Specified Domestic Transactions. Accordingly, under the Explanation to sec.80IA(8) of the Act, the "market value" for specified domestic transactions is meant as the "arms' length price" as defined in clause (ii) of section 92F. Under section 92F(ii), the term "arm's length price" has been defined as under:-

"arm's length price" means a price which is applied or proposed to be applied in a transaction between persons other than
associated enterprises, in uncontrolled conditions."

Accordingly, for the purpose of sec. 10A/10AA/10B/80-IA and other incentive provisions, the "market value" of the transaction shall mean "Arm's length price" as determined in sec. 92 of the Act. Section 92C of the Act prescribes the modes of computation of arm's length price.

39.15 Under section 92C(4), where an arm's length price is determined by the AO under sub-section (3), the AO may compute the total income of the assessee having regard to the arm's length price so determined. It is further provided that no deduction u/s 10A or section 10AA or section 10B or under Chapter VIA 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 sec. 92C(4).

39.16 As per provisions of sec.92(3), the transfer pricing provision of sec.92 shall not apply in a case where the computation of income/expenses under sub. sec (1) or (2) or (2A) of sec.92 has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the Specified Domestic Transaction was entered into.

39.17 It can be noticed that the provisions of sec.92C(4) requires computation of total income by adopting arm's length price determined by the AO and further, if the total income is enhanced on account of adoption of ALP, then the deduction u/s 10A/10AA/10B/Chapter VIA will not be available for such enhanced income. At the same time, while computing the deduction u/s 10A/10AA/10B/Chapter VIA, the AO has to compute the "Profits and gains of business" by substituting ALP and this exercise has to be carried out for the purpose of computing the quantum of deduction.

39.18 We have noticed earlier that the assessee has entered into inter-unit transactions with different units. It included transactions between (a) SEZ units and SEZ units,

(b) SEZ units and non-SEZ units.
In between SEZ units also, the transactions have taken place between SEZ units enjoying 100% tax deduction and SEZ units enjoying 50%

tax deduction. Accordingly, one unit shall be providing services and another unit shall be receiving services. The inter-unit transaction would result in "generation of income" for "Service provider", while it would constitute "expenditure" for the "Service receiver".

39.19 Before us, the assessee has raised many important contentions, which would impact the exercise of determination of ALP. They have been summarised by us in the earlier paragraphs. We notice that many of the contentions have not been examined by the TPO/AO. We have noticed earlier, the TPO has determined the ALP of Profit ratio at 15.58% and has actually added the excess profit declared by the undertaking. The provisions of sec.10AA requires re-computation of deduction by substituting the actual value with market value. We notice that the AO/TPO did not carry out this exercise of recomputing the quantum of deduction allowable u/s 10AA of the Act by recasting the profit and loss account with the ALP, which is the "market value" of inter-unit transactions. It is also pertinent to remember here that the ALP of transactions could be determined under any of the prescribed methods only.

39.20 Before us, the assessee has raised many contentions. We shall address below some of the contentions, which are legal in nature.

(A) One of the contentions of the assessee is that the inter-unit transactions between two eligible units should not be subjected to ALP adjustment. We notice that the provisions of sec.80IA(8) refer to the transactions between "eligible units" and "noneligible units". We have noticed earlier that, in the case of the assessee, various eligible units, inter se, have also entered into transactions. We have noticed earlier that the TPO has expressed the view in his remand report that the transactions between two SEZ units (eligible units) have also been included for the purpose of determining ALP of the transactions. However, we notice that the provisions of sec. 80IA(8) cover only the transactions entered between "eligible units" and "non-eligible units", i.e., it does not take into its ambit the transactions entered between two eligible units. Accordingly, we are of the view that there is merit in the contentions of the assessee that the transactions entered between two eligible units would not be covered by the provisions of sec. 80IA(8) of the Act. Even if the rate of deduction allowable to two eligible units differ and such inter-unit

transactions between two eligible units may result in tax arbitrage, yet, we are of the view that the same shall be outside the scope of provisions of sec.10AA/Transfer pricing provisions, since the provisions of sec.80IA(8) do not cover transactions between two eligible units. This may be a lacunae in the Income tax Act, but the said lacunae could be cured only by the Parliament. Hence, on a strict interpretation of law, the transactions between two eligible units are not covered by sec.80IA(8) of the Act. Consequently, the transactions entered between two eligible units are outside the scope of "specified domestic transactions" mentioned in sec.92BA of the Act. Accordingly, this view of the tax authorities is set aside.

(B) The assessee also contended that Arms length price should be applied to both the eligible unit and non-eligible unit. This contention of the assessee is liable to rejected **for the purpose of computing deduction u/s 10AA of the Act**. This is so because, as per the provisions of sec.80IA(8) of the Act, the profits and gains of "eligible unit" alone is mandated to be recast by adopting "market value" for the purpose of computing deduction u/s 10AA of the Act. Since deduction u/s 10AA is not allowed for "noneligible unit", the question of recasting the profit and loss account of that unit shall not arise.

(C) However, in our view, the above said contention of the assessee will hold good for sec. 92 of the Act, since the provisions of sec.92(2A) mandates that any income in relation to the SDT shall be computed having regard to the "arms' length price". Further, as per the provisions of sec.92C(4), the assessing officer may compute the "total income" of the assessee having regard to the arms' length price so determined. Accordingly, unless the ALP is adopted in both the "service providing unit" and "service receiving unit" in respect of their inter-unit transactions, the total income cannot be computed having regard to the arms' length price. Accordingly, the ALP of the inter-unit transactions should be applied in both the eligible and noneligible unit for the purpose of sec.92 of the Act.

(D) In our view, provisions of sec.92(3) shall not apply to interunit transactions. Sec.92(3) of the Act prescribes a condition that, where the T.P adjustment required to be made consequent to determination of ALP has the effect of reducing income chargeable to tax or increasing loss, then the T.P provisions shall not apply. In respect of international transactions, the transaction is entered

between the assessee and its Associated Enterprises. Both are two different tax entities. However, in the instant cases, the transactions are entered between two units belonging to the same assessee. Hence both the units are two arms of the same tax entity. We have earlier expressed the view that the ALP value of inter-unit transactions has to be applied in both the transacting units for the purposes of sec. 92 of the Act. Hence the substitution of ALP value (market value) in respect of inter-unit transactions u/s 92 of the Act is tax neutral exercise. However, the effect will be seen in this regard while computing deduction u/s 10A/10AA/10B of the Act. Accordingly, the "reduction", if any, in the quantum of deduction under above sections after application of the ALP, in our view, is the Transfer pricing adjustment contemplated in sec.92 of the Act.

39.21 We have prepared certain illustrations in order to explain above points. They are given below:-

There are two situations in which the profits of eligible business are inflated. They are

(a) Over invoicing revenue

(b) Under invoicing expenses

Let us give some illustrations in order to explain the effect of adoption of ALP u/s 92 and also while computing deduction u/s 10AA of the Act. The illustrations are given in sets, i.e., for units eligible for deduction @ 100% and units eligible for deduction @ 50%. Within the above said examples, illustrations are given for both the situations, viz., over invoicing of revenue and under invoicing of expenses by eligible units.

EXAMPLE A: -

Eligible Unit – eligible for deduction u/s 10AA of the Act @ 100%.

ILLUSTRATION 1 (Over invoicing revenue)

Transaction between an Eligible unit, which is eligible for deduction @ 100% and a non-eligible unit.

Eligible unit is Service Provider and accordingly earns revenue from non-eligible unit.

Transaction Price - 1,00,000
Arms Length Price - 50,000

	Actual Transaction			**SDT Adjustment**		
	Eligible Unit	Non-eligible unit	Total	Eligible Unit	Non-eligible unit	Total
Sales Revenue Less: Adjustment for ALP	10,00,000 -	5,00,000 -	15,00,000 -	10,00,000 - **50,000**	5,00,000	15,00,000 - 50,000
Adj Rev	10,00,000	5,00,000	15,00,000	9,50,000	5,00,000	14,50,000
Cost Add: Corresponding Adjustment for ALP	-9,00,000 -	-4,25,000 -	-13,25,000 -	-9,00,000 -	-4,25,000 **50,000**	-13,25,000 50,000
Adj Cost	-9,00,000	-4,25,000	-13,25,000	-9,00,000	-3,75,000	-12,75,000
Net Income Deduction u/s 10AA – 100%	1,00,000 **-1,00,000**	75,000	**1,75,000** -1,00,000	50,000 **-50,000**	1,25,000	**1,75,000** - 50,000
Total Income			75,000			1,25,000
SDT adjustment						**50,000**

In this illustration,

(a) the "net income" remains at Rs.1,75,000/- before and after ALP adjustments u/s 92 of the Act, since adjustment to the interunit transactions have to be done in the hands of both eligible and non-eligible units u/s 92 of the Act.

(b) The amount of deduction u/s 10AA worked out to Rs.1,00,000/- prior to ALP adjustment. However, it has fallen down to Rs.50,000/- after ALP adjustment in terms of sec.80IA(8).

(c) Accordingly, the Total income has increased from Rs.75,000/- (prior to ALP adjustment) to Rs.1,25,000/- after ALP

adjustment. On this increase of Rs.50,000/-, the assessee is not eligible for deduction u/s 10AA of the Act.

(d) It can be noticed that the reduction in the quantum of deduction u/s 10AA, i.e., Rs.50,000/- is also the adjustment made u/s 92 of the Act in respect of Specified domestic transaction, i.e. the net effect is the addition of SDT adjustment of Rs.50,000/-.

ILLUSTRATION 2 (Under invoicing expenses)

Transaction between an Eligible unit, which is eligible for deduction @ 100% and a non-eligible unit.

(B) Eligible unit is Service receiver and accordingly pays money to non-eligible unit. The said payment constitutes expenditure in the hands of Eligible Unit.

Transaction Price - 1,00,000
Arms Length Price - 1,50,000

	Actual Transaction			**SDT Adjustment**		
	Eligible Unit	Non-eligible unit	Total	Eligible Unit	Non-eligible unit	Total
Sales Revenue Less: Adjustment for ALP	10,00,000 -	5,00,000 -	15,00,000 -	10,00,000 -	5,00,000 **50,000**	15,00,000 50,000
Adj Rev	10,00,000	5,00,000	15,00,000	10,00,000	5,50,000	15,50,000
Cost Add: Corresponding Adjustment for ALP	-9,00,000 -	-4,25,000 -	-13,25,000 -	-9,00,000 - **50,000**	-4,25,000 -	-13,25,000 - 50,000
Adj Cost	-9,00,000	-4,25,000	-13,25,000	-9,50,000	-4,25,000	-13,75,000
Net Income Deduction u/s 10AA – 100%	1,00,000 **-1,00,000**	75,000	**1,75,000** -1,00,000	50,000 **-50,000**	1,25,000 -	**1,75,000** - 50,000
Total Income			75,000			1,25,000
SDT adjustment						**50,000**

In this illustration,
(a) the "net income" remains at Rs.1,75,000/- before and after ALP adjustments u/s 92 of the Act, since adjustment to the interunit transactions have to be done in the hands of both eligible and non-eligible units.

(b) The amount of deduction u/s 10AA worked out to Rs.1,00,000/- prior to ALP adjustment. However, it has fallen down to Rs.50,000/- after ALP adjustment in terms of sec.80IA(8).

(c) Thus the reduction in the quantum of deduction u/s 10AA, i.e., Rs.50,000/- is also the adjustment made u/s 92 of the Act in respect of Specified domestic transaction.

(d) Hence the total income has increased from Rs.75,000/- (prior to ALP adjustment) to Rs.1,25,000/- after ALP adjustment. The net effect is the addition of SDT adjustment of Rs.50,000/-.

(B) Eligible Unit – eligible for deduction u/s 10AA of the Act @ 50%.

ILLUSTRATION 3 (Over invoicing of revenue)

Transaction between an Eligible unit, which is eligible for deduction @ 50% and a non-eligible unit.

Eligible unit is Service Provider and accordingly earns revenue from non-eligible unit.

Transaction Price - 1,00,000
Arms Length Price - 50,000

	Actual Transaction			**SDT Adjustment**		
	Eligible Unit	Non-eligible unit	Total	Eligible Unit	Non-eligible unit	Total
Sales Revenue Less: Adjustment for ALP	10,00,000 -	5,00,000 -	15,00,000 -	10,00,000 - **50,000**	5,00,000	15,00,000 - 50,000
Adj Rev	10,00,000	5,00,000	15,00,000	9,50,000	5,00,000	14,50,000
Cost Add: Corresponding Adjustment for ALP	-9,00,000 -	- 4,25,000 -	-13,25,000 -	-9,00,000	4,25,000 **50,000**	-13,25,000 50,000
Adj Cost	-9,00,000	- 4,25,000	-13,25,000	-9,00,000	- 3,75,000	-12,75,000
Net Income Deduction u/s 10AA	1,00,000 **50,000**	75,000 -	**1,75,000** - 50,000	50,000 **-25,000**	1,25,000 -	**1,75,000** - 25,000
– 100%						
Total Income			1,25,000			1,50,000

SDT adjustment	**25,000**

In this illustration,

(a) the "net income" remains at Rs.1,75,000/- before and after ALP adjustments u/s 92 of the Act, since adjustment to the interunit transactions have to be done in the hands of both eligible and non-eligible units.

(b) The amount of deduction u/s 10AA worked out to Rs.50,000/- prior to ALP adjustment. However, it has fallen down to Rs.25,000/- after ALP adjustment in terms of sec.80IA(8).

(c) Thus the reduction in the quantum of deduction u/s 10AA, i.e., Rs.25,000/- is also the adjustment made u/s 92 of the Act in respect of Specified domestic transaction.

(d) Hence the total income has increased from Rs.1,25,000/- (prior to ALP adjustment) to Rs.1,50,000/- after ALP adjustment. The net effect is the addition of SDT adjustment of Rs.25,000/-.

ILLUSTRATION 4(Under invoicing expenses)

Transaction between an Eligible unit, which is eligible for deduction @ 50% and a non-eligible unit.

Eligible unit is Service receiver and accordingly pays money to non-eligible unit. The said payment constitutes expenditure in the hands of Eligible Unit.

Transaction Price - 1,00,000
Arms Length Price - 1,50,000

	Actual Transaction			**SDT Adjustment**		
	Eligible Unit	Non-eligible unit	Total	Eligible Unit	Non-eligible unit	Total
Sales Revenue Less: Adjustment for ALP	10,00,000 -	5,00,000 -	15,00,000 -	10,00,000	5,00,000 **50,000**	15,00,000 50,000
Adj Rev	10,00,000	5,00,000	15,00,000	10,00,000	5,50,000	15,50,000
Cost Add: Corresponding Adjustment for ALP	-9,00,000 -	-4,25,000 -	-13,25,000 -	-9,00,000 **-50,000**	-4,25,000 -	-13,25,000 - 50,000
Adj Cost	-9,00,000	-4,25,000	-13,25,000	-9,50,000	-4,25,000	-13,75,000
Net Income Deduction u/s 10AA – 100%	1,00,000 **-50,000**	75,000 -	**1,75,000** - 50,000	50,000 **-25,000**	1,25,000 -	**1,75,000** - 25,000
Total Income			1,25,000			1,50,000
SDT adjustment						**25,000**

In this illustration,

(a) the "net income" remains at Rs.1,75,000/- before and after ALP adjustments u/s 92 of the Act, since adjustment to the interunit transactions have to be done in the hands of both eligible and non-eligible units.

(b) The amount of deduction u/s 10AA worked out to Rs.50,000/- prior to ALP adjustment. However, it has fallen down to Rs.25,000/- after ALP adjustment in terms of sec.80IA(8).

(c) Thus the reduction in the quantum of deduction u/s 10AA, i.e., Rs.25,000/- is also the adjustment made u/s 92 of the Act in respect of Specified domestic transaction.

(d) Hence the total income has increased from Rs.1,25,000/- (prior to ALP adjustment) to Rs.1,50,000/- after ALP adjustment. The net effect is the addition of SDT adjustment of Rs.25,000/-.

39.22 We notice that the TPO has not carried out these exercises. Hence, in our view, this issue requires fresh examination at the end of TPO/AO by duly considering various other contentions of the

assessee and also by considering the discussions made supra. Accordingly, we set aside the order passed by A.O. on this issue and restore the same to the file of the AO/TPO for examining it afresh."

In this year also, the TPO has not examined this issue in the line discussed above. Accordingly, we set aside the order passed by the AO on this issue and restore the same to the file of AO/TPO for examining it afresh in the light of discussions made supra."

18. Respectfully following the above judgement cited supra in assessee's own case, we remit this issue to the TPO/AO for examining it afresh in the light of discussions made supra. In the result, this issue is allowed for statistical purpose.

19. The last item of TP adjustment, i.e. the 5th item, pertains to the TP adjustment made towards interest on delayed receivables to Overseas subsidiaries. The facts are that the assessee had granted short term advances to its- various foreign subsidiaries without charging interest. Hence, the TPO computed interest on such receivables to the tune of 1.04 crores. The Ld. DRP also confirmed the view taken by TPO.

20. The Appellant, during the course of hearing, made the following submissions in support of its contention that the above TP adjustment is liable to be deleted:

(i) Wipro does not charge interest on receivables delayed beyond the credit period to any party whether it is AE or not. Accordingly, interest should be benchmarked at nil interest based on internal CUP. Further, OECD TP Guidelines also states that no interest may be charged on delayed payment on commercial consideration for ensuring a long and healthy relationship as persuasive value;

(ii) Even otherwise, Wipro provides similar credit period to both AEs and Non-AEs and accordingly, based on internal CUP, no adjustment is warranted. Reliance placed on order of the Hon'ble Bombay High Court dated 08.01.2013 in ITA(L) No.1053/2012 in the case of CIT v. Indo American Jewellery Ltd.

(iii) Without prejudice to above, interest rate of Libor + 450 basis points is applied by TPO and DRP has directed to apply Average SBI deposit rate (which was not applied while computing adjustment in the FAO). As regards advances to overseas subsidiaries interest rate of Libor+150 basis point is directed by Hon'ble Tribunal. Delayed receivables are much shorter credit period provided to AEs and Non-AEs and should warrant even a lower rate of interest.

21. Considering the arguments from both the sides and the orders of the authorities below, during the course of hearing, after taking consent from both the sides, we think it will be appropriate to grant credit period of 45 days and interest is to be calculated using LIBOR 6 months+350 basis points. Accordingly this is sent back to TPO/AO to recalculate the interest on delayed receivables afresh following the LIBOR 6 months+350 basis points. This ground is allowed for statistical purpose.

22. The ground No. 06 relates to the disallowance of expenses u/s 14A of the Act against exempt income. During the year the assessee has received dividend of Rs. 6.58 crores and also earned Rs. 58.00 crores as interest income from tax free bonds. The assessee suo motu made disallowance for administrative expenses of Rs. 3.07 Crores. The total investments were made of Rs. 18463 crores and Reserve & Surplus were stood at Rs. 40,411.10 crores. The AO asked for details of computation made which was submitted by the assessee, but the AO was not satisfied and he calculated

disallowance afresh after applying Rule 8D r.w.s. Section 14A of the Act at Rs. 8.76 Crores. The assessee had itself made disallowance of Rs. 3.07 crores accordingly the net disallowance were made of Rs. 5.69 crores. Considering the arguments from both the sides, we notice that an identical issue has been restored back to the file of the AO in AY 2015-16 following the decision rendered in assessee's own case in AY 2009-10 to 2014-15 where the relevant observations made by the co-ordinate bench are extracted below:-

"22.2 The assessee has received dividend income from investments made in various mutual funds and claimed the same as exempt. The assessee also made disallowance u/s 14A of the Act by allocating some expenses as relatable to the exempt earned by the assessee. Since the quantum of investment was more than the own funds available with the assessee, no disallowance was made out of interest expenses. Hence the disallowance was made out of administrative expenses only, which worked out to about 2% of the corporate expenses. The A.O. did not accept the workings furnished by the assessee. Accordingly he computed the disallowance as per rule 8D(2)(iii) of the I.T. Rules @ 0.5% of average value of investments. Ld. DRP restored the matter to the file of A.O. with the direction to examine this issue afresh by considering the decision rendered by ITAT in the case of Syndicate Bank, by Hon'ble Bombay High Court in the case of Godrej &Boyce Manufacturing Company Ltd. 328 ITR 81 and by Hon'ble Kerala High Court in the case of Dhanalakshmi Bank Ltd. 344 ITR 259. The A.O. while passing the final assessment order, duly considered the above said 3 decisions and confirmed the disallowance originally made in the draft assessment order. Aggrieved, the assessee has filed this appeal before us.

22.3 We heard the parties on this issue and perused the records. We notice that the coordinate bench has considered an identical issue in assessment year 2008-09 and the matter was restored to the file of the A.O. with the following observations:

"12. Thus it is clear that the Tribunal was of the view that the disallowance made under section 14A as computed under Rule 8D(2)(iii) cannot be more than the actual expenditure which can be relatable for earning the exempt income and debited to the Profit and Loss account. In the case on hand the disallowance made by the assessee on its own is not the total expenditure debited to the profit and loss account but it is the allocation made by the assessee out of the total expenditure. Therefore the basis of the allocation and apportionment of the said disallowance made by the assessee is subject matter of verification and satisfaction of the Assessing Officer. Accordingly, we set aside this issue to the record of the Assessing officer to re-examine the issue in the light of the orders of this Tribunal in assessee's own case as well as in the case of DCIT vs. M N Dastur & Co P Ltd (supra)."

Before us the assessee contended that the A.O. has not given any substantial finding in respect of correctness or otherwise of the amount disallowed by the company. Accordingly, it was submitted that the A.O was not justified in applying rule 8D of IT Rules. The Ld. A.R. also placed reliance on the decision rendered by Hon'ble Supreme Court in the case of Godrej &BoyceManufacturing Company Ltd. 394 ITR 449.

22.4 We have noticed that this issue has been restored by ITAT in assessment year 2008-09 to the file of the A.O. A perusal of the assessment order passed by A.O. would show that the A.O. has observed that he was not satisfied with the working furnished by the assessee. However, the A.O. has not examined the basis of the allocation and apportionment of expenses towards the exempt income. Hence, the coordinate bench has restored this issue to the file of the A.O. for examining it afresh. Accordingly, following the decision rendered by the coordinate bench, we restore this issue to the file of the A.O. The assessee is free to make its submissions and the AO shall decide the decide the issue in accordance with law, by duly considering the submissions made by the assessee."

23. Accordingly, following the above said decisions in assessee's own case for AY 2015-16, we restore this issue to the file of AO with similar directions. Since Rule 8D has been amended, the AO has

to follow the amended Rule 8D. This ground is allowed for statistical purpose.

24. Ground No. 7 relates to the taxability of Marked to Market income on reinstatement of forward contracts. On scrutiny of the Profit & Loss account the AO noted that the assessee had debited Rs.

445.80 crores towards exchange fluctuation loss under the Finance Costs under Schedule 29 and a sum of Rs. 343.10 crores towards exchange fluctuation gain under Schedule 25 shown as income, resultantly there was a net loss of Rs. 102.70 crores . The assessee was asked to justify the same which the assessee by reply dated 20.12.2019 with detailed written submissions which has been incorporated by the AO in his order. The assessee also relied on the judgement of the

Hon'ble Supreme Court in the case of ITO vs, Woodward Governor India (P) Ltd. (2009) 179 Taxman 326 (SC). The AO noted that the loss claimed by the assessee is notional & contingent in nature accounted prior to date of settlement and therefore such losses have to be treated as speculative loss in terms of section 43(5) of the I.T. Act. Considering the arguments from both the sides we note that an identical issue has been examined by the co-ordinate bench in the assessee's own case in AY 2009-10 to 2015-16 and it was decided as under:-

> ""27.5 We heard Ld. D.R. on this issue and perused the record. We notice that the Tribunal is consistently taking the view that the loss arising on revaluation of outstanding forward contracts entered to safe guard the underlying revenue assets cannot be considered as notional loss and accordingly the same is eligible for deduction while computing total income. The following observations made by the

co-ordinate bench in the case of M/s Quality Engineering and software Technologies P Ltd (supra) are relevant:-

"4.5.11 As discussed earlier, in the case on hand, there has been an existing contract with a binding obligation accrued against the assessee when it entered into forex forward contracts. The forward contracts are in respect of consideration for export proceeds, which are revenue items. There is an actual contract for sale of merchandise. In this factual matrix, it is clear in our view that the transaction in question will not qualify to be called as speculative transaction. In view of the facts and circumstances of the case on hand, as discussed above, we hold that the provision on derivative contracts is allowable as expenditure. We, accordingly allow the Grounds at S. Nos. 1 to 9 raised by the assessee."

We have noticed that the assessee has voluntarily disallowed the loss arising on restatement of foreign hedge transactions and hedging on ECB loans, since both the items are relating to capital account transactions. We also notice that the AO has allowed the loss arising on restatement of trade debtors, trade creditors and other monetary assets. The AO has, however, disallowed the loss arising on restatement of forward contracts.

27.6 The decision rendered by the co-ordinate bench in the case of Quality Engineering and software technologies P Ltd (supra) states that the loss arising on reinstatement of a forward contract, whose underlying assets is a revenue item, then the said loss cannot be considered as speculative loss and also not a notional loss. We notice that the details of underlying assets in respect of outstanding forward contracts are not available on record. There should not be any doubt that the value of underlying assets (in the form of debtors, creditors and other monetary assets) as on the balance sheet date, against which the outstanding forward contracts have been taken, should be more than the value of outstanding forward contracts. In that case, the loss arising on restatement of forward contract is fully allowable as deduction. Since the AO has not examined this aspect, we are of the view that this issue needs to be restored to the file of the AO for the limited purpose of examining as to whether the value of underlying assets is more than the value of the forward contracts. Since the AO has disallowed the loss in AY 2009-10, 2011-12 and 2012-13, this issue is restored to the file of AO in the above said three

> years alone. The assessee is directed to furnish relevant details to prove that the value of underlying assets is more than the value of outstanding forward contracts as on the balance sheet date."
>
> Following the above said decision of co-ordinate bench rendered in the assessee's own case, we restore this issue to the file of AO with similar directions."

25. Following the above said decision of co-ordinate bench rendered in the assessee's own case, we restore this issue to the file of AO with similar directions. The assessee is directed to furnish relevant details to prove that the value of underlying assets is more than the value of outstanding forward contracts as on the balance sheet date." Accordingly this ground is allowed for statistical purpose.

26. Ground No. 08 relates to the action of the AO in setting off the loss arising from SEZ units against income earned by non-tax holiday units. During the course of assessment proceedings the AO noted that the assessee has various SEZ units at different locations. Among SEZ units all are not profit making and the assessee had incurred losses on the six SEZ units as tabulated by the AO. The AO noted that the assessee has set-off the losses of the six SEZ units from other taxable units and other divisions. The AO after discussing the relevant provisions did not allow set–off the losses of the six SEZ units and added back in to the total income of the assessee to the extent of Rs.

90.66 crores. Considering the rival submissions we noted that an identical issue has been examined by the co-ordinate bench in the assessee's own case in AY 2009-10 to 2015-16 and it was decided as under:-

"4.7 We heard rival contentions on this issue and perused the record. We notice that the co-ordinate bench has considered an identical issue in AY 2008-09 in assessee's own case in ITA No.1665/Bang/2012 dated 04-01-2017 and it was decided in favour of the assessee with the following observations:-

"14. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. At the outset, we note that an identical issue was also involved for the Assessment Year 2004-05 as well as for the Assessment Year 2007-08. The Hon'ble jurisdictional High Court in assessee's own case reported in 382 ITR 179 for the Assessment Year 2004-05 has upheld the decision of this Tribunal in favour of the assessee and against the revenue. We further note that this Tribunal in assessee's own case for the Assessment Year 2007-08 has again decided this issue in para 7.4 as under :

"7.4 We have heard both parties and perused and carefully considered the material on record. We find that the identical issue was considered by a co-ordinate bench of the Tribunal in the assessee's own case for Assessment Year 2004-05 in ITA Na1072/Bang/2007 (supra), wherein the Tribunal confirming the finding of the learned CI (A), at para 16.4 on pages 29 and 30 thereof, held as under :

"16.4. We have carefully considered the contentions of the either parties and also carefully perused the order of the Hon'ble Tribunal While deciding an identical issue, the Hon'ble Tribunal cited the following decisions -

(1) [12.5.] ITA No: 669 & 804/Ban/05 dated: 22.3.2006 for the AY-2000-01 in the case of assessee company wherein it was concluded that we direct the AO to allow set off of loss from 10A units against the other business income of the assessee or income from other sources."
(2) ITA NO.248 & 249/Bang/07 dated2711.2007in the case of IGate Global Solutions Ltd v. ACIT wherein the issue was decided in favour of the assessee.

(3) ITA No.387/Bang/06 dated: 26.6.2007 in the case of M/s Web Spectron P.Ltd the issue was decided in favour of the assessee. The Hon'ble Tribunal has, further, observed that "the decision of jurisdictional High Court is to the effect that deduction allowed u/s 10A in respect of undertaking is to be allowed after setting off of brought forward loss of that undertaking. Income of each undertaking is to be computed independently as per the provisions of the Act. An assessee cannot be compelled to seek deduction u/s 10A in respect of an undertaking in which there is a loss. This is the basis of not setting off of losses of 10A units against the profit of 10A units for computing deduction u/s 10A. This is in view of the decision of the Third Member in the case of Navin Bharat Industries Ltd v. DCIT 90 ITD 1. In view of the judgment of the jurisdictional High Court in the case of Himmatsingh (supra), the assessing officer will set off brought forward losses of the units for which the assessee has disclosed positive income for the purpose of claiming deduction u/s 10A".

16.5 Respectfully following the decisions of the Hon'ble Tribunal referred supra, we direct the assessing officer to set off brought forward losses of the units for which the assessee has disclosed positive income for the purpose of claiming deduction u/s 10A"

Respectfully following the decision of the co-ordinate bench of the Tribunal in the assessee's own case for Assessment Year 2004-05 (supra) on this issue, we direct the Assessing Officer to set off brought forward losses of the units for which the assessee has disclosed positive income for the purpose of claiming deduction under section 10A."

Thus it is clear that the Tribunal has followed the earlier order for the Assessment Year 2004-05 which has been upheld by the Hon'ble jurisdictional High Court. Following the earlier order of this Tribunal as well as Hon'ble jurisdictional High Court, we decide this issue in favour of the assessee and against the revenue."

4.8 Though it is stated that the issue is decided in favour of the assessee, we notice that the discussions were not happily worded. We notice that an identical issue was decided by Hon'ble High Court of Karnataka in AY 2001-02 to 2004-05 in the assessee's own case reported in 382 ITR 179. We extract below the relevant discussions made by Hon'ble Karnataka High Court on this issue:-

"Substantial question of law No.14:

"Whether the Tribunal was right in directing that losses of a section 10A unit, which are already set off against other business income of the appellant, should be again carried forward and setoff against eligible profits of the same unit in a subsequent year?"

"Whether the Tribunal was correct in holding that income of each undertaking should be taken independently and losses of section 10A units cannot be set off against profits of section 10A units, when computing deduction under section 10A of the Act?"

"Whether the appellate authorities failing to take into consideration the amendment provision of section 10A(6)(ii) of the Act, which clearly contemplated that the loss of the undertaking can be carried forward and adjusted against other income?"

"Whether the appellate authorities were correct in holding that the finding recorded by the Assessing Officer that in view of the amendment to section 10A(6)(ii) with effect from April 1, 2001 the loss of the STP units should be carried forward at the end of the 10 years, tax holiday period under section 10A of the Act and should be set off against profits in respect of Madivala R&D unit by treating the cost of development of shrink wrap computer software as work in progress and therefore cannot set off the loss?"

163. The said substantial questions of law was considered by the apex court in the case of CIT v. Canara Workshops P. Ltd. (1986) 161 ITR 320 (SC) in favour of the assessee and against the Revenue.

164. Following the said judgement in the assessee's case itself in ITA 1395 of 2006 connected with ITA 1394 of 2006, this court by its order dated November, 5, 2013 following the judgement of the Supreme Court answered the said substantial question of law in favour of the assessee and against the Revenue. Therefore, aforesaid questions of law are answered in favour of assessee and against the Revenue."

4.9 We notice that the jurisdictional Hon'ble Karnataka High Court has decided an identical issue in favour of the assessee. Accordingly,

we hold that the loss arising in eligible SEZ/STPI undertakings are not required to be adjusted against the profits arising from other SEZ/STPI undertakings and the said loss can be adjusted against profits arising from non-SEZ/non-STPI units. Accordingly, this issue is decided in favour of the assessee."

The Ld A.R submitted that the above said view of the Hon'ble Karnataka High Court has since been upheld by Hon'ble Supreme Court in the case of Yokogawa India Limited (2017)(391 ITR 271)(SC). Accordingly, following the above said decision rendered in the assessee's own case, we hold that the loss arising in eligible SEZ/STPI undertakings are not required to be adjusted against the profits arising from other SEZ/STPI undertakings and the said loss can be adjusted against profits arising from non-SEZ/non-STPI units. "

9.2.We further noted that in the assessee's own case the Hon'ble SC dismissed the SLP filed by the revenue against the order of the Hon'ble High Cort reported in **[2022] 134 taxmann.com 302 (SC) in** SLP APPEAL (C) NO.11582 OF 2021† NOVEMBER 26, 2021 in which it has been held as under:-

"3. This Special Leave Petition challenges the judgment and final order dated 15-12-2020 passed by the High Court of Karnataka at Bengaluru in ITA No. 316 of 2012, which was disposed of in terms of the judgment passed in ITA No. 315 of 2021. ITA No. 315 of 2012 in turn was disposed of in terms of the judgment passed in Pr. CIT v. Wipro Ltd. [2021] 124 taxmann.com 240/278 Taxman 162 (Kar.).
4. While disposing of ITA No. 464 of 2017, the High Court had made following observations :

"14. At this stage, learned counsel for the revenue submits that all the remaining issues covered by decisions of this Court in M/s. WIPRO Ltd. v. DCIT [2016] 383 ITR 179 (Kar) and Commissioner of Income-tax & Another v. TATA Elxsi Ltd., 382 ITR 654 (Kar) are pending adjudication at the instance of the revenue before the Supreme Court. In view of the aforesaid submission

needless to state that the Assessing Officer shall decide the issues in accordance with the decision which may be rendered by the Supreme Court.

15. For yet another reason, at this stage, no interference is called for with the order passed by the tribunal. The Supreme Court in Radhasoami Satsang v. Commissioner of Income Tax, (1992) 60 Taxman 248 (SC) has held that even though principles of res judicata do not apply to income tax proceedings, but where a fundamental aspect permeating through the different Assessment Years has been found as the fact one way or the other and the parties have allowed the position to be sustained by not challenge the order, it would not be at all appropriate to allow the position to be changed in subsequent year. For this reason also, in the facts of the case, a different view cannot be taken. In the instant case, the tribunal has answered all the substantial questions of law in favour of the assessee by placing reliance on the case of the assessee in previous Assessment Years viz., 2004-05 and 2007-08.

In the result, the appeal is disposed of in terms stated above."

5. In view of the observations made by the High Court, we dispose of the instant petition by reiterating the observations and clarifying that as and when the decisions with respect to the Questions No. (i), (ii) and (viii) are rendered by this Court, the matters shall be governed in terms of directions issued by the High Court.

6. With these observations, the Special Leave Petition is disposed of.

27. Respectfully following the above judgements, we hold that the loss arising in eligible SEZ/STPI undertakings are not required to be adjusted against the profits arising from other SEZ/STPI undertakings and the said loss can be adjusted against profits arising from nonSEZ/non-STPI units this issue is decided in favour of the assessee.

28. Ground No. 09 relates to the taxability of profits from development centers located outside India. During the course of hearing the AO observed from the annual report of the company that the assessee has software development facilities in Germany, Sweden, United Kingdom, Australia, Netherlands, Finland, Hungary, Singapore, USA and Malaysia. In this regard the assessee was asked to produce the turnover generated by these units and where such turnovers are reflected. In reply the assessee submitted that these centers are set up to facilitate on-site development of software to specific customers and these are cost centers , no separate books of accounts maintained in this regard. And revenue generated by these units are included in the SEZ units. The profits shown has been claimed as exemption in view of explanation (2) to section 10AA. The AO was not satisfied and disallowed the exemption. Considering the rival submissions, the coordinate bench has decided the similar issue in assessee's own case in the AY 2015-16 in which it has been held as under:-

> "The case of the assessee was that these development centers are only extension of STPI units eligible for deduction u/s 10A/10AA/10B etc. However, the AO took the view that these development centres are independent units and accordingly estimated income from these centres and correspondingly reduced the said profit from the units eligible for deduction u/s 10A/10AA/10B of the Act. An identical issue has been examined by the co-ordinate bench in the assessee's own case in Ay 200910 to 2014-15 and it was adjudicated as under:-
>
> "23.3 We heard the parties on this issue and perused the record. We notice that the coordinate bench has considered an identical issue in assessment year 2008-09 and matter was restored to the file of the A.O. with the following observations:

"18. Ground no.11 & 12 are regarding computation of profit of overseas software development centre.

19. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. At the outset, we note that an identical issue has been considered in assessee's own case for the Assessment year 2004-05 and again for the Assessment year 2007-08. For the Assessment Year 2007-08, the Tribunal has decided this issue in para 10.4 as under:

"10.4 We have heard both parties and have carefully perused and considered the material on record. We have perused the order of the co-ordinate bench of the Tribunal in the assessee's own case for Assessment year 2004-05 in ITA No.1072/Bang/07 (supra) and find that the discussions are at para 24 onwards and the relevant findings are at para 24.2 to para 24.2 which are extracted hereunder:

"24.2 We have carefully considered the argument put-forth by the Ld. A.R. and also the reasoning of the Ld. A.O. and the Ld. CIT(A) in their respective orders. The Hon'ble Tribunal, for the AYs 2001-02 and 02-03 in the assessee's own case had an occasion to deal with an identical issue. After deliberations, the Hon'ble Tribunal had concluded thus –

"34.4 The learned CIT(A) has also not recorded a finding that such goods or services have been transferred at the market value. In absence of such a finding, it is not possible to uphold the finding of the learned CIT(A). This issue is required to be remitted back to the assessing officer and the assessee will be required to file the relevant details as required by the assessing officer so that the assessing officer can ascertain the market value of such goods or services transferred by arriving at the profit of the eligible business."

24.3 Considering the above finding, we are of the firm view that this issue requires to be remitted back to the assessing officer and, accordingly, we are remitting back this issue to the assessing officer for necessary action as contemplated in the Tribunal's finding referred supra."

> On consideration of the above findings, we respectfully following this decision, are of the opinion that for this year also the issue requires to be remitted back to the Assessing Officer and accordingly do so with a direction to the Assessing Officer to follow the decision of Tribunal mentioned supra."
>
> By following the earlier orders of this Tribunal, we remit this issue to the record of the Assessing Officer to consider the same in accordance with the earlier directions of the Tribunal."

29. Consistent with the view taken by the Tribunal in the earlier years, we remit this issue to the file of the A.O. for examining it afresh in accordance with the directions given in the earlier order of the Tribunal.

30. The tenth issue relates to exclusion of "other income" for the purpose of computing deduction u/s 10AA of the Act. The details of miscellaneous income reported during the year under consideration are given below:-

Sale of scrap/News paper	-	0.90 crores
Other income		25.42 crores

		26.32 crores
		=========

31. During the course of assessment proceedings the details of unit wise Miscellaneous income was furnished. The assessee submitted that the sale of- scrap/newspapers are covered in favour of the assessee by the judgement of Hon'ble Karnataka High Court in ITA No. 507/2002 for the AY 1997-98 but the AO observed that the revenue has filed appeal before the Hon'ble SC against the judgement of the Hon'ble High Court and he did not allow the claim of the assess. Further in respect of Other income reported above the AO noticed that the these income have no

nexus with software development activity of the units . In this regards the assessee submitted that these includes refunds/write back of costs and liability recorded in earlier years. Further the assessee submitted that since the costs have reduced the net profits of the SEZ units in the past, the reversal of the same cost in AY 2016-17 must be considered as part of the SEZ income. The AO noted that the assessee has not furnished detailed break-up with respect to the expenses debited in earlier years relating to these items, accordingly he reduced from the computation of exemption u/s 10AA. Considering the rival submissions we noted that a similar issue has been decided by the co-ordinate bench of the Tribunal in assessee's own case for the AY

2015-16 in which it has been observed as under:-

> "The AO excluded the above income while computing income u/s 10AA of the Act. An identical issue was considered by the co-ordinate bench in the assessee's own case in AY 2009-10 to 2014-15 and it was decided as under:-
>
> "5.4 We notice that an identical issue was considered by the Hon'ble High Court in the assessee's own case reported in 382 ITR 179. For the sake of convenience, we extract below the decision rendered by Hon'ble High Court:
>
> "166. The court had an occasion to consider the substantial question of law in the assessee's case itself in ITA 507 of 2002 decided on August 25, 2010 while dealing with the income earned from sale of scrap, export incentive and rent received, answered the question in favour of the assessee and against the Revenue.
>
> 167. In so far as gain on exchange rate fluctuation is concerned, it was subject matter of ITA 3202 of 05 which was decided on February 28, 2012 in the assessee's case itself, where the said question was answered in favour of the assessee and against the Revenue.

168. In so far as income earned from interest is concerned that was subject matter of this court in the case of CIT v. Motorola India Electronics P. Ltd. in ITA No.428 of 2007 decided on December 11, 2013 – (2014) 2 ITROL 499 (Karn), while dealing with exemption under section 10B. It is in Pari materia with section 10A and has answered the said question in favour of the assessee and against the Revenue.

169. As all these questions are decided and answered in favour of assessee in the aforesaid case, this question of law is answered in favour of the assessee and against the Revenue."

5.5 The decision rendered by Hon'ble Karnataka High Court would cover the income booked under the head Sale of Scrap/Newspaper, Rental income and interest income.

Accordingly, we direct the AO to allow deduction u/s 10A/10AA/10B of the Act in respect of income earned on sale of scrap/newspaper and Rental income. The issue relating to interest income is dealt under the head Issue no.3 below.

5.6 The remaining item is "Other income". In AY 2007-08 and 2008-09, this item of miscellaneous income was restored to the file of the AO for examining the nature of receipt and decide the same accordingly. The observations made by the Tribunal in

AY 2007-08 are extracted below:-

"……However, since we find that no details are available with regard to 'other income' of Rs.3,48,524/-, we deem it fit to remit the matter back to the file of the Assessing Officer with a direction to examine the matter afresh and decide the issue on merits."

Following the same, we restore the issue relating to "Other income" to the file of the AO with similar directions."

32. Following the above said decision rendered by the co-ordinate bench in the assessee's own case, we hold that the income generated on sale of scrap/newspaper should be included in the profits of the undertaking eligible for deduction u/s 10AA of the Act. In this year also, the break-up details of "Other income" are not available. Accordingly,

we restore this issue to the file of AO with the direction to examine the break-up details of other income which were debited into the profit & loss account in earlier years and decide the issue in accordance with the discussions made supra. Accordingly this issue is partly allowed for statistical purpose.

33. The eleventh issue relates to rejection of claim for deduction u/s 10AA of the Act in respect of interest income earned by the assessee. During the year under consideration, the assessee had earned interest income on short term deposits made out of PCFC Loan and also from Surplus funds. After deducting the interest expenses, there was net surplus of 2.19 crores. The AO held that the same is not eligible for deduction u/s 10AA of the Act by observing that there is no relation of interest income with the Software Development Activity of the units claiming deduction u/s 10AA. It is also not akin to investment of surpluses earned and generated from Software Development Activity, which may be regarded as profits and gains of the undertaking to the extent they are held for working capital purpose of the undertaking or units distributed to the shareholders of the company. An identical issue has been examined by the co-ordinate bench in the assessee's own case and it was decided as under:-

> "6.2 We notice that the assessee has booked interest income under the head "Miscellaneous income" in AY 2012-13 and 2013-14, apart from booking interest income separately as under:-
>
> | Assessment year | Interest Income |
> |---|---|
> | 2009-10 | 60.27 crores |
> | 2010-11 | 150.03 crores |

2011-12	26.54 crores
2012-13	224.65 crores
2013-14	2.91 crores
2014-15	3.45crores

It is also not clear as to whether the nature of interest income booked under the head "miscellaneous income" in AY 2012-13 and 2013-14 are identical with the nature of interest income booked separately. Since the legal principles relating to deduction of interest income u/s 10A/10AA/10B are discussed here, we adjudicate interest income booked under the head "miscellaneous income" and also reported separately. The facts relating to this issue as narrated by the assessee in its written submissions are that the assessee had availed "packing credit loan" in foreign currency (PCFC) from M/s Duetsche Bank, HSBC, JP Morgan, Bank of Tokyo. It is in the nature of preshipment credit extended to the exporters for financing working capital. According to the assessee, it has used the funds, which are not immediately required in operations, to make short term fixed deposits. Similarly, the surplus funds available with the SEZ units have also been invested in fixed deposits. All these fixed deposits have earned interest income. The contention of the assessee is that these fixed deposits have been made out of loan funds as well as surplus funds generated through operations of

SEZ units and hence they form part of "profits of business".
Hence they are eligible for deduction u/s 10A/10AA/10B of the Act. However, the AO took the view that the impugned interest income is not related to the software development activity. Further, the AO also took the view that the surplus funds is fully fungible and hence surplus funds relating to SEZ division could not be separately identified, if all the surpluses of all divisions (both 10A/10AA/10B units and non-10A/non-10AA/non-10B units) are put together. Accordingly, the AO rejected the claim of the assessee. The Ld DRP also confirmed the same.

…….

6.5 From the foregoing discussions, we notice that the principle enunciated by Hon'ble Karnataka High Court in the case of Motorola India Electronics (P) Ltd (supra) is that the deduction u/s 10B is allowable if there is direct nexus between interest income and the income of the business of the undertaking. The co-ordinate benches

in the earlier years have also followed the decision rendered by Hon'ble Delhi High Court in the case of CIT Vs. Shriram Honda Power Equipment 289 ITR 475, wherein it was held that, if the AO has assessed interest income under the head Income from business and this has not been challenged by the department thereafter, then the question cannot be permitted to be reopened and the only question then will be if netting should be allowed. Accordingly following principles emerge out from the above said discussions:-

(a) if the AO has assessed interest income under the head Income from business, which has not been challenged by the department, then it shall form part of business income as per the decision of Hon'ble Delhi High Court in the case of Shriram Honda Power equipment (supra).

(b) if there is direct nexus between interest income and income of the business of undertaking, then also it shall form part of business income as per the decision of Hon'ble Karnataka High Court in the assessee's own case.

In both the cases, the interest income should be eligible for deduction u/s 10A/10AA/10B of the Act.

6.6 In the instant cases, the assessee has earned interest income from two types of deposits, viz.,

(a) The packing credit loan funds, which are not immediately required in its business operations were deposited into short term fixed deposits.

(b) The surplus funds available with the SEZ units have also been invested in fixed deposits.

Hence it is required to be examined first as to whether the AO has assessed interest income under the head "Income from business" or under the head "Income from other sources". If the AO has assessed interest income as business income, then the assessee is eligible for deduction u/s 10A/10AA/10B on interest income also. However, if the AO has assessed interest income under the head "income from other sources", then it is required to be examined as to whether there is direct nexus between interest income and income of business undertaking.

> 6.7 With regard to Category (a) above, if the nexus is shown between the loan funds and the deposits, the assessee is eligible for deduction in respect of interest income, following the decision rendered by the Hon'ble Karnataka High Court in the assessee's own case (referred supra).
>
> 6.8 With regard to Category (b) above, it is imperative on the part of the assessee to show that there is nexus between interest income and income of business undertaking. We have noticed earlier that the AO has taken the view that the surplus funds of undertaking located in SEZ are put into common bank account. Accordingly, the AO has observed that the surplus funds relating to SEZ division could not be separately identified, if all the surpluses of all divisions are put together, meaning thereby, it is the case of the AO that there is no nexus between interest income and income of business undertaking. In our view, the assessee may be given an opportunity to show that the nexus between SEZ/STPI divisions and the fixed deposits from which interest income was earned. If the assessee is able to show the nexus to the satisfaction of the AO, then the interest income to that extent should be eligible for deduction u/s 10A/10AA/10B of the Act.
>
> 6.9 With these observations, we restore this issue to the file of the AO for examining it afresh in the light of discussions made supra."

34. Respectfully following the above said decision, we restore this issue to the file of AO for examining it afresh with similar directions. This ground is allowed for statistical purpose.

35. Ground No. 12 relates to the eligibility of the assessee to claim deduction u/s 10AA of the Act for deemed exports, i.e., sales made to own units located in SEZs and Indian subsidiaries of Foreign MNCs. The claim of the assessee was rejected by the AO by observing that only turnover pertaining to sales outside India is being taken as export sales. He further observed that the deemed export cannot be treated as Export out of the country and sec. 10AA is very clear on that. Secondly, the

assessee in the return filed has not included the deemed export as part of ETO and now no additional claim for exclusion will be entertained. An identical issue was examined by the co-ordinate bench in the assessee's own case in AY 2009-10 to 2014-15 and it was decided as under:-

> 7.2 During the years under consideration, the assessee has provided services to some of the customers located in SEZ units and received sale proceeds in foreign currency. The assessee claimed it to be part of export turnover and accordingly claimed deduction u/s 10A/10AA/10B of the Act. According to the assessee, the services were provided to its customers located in SEZs are ultimately exported by those SEZs to a person located outside India.
>
> …….
> 7.5 We heard Ld. D.R. and perused the record. We notice that an identical issue has been decided in favour of the assessee by Hon'ble High Court of Karnataka by following the decision rendered by High Court in the case of Tata Elixsi Ltd. The relevant portion of High Court's order is extracted below:-
>
> "Substantial Question No.8:
>
> "Whether the Tribunal was right in excluding the computer software sales made to STP units in India from "export turnover" for the purpose of computing deduction under section 10A of the Act?"
>
> 147. The said question came up for consideration before this Court in the case Tata Elxsi vs. Asst. CIT (I.T.A No.411 of 2008). This court has answered the said substantial question in favour of the assessee and against the Revenue. Accordingly, the said substantial question of law is answered in favour of the assessee and against the Revenue."
>
> 7.6 In the case of Tata Elxsi Ltd (supra), the Hon'ble Karnataka High Court dealt with this issue as under:-
>
> "18. As Section 10A was introduced to give effect to the Exim Policy of the Central Government, we have to take into consideration the provisions of the Exim Policy.

19. Paragraph 6.10 of the Exim Policy speaks about exchange through others. It provides that a EOU/EHTP/STP/BTP unit may export goods manufactured/software developed by it through another exporter or any other EOU/EHTP/STP/SEZ unit subject to the conditions mentioned in paragraph 6.19 of Handbook. The conditions to be fulfilled if a Unit has to export through other exporters is as under:

"6.19 An EOU/EHTP/STP/BTP unit may export goods manufactured/software developed by it through other exporter or any other EOU/EHTP/STP/SEZ/BTP unit subject to condition that:

a) Goods shall be produced in EOU/SHTP/STP/BTP unit concerned.
b) Level of NFE or any other conditions relating to imports and exports as prescribed shall continue to be discharged by EOU/EHTP/STP unit concerned.

c) Export orders so procured shall be executed within parameters of EOU/EHTP/STP/BTP schemes and goods shall be directly transferred from unit to port of shipment.

d) Fulfillment of NFE by EO U/EHTP/STP/BTP units in regard to such exports shall be reckoned on basis of price at which goods are supplied by EOUs to other Exporter or other EOU/EHTP/STP/BTP/SEZ unit.

e) All export entitlements, including recognition as Status Holder would accrue to exporter in whose name foreign exchange earnings are realized. However, such export shall be counted towards fulfillment of obligation under EOU/EHTP/STP/BTP scheme only."

20. From the aforesaid provisions, it is clear that if a assessee wants to claim the benefit of Section 10A, firstly he must export articles or things or computer software. Secondly, the said export may be done directly by him or through other exporter after fulfilling the conditions mentioned therein. Thirdly, such an export should yield foreign exchange which should be brought into the country. If all these three conditions are fulfilled, then the object of enacting Section 10A is fulfilled and the assessee would be entitled to the

benefit of exemption from payment of Income Tax Act on the profits and gains derived by the Undertaking from the export.

21. Clause 6.11 of Exim Policy dealing with entitlement for supplies from the DTA states that supplies from the DTA to EOU/EHTP/STP/BTP units will be regarded as 'deemed export', besides being eligible for relevant entitlements under paragraph 6.12 of the Policy. They will also be eligible for the additional entitlements mentioned therein. What is of importance is when a supply is made from DTA to STP, it does not satisfy the requirements of export as defined under the Customs Act. However, for the purpose of Exim policy, it is treated as 'deemed export'. Therefore, when Section 10A of the Act was introduced to give effect to the Exim Policy, the supplies made from one STP to another STP has to be treated as 'deemed export' because

Clause 6.19 specifically provides for export through Status Holder. It provides that an EOU/EHTP/STP/BTP unit may export goods manufactured/software developed by it through other exporter or Status holder recognized under this policy or any other EOU/EHTP/STP/SEZ/BTP unit. What follows from this provision is that to be eligible for exemption from payment of income tax, export Should earn foreign exchange. It does not mean that the undertaking should personally export goods manufactured/software developed by it outside the country. It may export out of India by itself or export Out of India through any other STP Unit. Once the goods manufactured by the assessee is shown to have been exported out of India either by the assessee or by another STP Unit and foreign exchange is directly attributable to such export, then Section 10A of the Act is attracted and such exporter is entitled to benefit of deduction of such profits and gains derived from such export from payment of income tax. Therefore, the finding of the authorities that the assessee has not directly exported the computer software outside country and because it supplied the software to another STP unit, which though exported and foreign exchange received was not treated as an export and was held to be not entitled to the benefit is unsustainable in law. The substantial question of law is answered in favour of the assessee and against the revenue. The appeal is allowed. The impugned orders are set-aside. The assessee is held to be entitled to deduction of such profits and gains derived from the export of the computer software."

> 7.7 In view of the binding decision of the jurisdictional Karnataka High Court, we direct the A.O. to include deemed exports as part of turnover while computing deduction u/s 10A/10AA/10B of the Act."

36. Respectfully following the above said decision of the coordinate bench and also the binding decision of the jurisdictional Hon'ble Karnataka High Court, we direct the AO to include deemed exports to SEZ as part of turnover while computing deduction u/s 10AA of the Act. Accordingly this ground is allowed.

37. Ground No. 13 relates to the to question as to whether reimbursements received by the assessee are required to be excluded from the export turnover for the purpose of computing deduction u/s 10AA of the Act. During the year under consideration, the assessee had received reimbursements to the tune of Rs.177.77 crores categorized as assets reimbursements of Rs. 3.17 crores, communication link reimbursements of Rs. 24.79 crores, travel reimbursements of Rs. 23.24 crores, and incentive awards/other reimbursements of Rs. 126.57 crores. The ld. AR of the assessee submitted that reimbursements constitute an integral part of the measurement for realizing its price for the computer software exported. He further submitted that the similar issue has been decided by the coordinate bench of the Tribunal in assessee's own case for the AY 2015-16. The AO excluded these reimbursements from the profits for computing deduction u/s 10AA of the Act. Considering the rival submissions we found that in assessee's own case the co-ordinate bench has observed as under:-

An identical issue has been examined by the co-ordinate bench in the assessee's own case in AY 2009-10 to 2014-15. The relevant facts have been narrated by the co-ordinate bench as under:-

"20.2 The facts relating to this issue are discussed in brief. In respect of software development activity, for which the assessee had claimed deduction u/s 10A/10AA/10B of the Act, the assessee has received certain payments as reimbursements. These reimbursements have been categorized as asset reimbursements, communication link reimbursements, travel reimbursements, incentive awards and other reimbursements. The A.O. excluded the above amounts from export turnover and accordingly computed deduction u/s 10A/10AA/10B of the Act. The A.O. did not accept the contentions of the assessee that these amounts were also received in foreign exchange and hence they are in the nature of export proceeds realized in respect of computer software export and hence they should not be excluded from export turnover."

……..

15.1 It was noticed in the earlier years that the assessee had received different types of reimbursements, which have been grouped as under:-

(a) Asset reimbursements
(b) Communication link reimbursements
(c) Travel reimbursements
(d) Incentive rewards and other reimbursements.

15.2 The co-ordinate bench has rendered its decision on each type of reimbursements as under:-

"20.5 We shall first examine the amount received as asset reimbursement. From the submissions made by the assessee, we notice that the assessee has purchased certain specialized equipment on the specific request of the customers, who had also agreed to reimburse the cost of the equipment. The assessee has debited the profit & loss account with the cost of purchase of assets and credited the profit & loss account with the amounts reimbursed by the customers. From the facts, we notice that the cost so incurred cannot be categorised as direct cost related to the development of software.

Since it is an expenditure incurred at the request of customer for which reimbursement was also received, there is no revenue element involved in it. Accordingly, we are of the view that this amount should not be considered as either expenditure or part of export turnover, i.e., the receipt should be netted off against the expenditure. We hold accordingly.

20.6 We shall next examine the nature of payment received by way of incentive awards. It is the submission of the assessee that whenever it completes software development work within the timeframe to the satisfaction of the customer, the customers pay a bonus/reward as consideration. It is stated that the said amount has been realized in foreign exchange and accordingly included in the export turnover. From the submission so made, we notice that this amount has been received as incentive from the customers, meaning thereby, it is in the nature of additional payments received towards export of software. Hence, we are of the view that it shall form part of sales turnover. Since it is only a revenue item, it cannot be categorized as expenditure as contemplated under the definition of the export turnover. Hence the same is not required to be excluded from the export turnover.

20.7 In respect of the remaining amounts received, in our view, it is required to be examined as to whether the same shall form part of expenses, which are required to be excluded from the amount of Export turnover, as per the definition of the term "export turnover" given in sec.10A/10AA/10B of the Act. We have discussed the principles at length while adjudicating the earlier issue. Accordingly, the remaining amounts require fresh examination in the light of discussions made supra.

20.8 We also make it clear that, if any of the amount is required to be excluded from export turnover, then the same shall be excluded from the total turnover also, as held by Hon'ble High Court of Karnataka in the case of CIT Vs. Tata Elxi Ltd. 204 Taxmann.com 321 and also by Hon'ble Supreme Court in the case of CIT Vs. HCL Technologies Ltd. (C.A. No.8489-8490)."

20.9 Accordingly, we direct the AO to compute the deduction u/s 10A/10AA/10B of the Act by following discussions made supra."

38. In the above said decision, detailed discussions have been made with regard to this issue. Accordingly, we restore this issue to the file of AO with the direction to examined the break-up details of reimbursements and follow the directions given in AY 2009-10 to 2014-15 for computing deduction u/s 10AA of the Act. Accordingly, the grounds raised by the assessee is allowed for statistical purpose.

39. The fourteenth issue relates to question as to whether the expenditure incurred in foreign currency is required to be deducted from the export turnover while computing deduction u/s 10AA of the Act. On going through the entire submissions and order of the authorities below we observe that the expenditure incurred outside India for onsite development of computer software is not to be deducted from export turnover. Only the expenditure on telecommunication charges or insurance attributable to the delivery of the computer software outside India or expenses, if any incurred in foreign currency in providing technical services outside India also are required to be excluded from the export turnover. Further , if any amount excluded from the export turnover is required to be deducted from total turnover. An identical issue was examined by the coordinate bench in the assessee's own case in AY 2009-10 to 2014-15 and it was decided as under:-

> "19.2 The facts relating to this issue are stated in brief. The A.O. noticed that the assessee has incurred various expenses in foreign currency under different heads. The issue is whether these expenses are required to be deducted from "export turnover" as required under the definition of the term "Export turnover" for the purpose of computing deduction u/s 10A/10AA/10B of the Act. … ……
>
> 19.3 ……The AO took the view that, as per the definition of the term "Export Turnover" given under sec.10A/10AA/10B of

the Act, "expenditure incurred in foreign currency" is required to be excluded from the amount of "Export turnover". Accordingly, the A.O. proposed to exclude all the expenditure incurred in the foreign currency from the amount of export turnover while computing deduction u/s 10A of the Act. ……

19.5 The Ld. DRP agreed with the view taken by A.O. on the matter of exclusion of those expenses incurred in foreign currency from the amount of "export turnover", while computing deduction u/s 10A/10AA/10B of the Act. However, in assessment year 2009-10 to 2011-12, the Ld. DRP directed the A.O. to exclude expenses incurred in foreign currency towards communication expenses, travel expenses and legal & professional fees both from export turnover and total turnover while computing deduction u/s 10A of the Act.

19.6 We heard the rival contentions on this issue and perused the record. We notice that the co-ordinate bench has accepted the alternative submissions of the assessee in AY 2008-09 by following the decision rendered by Hon'ble Karnataka High Court in the case of Tata Elixi Ltd (supra) and accordingly directed the AO to exclude the amounts from both export turnover and total turnover, while computing the deduction. The relevant discussions find place at paragraphs 28 to 31 of the order. Before us, the Ld A.R submitted that the main contention of the assessee has been addressed by the coordinate bench in assessment year 2004-05 (ITA No.1072/Bang/2007). We notice that the main contention of the assessee has been decided as under in AY 2004-05 by the co-ordinate bench:

"15. The ninth effective ground is with regard to the action of the CIT(A) in directing the AO not to exclude expenditure in foreign currency. The Ld.AO had excluded from export turnover the expenses incurred in foreign currency on the basis of the definition of the export turnover contain in section 10A. He had also concluded that the assessee had ed technical services and thus expenses incurred in foreign currency in rendering such technical services require exclusion from export turnover. On the other hand, the assessee company, extensively quoting the provisions of section 10A(4) of the Act and also placing strong reliance on the decision of the CIT(A) for the AYs 01-02 and 0203 had argued that the exclusion of above

sums of communication link and other reimbursements, VAT/GST, telecommunication expenses and expenditure in foreign currency as carried out by the AO be vacated.

15.1. After critically analyzing the rival submissions and also drew strength from his earlier decision on a similar issue, the Ld.CIT(A) has held that no exclusion was required on this issue and, accordingly, directed the Ld. AO to re-compute the deduction u/s 10A.

15.2. Protesting against the action of the Ld. CIT(A), the Revenue has brought up this issue before us for redressal. It was the case of the Revenue that the Ld.CIT(A) has grossly erred in deciding the issue in favour of the assessee by following the decision of Hon'ble Tribunal in the case of Infosys Technologies Limited which has been challenged before the Hon'ble High

Court. Another point on which the Revenue found fault with the CIT(A) was that the decision relied on by him was rendered with regard to deduction u/s 80HHC whereas the issue before him was the claim u/s 10A of the Act. It was, further, submitted that the assessee had filed annual returns before the STPI authorities showing the assessee had earned export income through data communication as well as onsite consultancy which shows that it had rendered technical services. The agreements entered into by the assessee with the clients for exporting computer software clearly provides software application development, deployment and support services. To strengthen its stand, the Revenue, further, submitted that the assessee provides technical services in developing software as per the specifications of the client(s) and, hence, it is clear that it provides technical services and therefore such expenditure met out in foreign currency in providing technical services outside the country should be deducted from the export turnover.

15.3. On the other hand, the Ld.A.R, has submitted that the issue stands covered by the decision of the Hon'ble Tribunal for the AYs 2001-02 & 02-03 in the assessee company's own case which may be ordered to be followed for this assessment year as well.

15.4. Rival submissions were carefully considered. We have perused the order of Hon'ble Tribunal also. The decision of the

Hon'ble Tribunal has been extensively quoted by us when we have decided the ground No.8 of the Revenue. The said decision is applicable to this issue also [issues raised by the Revenue in ground Nos: 8 & 9 are rather inter-linked), we respectfully following the Tribunal's decision referred supra, we uphold the action of the Ld.CIT(A) on this count."

19.7 We notice that the co-ordinate bench has referred to the ground no.8, wherein the question of exclusion of communication expenses was examined. For the sake of convenience, we extract below the relevant observations made in respect of ground no.8 in AY 2001-02

"14. The next effective eighth ground is with regard to reimbursement of communication links, incentives, rewards, telecommunication expenses etc., In respect of reimbursement of communication links and other sales performance incentives, the Ld. AO had stated that only the consideration in respect of export of article or things is liable to be taken for the purposes of section 10A. Thus, the AO had concluded that the amount received by the assessee as communication link charges or other rewards and incentives were not a consideration for the export of the software. However, the assessee company's contention was that —

"15.1 The reimbursement of certain expenses was also in the nature of export as the same was paid pursuant to the contract of sale of computer software. Alternatively, if it is held that the said sum does not form part of sale proceeds of export turnover then similar amount should be reduced from the total turnover also as held by Bombay High Court in Sudarshan Chemicals reported in 245 769. Alternatively, the AO should have consistently applied the rationale that what is not turnover in the first place cannot be part of either export turnover or total turnover."

14.1, After considering the rival submissions, the Ld. CIT(A) took a view that this issue was covered by his decision for the AYs 01-02 and 02-03 and holds good for the AY under dispute also and, accordingly, directed the AO to consider the reimbursements as part of export turnover for the purpose of computing deduction u/s 10A.

14.2. In respect of Telecommunication expenses, the Ld. AO retied on the definition of the export turnover to exclude of the said

expenses as expenses attributable to delivery of computer software and excluded the said sum from export turnover.

14.3. The assessee company in its submission was of the view that —

"17.1 ……This is erroneously excluded by the AO. The expenses never formed part of export turnover. Exclusion can be made provided the same is included in the first place. As telecommunication expenses are debited to the profit and loss account of each section 10A unit, it is clear that they have not been included in the turnover. Thus exclusion from tunio.er is not warranted at all. However, the AO has estimated Rs.1,81,04,480/- being 5% of the net communication charges incurred as the amount incurred for delivery of computer software outside India and reduced the same only from export turnover. If it is held that the said sum is required to be excluded from export turnover then similar amount should be reduced from the total turnover also as held by Bombay High Court in Sudarshan Chemicals reported in 245 ITR 769."

14.4. After considering the rival submissions, the Ld. CIT(A) took a view that this issue was also covered by his decision for the AYs 01-02 and 02-03 and the same holds good for the AY under dispute and, accordingly, directed the AO to consider 5% of Rs.14.56 crores for exclusion from the export turnover on account of telecommunications. The exclusion shall also be similarly made from the total turnover.

14.5. Aggrieved, the Revenue has come up before us. The Ld. A.R forcefully submitted that the issues stand covered by the decision of the case of the assessee company for the AYs. 01-02 and 02-03.

On the other hand, the Id. D.R urged that the action of the Ld. AO is in order which may be upheld.

14.6. We have carefully considered the submissions of the either parties. We find that the Hon'ble Tribunal has dealt with these issues comprehensively. After considering the pros and cons of the issues, the Hon'ble Tribunal has decided thus —
"24.5 .....In respect of expenditure incurred on on-site development, the issue stands covered by the order of this Tribunal

in the case of Infosys Technologies Limited. This Bench in the case of Insosys Technologies vide order dated 31 March, 2005 in ITA NO.50/Bang/2001 held in that case that the assessee is involved in developing software. The assessee was not involved in rendering of technical services. Such software are provided through the computer programmes developed by them. Hence, expenses in foreign currency were not to be reduced for ascertaining the export turnover. This bench in the case of M/s.Relq software Pvt. Ltd. in ITA No:767/Bang/2007 vide order dated 16th May 2008 has also held that the on-site expenses for development of computer software is not in the nature of technical services. It will be useful to reproduce para 14 and 15 from that order:-

"14. During the course of proceedings before us, the learned AR submitted that the issue stands decided in favour of the assessee by the Tribunal in the case of -

1. ACIT v. M/s.Infosys Ltd.653 & 969(B)/2006
2. M/s.TataElxsi Ltd. 315(B)/2006 dt 16.10.2007
3. M/s.I-Gate Global Solutions Ltd. v.ACIT (Supra)

15. We have heard both the parties. Deduction u/s 10A is available in respect of profit or gains derived from an undertaking from the export of articles or things or computer software. One has to understand the meaning of computer software with reference to the fact that it is preceded by articles or things. Deduction u/s 10A was allowed if export proceeds are from the export of articles or things or computer software. It means that such export proceeds must relate to the goods and no for the services. Computer software is developed by providing off site expenses and onsite expenses. The amount receivable in respect of computer software does not include any reimbursement of onsite expenses. Payments made to Engineers employed on site are for the development of software. By such development, the assessee has not rendered any technical services relevant to clause (iv) of Explanation 2 of section 10A technical services have not been defined. The CBDT vide Circular No.694 dated 2.3.11.1994 stated that computer programmes are not physical goods but are developed as a result of an intellectual analysis of the system and method followed by the purchaser of the programme. It is often prepared on site with the software personnel going to the clients premises. Hence, when the expenditure is in respect of

payments on site development, the same cannot be excluded from the export turnover by holding it as technical services. When export of services only is not entitled to deduction u/s IOA then the Legislature made clear that foreign exchange relating to technical services will be excluded. If there is export of goods as well as services then only that portion will be eligible for deduction which relates goods. Hence, the AO is not justified in excluding Rs.4,86,63,187/- from export turnover.

24.6. The Hyderabad Bench in the case of Patni Telecom P. Ltd. v. ITO vide order dated 11th January, 2008 in ITA NO.5/11yd/20005 and 354/11yd/2006 held that expenditure incurred on travel and allowances for the purpose of development of software at clients site outside India cannot be excluded from the export turn-over. Similar finding has been given by Chennai Bench vide order dated 15th February 2008 in ITA NO.731/Mad in the case of Changepond Technologies P.Ltd v. ACIT wherein it has been held that expenses on salaries, traveling and other perquisites are to be included in the export turnover. Hence, following the decision of this Bench and considering the decisions of other Benches on this issue, the expenses on traveling etc. cannot be excluded from the export turnover. Income-tax Act does not provide any bifurcation of the expenses incurred outside India. The assessing officer has not brought on record any expenditure which may not be relevant for the purpose of export. Hence, the apportionment is not desirable. We confirm the finds of the learned CIT(A) that such apportionment cannot be done.

24.7. In respect of telecommunication expenses, only those expenses which are relevant for the delivery of software are to be excluded. No effort has been made by the assessing officer to ascertain the telecommunication expenses relating to the delivery of the software. This Bench in the case of I-Gate Global Sales held that 80% of unlinking charges should be reduced from the export turnover. Such finding of the learned CIT(A) was confirmed on the basis of the fact that the learned CIT(A) discussed the software development with a number of representatives of various companies and noticed that 80% of the uplinking charges are incurred for the delivery of software. We are not having the details of the unlinking charges, hence, the issue of disallowance of telecommunication expenses relating to the delivery of software is restored on the file of the assessing officer. The assessing officer will give opportunity to the

assessee to furnish the details in respect of telecommunication expenses for the delivery of software."

14.7. As similar issues have been decided by the Hon'ble Tribunal for the AYs 01-02 & 02-03 in the assessee's own case, we respectfully follow the said decision in toto which holds good for the AY under dispute also. Accordingly, this issue is remitted back on the file of the assessing officer as in last year."

19.8 We notice that the coordinate bench has followed the decision rendered by another coordinate bench in the case of M/s. RELQ Software Private Ltd (supra), wherein a distinction was made to the term "Technical services" and it was held that payment made to engineers employed on site for development of software cannot be considered as "Technical services" mentioned in clause (iv) of explanation (2) to section 10A of the Act. Accordingly, it was held that the A.O. was not justified in excluding the expenses incurred in foreign currency from export turnover. The Tribunal also noticed that the decisions rendered by Hyderabad bench of Tribunal in the case of Patni Telecom Pvt. Ltd (supra) and Chennai bench of Tribunal in the case of "Change Pond Technologies Pvt. Ltd. (supra). I have also taken an identical issue.

19.9 We notice that the assessee has submitted before the A.O. that these expenses have been incurred in development of software on site and hence, they formed part of "direct cost" of developing a software. It has also been submitted that the assessee has been raising invoice on its customers on cost plus basis. Accordingly, it is required to be examined as to whether these expenses are required to be excluded from "export turnover", by considering the definition of the term "export turnover" given in section 10A/10AA/10B of the Act. We have extracted the definition given in all the three sections earlier. A careful perusal of the above said definition given in sec.10A and 10B would show that what is required to be excluded is freight, telecommunication charges, or insurance attributable to the computer software outside India or expenses, if any incurred in foreign exchange in providing technical services outside India. However, in sec.10AA, there is modification of the definition, i.e., the term "technical" is not used therein. It is mentioned as "expenses, if any, incurred in foreign exchange in rendering of services (including computer software) outside India. The question as to

whether the cost of development of software would fall under the category of "technical services" has been examined by the coordinate bench in assessment year 2004-05 and the Tribunal has taken the view that the cost incurred outside India in development of software would not fall under the category of 'expenses incurred in providing technical services outside India' as mentioned in the definition. Accordingly, we are of the view that the expenditure incurred in development of software and which forms part of "direct cost of development of software" would not fall under the category of "technical services" or "services" rendered outside India, as contemplated in the definition of Export turnover. Hence the same is not required to be excluded from export turnover. Accordingly, what is required to be excluded is the expenses specifically mentioned in the definition of "export turnover", viz., the expenditure incurred on freight, telecommunication charges or insurance attributable to the delivery of the computer software outside India or expenses, if any incurred in foreign exchange in providing technical services outside India alone are required to be excluded from the export turnover.

19.10 Further, if any amount is excluded from "export turnover", the same is required to be excluded from "total turnover" also, as held by Hon'ble Karnataka High Court in the case of Tata Elixi Ltd (2012)(204 Taxman 321) and by Hon'ble Supreme Court in the case of CIT vs. HCL Technologies Ltd (CA No.8489-8490)

19.11 Accordingly, we set aside the order passed by the A.O. on this issue and direct him to compute the deduction u/s 10A/10AA/10B of the Act by following the discussions made supra."

17.1 Before us, the Ld A.R submitted that the above said decision rendered by the co-ordinate bench would get support from the decision rendered by Hon'ble Jurisdictional High Court in the case of Motor Industries Company Limited (ITA No.776/2007 C/w ITA Nos. 1172/2006, 1171/2006, 744/2007 and 115/2006".

40. Following the above said decisions, we set aside the order passed by AO on this issue and direct him to compute deduction u/s 10AA of the Act following the discussions made supra. Accordingly, this ground is allowed .

41. Ground No. 15 relates to the eligibility of the assessee to claim deduction u/s 10AA of the Act in case of Delayed collections of export proceeds. During the year the total outstanding balance was 209.25 crores out of which Rs. 193.66 crores were received beyond the period of six months from the end of the relevant year and were received upto 31.10.2016 and the remaining amount of Rs. 15.59 crores were received on 31.10.2019. The A.O. rejected the claim of the assessee on the reasoning that mere submission of application by the assessee to RBI is not sufficient to infer that RBI has allowed extension of time for realizing sale proceeds in foreign exchange. Accordingly, he rejected the claim of the assessee. The ld. DRP also rejected by observing that the assessee has not revised its return of Income A similar issue has been examined by the co-ordinate bench in the assessee's own case in

AY 2009-10 to 2014-15 and it was decided as under:-

> "8.2 The facts relating to the issue are stated in brief. As per the provisions of section 10A/10AA/10B of the Act deduction is allowable only on export turnover which received in or brought into India in convertible foreign currency within the period of 6 months from the end of the previous year within such further period as the competent authority may allow in this behalf. The competent authority means 'Reserve Bank of India (RBI)' or such other authority as is authorized under any law for the time being in force for regulating payments and dealings in foreign currency. During the years under consideration, certain amounts were not received or brought into India within 6 months from the end of the previous year. It was the submission of the assessee that it has made applications to RBI through the authorized dealer for extension of time for receipt of profits on export turnover. It was submitted that the amounts were collected subsequently after the expiry of the period of 6 months. Accordingly, during the course of assessment proceedings, the assessee made a claim before A.O. to include the sale amount, for

which extension applications were submitted to RBI through the authorized dealers in the amount of "export turnover", for the purpose of computing deduction. However, the A.O. rejected the claim of the assessee on the reasoning that mere submission of application by the assessee to RBI is not sufficient to infer that RBI has allowed extension of time for realizing sale proceeds in foreign exchange. Accordingly, he rejected the claim of the assessee. Ld. DRP also confirmed the order of A.O. in all the years under consideration except in assessment year 2011-12, wherein Ld. DRP directed the A.O. to include the turnover covered by the application filed to RBI as part of export turnover.

8.3 We heard the parties on this issue and perused the record. We notice that an identical issue was considered by Hon'ble High Court of Karnataka in the assessee's own case in 2001-02 to 2004-05, wherein the High Court decided the issue in favour of the assessee with the following observations:-

"146. The facts are not in dispute. The assessee is a status holder exporter. The export has been done strictly in accordance with law. Foreign exchange remittances should have been received within six months from end of the financial year. It has not been received. Therefore, an application is filed seeking for extension of time to the Reserve Bank of India. Even to this day the Reserve Bank of India has not rejected the said request. On the contrary, after the period of 6 months, foreign exchange remittances are received and credited to the assessee's account through the Reserve Bank of India. It is in this context merely because the written approval of extension is not passed by the Reserve Bank of India, whether the assessee could be denied the benefit of Section 10A. The Tribunal on consideration of the entire material on record, taking note of the statutory provisions and the object underlying this provision, has come to the conclusion that notwithstanding the fact there is no express order granting approval by the Reserve Bank of India, as it has not been rejected and foreign exchange is received and remitted through the proper channel, the assessee is entitled to the benefit of Section 10A. In the facts of the case, we do not find any error committed by the Tribunal. Therefore, the said substantial question is answered in favour of the assessee and against the revenue."

> Respectfully following the binding decision of the jurisdictional High Court, we direct the AO to include sale amount in the export turnover, while computing deduction u/s 10A of the Act, where the applications have been filed by the assessee to RBI seeking permission to receive the export proceeds beyond the prescribed period."

42. Following the decision of the Hon'ble jurisdictional Karnataka High Court, we direct the AO to include sale amount in the Export turnover while computing deduction u/s 10AA of the Act, wherever the applications have been filed by the assessee to RBI through its bankers seeking permission to receive the export proceeds beyond the prescribed period. Accordingly this ground is allowed.

43. Ground No. 16 to 16.3 relates to the claim of foreign tax credit and allowability of State Taxes paid. The contentions raised by the assessee in this year is two-fold. The first contention relates to the allowability of quantum of foreign tax credit. The second contention is that the foreign tax & State Taxes paid, if not fully allowed, then the difference amount should be allowed as business expenditure. A similar issue has been decided by the co-ordinate bench of the Tribunal in assessee's own case for the AY 2015-16 which is as under:-

> "18.1 With regard to the first contention, we notice that an identical issue was examined by the co-ordinate bench in the assessee's own case in AY 2009-10 to 2014-15 in respect of tax credit and it was decided as under:-
>
> "9.10 We notice that the issue relating to foreign tax credit has been examined in detail for Hon'ble High Court of Karnataka in the assessee's own case. For the sake of convenience, we extract below

the relevant observations made by the Hon'ble High Court of Karnataka on this issue.

37. It is in this background, when we notice section 90 of the Act—relief from double taxation is granted in the following circumstances.

Firstly, section 90(1)(b) of the Act speaks about avoidance of double taxation, i.e., the Central Government may enter into an agreement with the Government of any country for the avoidance of double taxation of income under this Act and under the corresponding law in force in other country, i.e., when tax is payable on income under this Act as well as under the corresponding law in that country they could agree to tax in one country. This happens even before payment of any tax. By virtue of such agreement, tax is paid only in one country, that is how the benefit of double taxation relief by way of avoidance is granted to the assessee in both the countries.

38. Secondly, under section 90(1)(a)(i) of the Act, once such assessee has paid Income-tax, under the Act as well as the tax in the other country, by such agreement, relief could be given by giving credit of the tax paid in the foreign country to the assessee in India. In cases covered under this provision the assessee pays tax in both the jurisdictions. After payment of such tax, he is entitled to double taxation relief by way of credit in respect of the tax paid in the foreign jurisdiction.

39. Thirdly, in cases covered under section 90(1)(a)(ii) of the Act it is not a case of the income being subjected to tax or the assessee has paid tax on the income. This applies to a case where the income of the assessee is chargeable under this Act as well as in the corresponding law in force in the other country. Though the Income-tax is chargeable under the Act, it is open to Parliament to grant exemptions under the Act from payment of tax for any specified period. Normally it is done as an incentive to the assessee to carry on manufacturing activities or in providing the services. Though the Central Government may extend the said benefit to the assessee in this country, by negotiations with the other countries, they could also be requested to extend the same benefit. If the contracting country agrees to extend the said benefit, then the assessee gets the relief. In another scenario, though the said income is exempt in this country,

by virtue of the agreement, the amount of tax paid in the other country could be given credit to the assessee. Thus for the payment of Income-tax in the foreign jurisdiction, the assessee gets the benefit of its credit in this country.

40. However, if the contracting country is not agreeable to extend the said benefits, then in terms of the agreement and probably in terms of the exemption granted, the assessee would be entitled to benefit only in this country on account of the exemption and the benefit in the other country is not extended. Thus when exemption is granted in respect of the income chargeable to tax under this Act in respect of which no benefit is granted in the corresponding country the assessee gets no benefit. However, if the benefit is extended to a portion of the income say for example 90 per cent. and 10 per cent. is subjected to tax then to that extent the assessee would be entitled to benefit of tax credit as he has paid tax in the foreign jurisdiction as per section 90(1)(a)(i) of the Act.

41. In this connection, it is contended on behalf of the Revenue that if the income is chargeable to tax in India, then only the assessee can have the benefit of tax credit in respect of the tax paid in foreign jurisdiction. In respect of exemption under section 10A, the income derived is not included in the total income. It is not charged to Income-tax. Therefore, section 90 of the Act has no application at all.

…….

52. Section 10A(1) speaks of "deduction". The deduction is of profits and gains for a period of ten consecutive assessment years. The said deduction is from the total income of the assessee. Therefore, the total income before allowing the said deduction includes the profits and gains from the business referred to in section 10A(1). Section 5 of the Act explains the scope of total income to mean all income from whatsoever source derived. Section 4 of the Act charges this total income. However, section 10A(1) provides that, subject to the provisions of the said section , profits and gains derived by an undertaking referred to in that section shall be allowed as deduction from the total income of the assessee. Therefore, by virtue of the aforesaid statutory provision namely section 10A of the Act, the income of the asses-see from exports in respect of the said unit is

exempted from payment of Income-tax. The very fact that it is exempted from payment of tax means but for that exemption such income is chargeable to tax. This relief under section 10A is in the nature of exemption although termed as deduction. But for this exemption, the said income namely profits and gains derived by an undertaking, is chargeable to tax under the Act. The said exemption is only for a period of ten years. After the expiry of the said ten years the said income is taxable. When such exemption is given under the Act, but the said income is taxed in foreign jurisdiction, there is no relief to the assessee at all. Therefore, to promote mutual economic relations, trade and investment, the Act was amended by way of the Finance Act, 2003 which came into force from April 1, 2004. By insertion of a new clause (ii) in sub-section (1)(a) of section 90 the Central Government has been vested with the power to enter into an agreement with the Government of any country outside India for the granting of relief in respect of Income-tax chargeable under the Income-tax Act or under the corresponding law in force in that country, to promote mutual economic relations, trade and investment. Therefore, the statute by itself is not granting any relief. But, by virtue of the statute, if an agreement is entered into providing for such relief, then the assessee would be entitled to such relief.

……

56. Therefore, it follows that the income under section 10A is chargeable to tax under section 4 and is includible in the total income under section 5, but no tax is charged because of the exemption given under section 10A only for a period of 10 years. Merely because the exemption has been granted in respect of the taxability of the said source of income, it cannot be postulated that the assessee is not liable to tax. The said exemption granted under the statute has the effect of suspending the collection of Income-tax for a period of 10 years. It does not make the said income not leviable to Income-tax. The said exemption granted under the statute stands revoked after a period of 10 years. Therefore, the case falls under section 90(1)(a)(ii).

57. In the background of this legal position, we have to look into the Double Taxation Agreements entered into between India and United States, Canada.

(1) Indo-US Agreement :

58. Article 25 of the Indo-US Double Taxation Agreement deals with relief from double taxation. Clause 2(a) is the relevant provision. It reads as under (see [1991]187 ITR (St.) 102, 124) :

"2(a) Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the Income-tax paid in the United States, whether directly or by deduction. Such deduction shall not, however, exceed that part of the Income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in the United States."

59. A perusal of the aforesaid provision makes it clear that if a resident Indian derives income, which may be taxed in the United States, India shall allow as a deduction from the tax on the income of the resident, amount equal to the Income-tax paid in the United States of America, whether directly or by deduction. The conditions mandated in the treaty is that if any "income derived" and "tax paid in the United States of America on such income", then tax relief/credit shall be granted in India on such tax paid in the United States of America. The said provision does not speak of any Income-tax being paid by the resident Indian under the Income-tax Act as a condition precedent for claiming the said benefit. Where the Indian resident pays no tax on such income derived, whereas the said income is taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the Income-tax paid in the United States. Therefore, this provision is in conformity with section 90(1)(a)(ii) of the Act, i.e., the Income-tax chargeable under the Income-tax Act and in the corresponding law in force in the United States of America. Therefore, it is not the requirement of law that the assessee, before he claims credit under the Indo-US convention or under this provision of Act should pay tax in India on such income. However, the said provision makes it clear that such deduction shall not, however, exceed that part of the Income-tax (as computed before the deduction is given) which is attributable to the income which is to be taxed in the United States. Therefore, an embargo is prescribed for giving such tax credit. In other words, the assessee is entitled to such tax credit only in respect

of that income, which is taxed in the United States. This provision became necessary because the accounting year in India varies from the accounting year in America. The accounting year in India starts from 1st of April and closes on 31st of March of the succeeding year. Whereas in America, the 1st of January is the commencement of the assessment year and ends on 31st of December of the same year. Therefore, the income derived by an Indian resident, which falls within the total income of a particular financial year when it is taxed in the United States, falls within two years in India. Therefore, while claiming credit in India, the assessee would be entitled to only the tax paid for that relevant financial year in America, i.e., the income attributable to that year in America. In other words, the Income-tax paid in the same calendar year in the United States of America is to be accounted for two financial years in India. Of course, this exercise should be done by the assessing authority on the basis of the material to be produced by the assessee.

(2) Indo-Canada agreement :

60. In so far as the Indo-Canada Double Taxation Agreement is concerned, article 23 deals with elimination of double taxation. It provides that the laws in force in either of the Contracting States will continue to govern the taxation of income in the respective Contracting States except where provisions to the contrary are made in this agreement. In the case of India, double taxation should be eliminated as follows (see [1998] 229 ITR (St.) 44, 64):

"3(a) The amount of Canadian tax paid, under the laws of Canada and in accordance with the provisions of the agreement, whether directly or by deduction, by a resident of India, in respect of income from sources within Canada which has been subjected to tax both in India and Canada shall be allowed as a credit against the Indian tax payable in respect of such income but in an amount not exceeding that proportion of Indian tax, which such income bears to the entire income chargeable to Indian tax."

61. A reading of the aforesaid provision makes it clear that the benefit of article 23 would be available to an assessee in India only in respect of the income from sources within Canada, which has been subjected to tax both in India and Canada, which forms part of the total income of the assessee and has suffered tax in India under the

Income-tax Act and has suffered tax in Canada also, i.e., assessee has paid tax both in India as well as in Canada on the same income. Then the agreement provides the tax paid in Canada shall be allowed as a credit against the Indian tax payable in respect of such income. However, the said benefit is confined only to the extent of an amount not exceeding that proportion of Indian tax, which such income bears to the entire income chargeable to Indian tax. In other words if the Income-tax paid in India is less than the Income-tax paid in Canada, the assessee would be entitled to relief only to the extent of tax paid in India and not to the extent of tax paid in Canada. Therefore, this clause is in conformity with section 90(1)(a)(i) of the Act. As a corollary if the assessee is exempted from payment of tax in India, then if the same income is subjected to tax in Canada, according to the treaty, there is no double taxation. Therefore, the benefit of this treaty is not available to the Indian assessee.

62. It is submitted on behalf of the assessee that by virtue of the formulae prescribed under section 10A(4), entire export profits had not got exempted under section 10A, residuary surplus being subjected to tax both in India and Canada. This residuary surplus could qualify for tax credit as it is subjected to tax in both the countries.

63. As is clear from the aforesaid clause in the Indo-Canadian agreement if the income from source within Canada, is lower, has been subjected to tax both in India and Canada then, the tax paid in Canada shall be allowed as a credit against the Indian tax paid in respect of such income. If the entire income assessed by the assessee under section 10A is exempted in India, then, the aforesaid clause does not confer any benefit on the assessee. However, notwithstanding the aforesaid provision, if any portion of the income falling under section 10A is subjected to tax then, by virtue of aforesaid provision, the tax paid in Canada corresponding to the income subjected to tax in India, the assessee would be entitled to credit of the tax paid in Canada. However, this exercise has to be done by the assessing authority on the basis of materials to be produced by the assessee and after giving effect to the formulae prescribed under section 10A(4) of the Act.

(3) No agreement with states :

64. Whether the assessee is entitled to the aforesaid benefit when India has no agreement with the States where tax is levied on the income of the assessee.

65. Section 91 of the Act specifically deals with the said question. The afore said section reads as under :

"91. Countries with which no agreement exists.—(1) If any person who is resident in India in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any country with which there is no agreement under section 90 for the relief or avoidance of double taxation, Income-tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian Income-tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country whichever is the lower, or at the Indian rate of tax if both the rates are equal . . .

(iv) the expression 'Income-tax' in relation to any country includes any excess profits tax or business profits tax charged on the profits by the Government of any part of that country or a local authority in that country."

66. The said provision provides for deduction of the tax paid in any country from the Indian Income-tax payable by him of a sum calculated on such doubly taxed income even though there is no agreement under section 90 for the relief or avoidance of double taxation. Explanation (iv) defines the expression Incometax in relation to any country includes any excess profit tax or business profits tax charged on the profits by the Government of any part of that country or a local authority in that country. Therefore the intention of Parliament is very clear. The Incometax in relation to any country includes Income-tax paid in any part of the country or a local authority. It applies to cases where in a federal structure a citizen is made to pay federal Income-tax and also the State income tax. The Income-tax in relation to any country includes Income-tax paid not only to the Federal Government of that country, but also any Income-tax charged by any part of that country meaning a State or a local authority, and the assessee would be entitled to the relief of double taxation benefit with respect to the latter payment also.

Therefore, even in the absence of an agreement under section 90 of the Act, by virtue of the statutory provision, the benefit conferred under section 91 of the Act is extended to the Income-tax paid in foreign jurisdictions. India has entered into an agreement with the federal country and not with any State within that country. In order to extend the benefit of this, relief or avoidance of double taxation, the aforesaid Explanation explicitly makes it clear that Income-tax in relation to any country includes the Income-tax paid to the Government of any part of that country or a local authority in that country. Therefore, even though, India has not entered into any agreement with the State of a country and if the assessee has paid Income-tax to that State, the Income-tax paid in relation to that State is also eligible for being given credit to the assessee in India. Therefore, the argument that in the absence of an agreement between India and the State, the benefit of section 90 is not available to the assessee is ex-facie illegal and requires to be set aside.

We notice that the Hon'ble High Court has accepted all the contentions of the assessee on various aspects discussed above.

9.11 We are also of the view that the expressions used in sec. 90(1)(a)(i) and (ii) and in sec.91 would also merit attention in this regard. Section 90(1)(a)(i) uses the expression "income on which have been paid both income tax….". Section 91(1) uses the expression "If any person who is resident in India in any previous year proves that in respect of his income which accrued or arose during the previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any Country with which there is no agreement under section 90 for the relief or avoidance of double taxation, income tax, by deduction or otherwise….. It can be noticed that, "payment of tax" is mentioned both in sec.90(1)(a)(i) and sec. 91. However, section 90(1)(a)(ii) uses the expression "income tax chargeable under this Act and under the Corresponding law in force in that Country….." Thus, it can be noticed that the provisions of sec.90(1)(a)(i) and sec.91(1) refers to actual payment made in the foreign Country and the provisions of sec.90(1)(a)(ii) refers to "income tax chargeable under this Act and under the corresponding law in force in that Country", i.e., there is no reference to actual payment of tax.

9.12 Accordingly, following the binding decision of High Court, we set aside the order passed by A.O. on this issue and direct him to

allow foreign taxes credit claimed by the assessee in terms of decision rendered by Hon'ble High Court of Karnataka referred above."

18.2 Following the above said decision of Hon'ble jurisdictional Karnataka High Court, we set aside the order passed by AO on this issue and direct him to allow foreign tax credit claimed by the assessee in terms of the decision rendered by Hon'ble High Court of Karnataka referred above.

18.3 The second contention of the assessee is that the foreign tax paid by the assessee, to the extent not given credit, should be allowed as business expenditure. The submission made by the assessee in this regard are extracted below:-

"FTC to be allowed as Business expense:

If relief from double taxation is denied for the reason that the income-tax paid or deducted in any foreign country is not eligible for relief u/s 90 or u/s 91, such tax paid of Rs. 117.32 Crores is deductible u/s 37(1) of the Act or allowable as a loss u/s 28 and such unrelieved foreign taxes are not covered by the restriction in Section 40(a)(ii) of the Act. But for the restriction imposed by clause (ii) of section 40a, income-taxes paid or deducted in foreign countries by the assessee-company is an expenditure laid out or expended wholly and exclusively for the purposes of the business carried on by the assessee outside India and the same is deductible u/s 37 of the Act. In any case, it is a loss incurred by the assesse-company in carrying on business outside India and such tax is allowable u/s 28 of the Act. A plain reading of the aforesaid provision makes it abundantly clear that foreign taxes paid on profits or gains is not deductible only to the extent relief is eligible u/s 90 or deduction is eligible u/s 91. To the extent relief u/s 90 or deduction u/s 91 is denied as ineligible, the company is eligible for deduction u/s 37 or as a loss u/s 28 of the Act.

Further, we wish to submit that the said amount shall also be allowed as a deduction from the book profits as "taxes levied under any Act other than Income Tax Act" is not covered in the inclusion given in Explanation – 2 u/s 115JB. We wish to reproduce the definition of income tax as provided in Explanation – 2:

« Explanation 2.—For the purposes of clause (a) of Explanation 1, the amount of income-tax shall include— (i) any tax on distributed profits under section 115-O or on distributed income under section 115R; (ii) any interest charged under this Act; (iii) surcharge, if any, as levied by the Central Acts from time to time; (iv) Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and (v) Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time.]

Further, it is submitted that FTC claim for Australia and Oman for the current assessment year includes the additional liability arising during the financial year 2017-18 for an amount of AUD 27,69,773 and 17,775 OMR respectively. Based on the above, we request your goodself to allow full credit based on DTAA or the proportionate foreign tax credit on profits which are taxed in the eligible units or allow deduction u/s 37 or as a loss u/s 28, as these profits have been subject to double taxation. Further, we request your goodself to allow the credit for the additional liability arising in Australia over above the liability in the branch tax return

18.4 We notice that the above said claim of the assessee finds support from the decision rendered by Hon'ble Bombay High Court in the case of Reliance Infrastructure Ltd vs. CIT (2016)(390 ITR 271)(Bom). The relevant discussions made by Hon'ble Bombay High Court are extracted below:-

"(j) This Court in S. Inder Singh Gill (supra) was required to answer the question whether for the purpose of computing total world income of the assessee as defined in Section 2(15) of the I. T. Act, the income accruing in Uganda has to be reduced by the tax paid to the Uganda Government in respect of such income? The Court while answering the question in the negative observed that it is not aware of any commercial principle/practice which lays down that the tax paid by one on one's income is allowed as a deduction in determining the income for the purposes of taxation.

(k) It is axiomatic that income tax is a charge on the profits/ income. The payment of income tax is not a payment made/incurred to earn profits and gains of business. Therefore, it cannot be allowed an as expenditure to determine the profits of the business. Taxes such as Excise Duty, Customs Duty, Octroi etc., are incurred for the

purpose of doing business and earning profits and/or gains from business or profession. Therefore, such expenditure is allowable as a deduction to determine the profits of the business. It is only after deducting all expenses incurred for the purpose of business from the total receipts that profits and/or gains of business/ profession are determined. It is this determined profits or gains of business/profession which are subject to tax as income tax under the Act. The main part of Section 40(a)(ii) of the Act does not allow deduction in computing the income i.e. profits and gains of business chargeable to tax to the extent, the tax is levied/ paid on the profits/ gains of business. Therefore, it was on the aforesaid general principle, universally accepted, that this Court answered the question posed to it in S. Inder Singh Gill (supra) in favour of the Revenue.

(l) We would have answered the question posed for our consideration by following the decision of this Court in S. Inder Singh Gill (supra). However, we notice that the decision of this Court in S. Inder Singh Gill (supra) was rendered under the Indian Income Tax Act, 1922 and not under the Act. We further note that just as Section 40(a)(ii) of the Act does not allow deduction on tax paid on profit and/or gain of business. The Indian Income Tax Act, 1922 Act also contains a similar provision in Section 10(4) thereof. However, the Indian Income Tax Act, 1922 contains no definition of "tax" as provided in 2(43) of the Act. Consequently, the tax paid on income/profits and gains of business/profession anywhere in the world would not be allowed as deduction for determining the profits/gains of the business under Section 10(4) of the Indian Income Tax Act, 1922. Therefore, on the state of the statutory provisions as found in the Indian Income Tax Act, 1922 the decision of this Court in S. Inder Singh Gill (supra) would be unexceptionable. However, the ratio of the aforesaid decision in S. Inder Singh Gill (supra) cannot be applied to the present facts in view of the fact that the Act defines "tax" as income tax chargeable under the provisions of this Act. Thus, by definition, the tax which is payable under the Act alone on the profits and gains of business are not allowed to be deducted notwithstanding Sections 30 to 38 of the Act.

(m) It therefore, follows that the tax which has been paid abroad would not be covered within the meaning of Section 40(a) (ii) of the Act in view of the definition of the word 'tax' in Section 2(43) of the Act. To be covered by Section 40(a)(ii) of the Act, it has to be

payable under the Act. We are conscious of the fact that Section 2 of the Act, while defining the various terms used in the

Act, qualifies it by preceding the definition with the word "In this Act, unless the context otherwise requires" the meaning of the word 'tax' as found in Section 2(43) of the Act would apply wherever it occurs in the Act. It is not even urged by the Revenue that the context of Section 40(a)(ii) of the Act would require it to mean tax paid anywhere in the world and not only tax payable/ paid under the Act.

(n) However, to the extent tax is paid abroad, the Explanation to Section 40(a)(ii) of the Act provides/clarifies that whenever an

Assessee is otherwise entitled to the benefit of double income tax relief under Sections 90 or 91 of the Act, then the tax paid abroad would be governed by Section 40(a)(ii) of the Act. The occasion to insert the Explanation to Section 40(a)(ii) of the Act arose as Assessee was claiming to be entitled to obtain necessary credit to the extent of the tax paid abroad under Sections 90 or 91 of the Act and also claim the benefit of tax paid abroad as expenditure on account of not being covered by Section 40(a)(ii) of the Act. This is evident from the Explanatory notes to the Finance Act,

2006 as recorded in Circular No.14 of 2006 dated 28th December, 2006 issued by the CBDT. The above circular inter alia, records the fact that some of the assessee who are eligible for credit against the tax payable in India on the global income to the extent the tax has been paid outside India under Sections 90 or 91 of the Act, were also claiming deduction of the tax paid abroad as it was not tax under the Act. In view of the above, Explanation inserted in 2006 to Section 40(a)(ii) of the Act, would require in the context thereof that the definition of the word "tax" under the Act to mean also the tax which is eligible to the benefit of Sections 90 and 91 of the Act. However, this departure from the meaning of the word "tax" as defined in the Act is only restricted to the above and gives no license to widen the meaning of the word "tax" as defined in the Act to include all taxes on income/profits paid abroad.

(o) Therefore, on the Explanation being inserted in Section 40(a)(ii) of the Act, the tax paid in Saudi Arabia on income which has accrued and/or arisen in India is not eligible to deduction under Section 91 of the Act. Therefore, not hit by Section 40(a)(ii) of the Act. Section 91 of the Act, itself excludes income which is deemed to accrue or arise in India. Thus, the benefit of the Explanation would

now be available and on application of real income theory, the quantum of tax paid in Saudi Arabia, attributable to income arising or accruing in India would be reduced for the purposes of computing the income on which tax is payable in India.

(p) It is not disputed before us that some part of the income on which the tax has been paid abroad is on the income accrued or arisen in India. Therefore, to the extent, the tax is paid abroad on income which has accrued and/or arisen in India, the benefit of Section 91 of the Act is not available. In such a case, an Assessee such as the applicant assessee is entitled to a deduction under Section 40(a)(ii) of the Act. This is so as it is a tax which has been paid abroad for the purpose of arriving global income on which the tax payable in India. Therefore, to the extent the payment of tax in Saudi Arabia on income which has arisen/accrued in India has to be considered in the nature of expenditure incurred or arisen to earn income and not hit by the provisions of Section 40(a)(ii) of the Act.

(q) The Explanation to Section 40(a)(ii) of the Act was inserted into the Act by Finance Act, 2006. However, the use of the words "for removal of doubts" it is hereby declared "...." in the Explanation inserted in Section 40(a)(ii) of the Act, makes it clear that it is declaratory in nature and would have retrospective effect. This is not even disputed by the Revenue before us as the issue of the nature of such declaratory statutes stands considered by the decision of the Supreme Court in CIT v. Vatika Township (P) Ltd. [2014] 367 ITR 466/227 Taxman 121/49 taxmann.com 249 and CIT v. Gold Coin Health Foods (P.) Ltd. [2008] 304 ITR 308/172 Taxman 386 (SC).

(r) In the above facts and circumstances, question (iii)(a) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee. Question (iii)(b) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee."

Accordingly, we direct the AO to allow the foreign tax paid by the assessee, to the extent not allowed as tax credit u/s 90 &91 of the Act, as deduction from the business income of the assessee."

44. Since this issue has been decided as stated above for the AY

2015-16 in assessee's own case, accordingly, we direct the AO to allow the foreign tax & State Tax paid by the assessee, to the extent not allowed as tax credit u/s 90 & 91 of the Act, as deduction from the business income of the assessee from the respective units.

45. Ground No. 17 to 17.2 relates to disallowance of payment made to M/s. Gartner Group u/s 40(a)(i) of the Act for non-deduction of tax at source at Rs. 10.23 crores. During the year the assessee paid Rs. 10.23 Crores to M/s Gartner group and no TDS was deducted. The assessee submitted that it is covered under exclusion clause of royalty as per section 9(1)(vi) wherein royalty paid for the purpose of business or profession carried outside India or for the purpose of making or earning any income from any source outside India is not regarded as royalty. The ld. AR of the assessee alternatively submitted that the undertaking is eligible for deduction u/s 10AA, therefore the deduction should be allowed on the enhanced profit of the eligible undertakings. Considering the rival submissions we notice that an identical issue has been decided against the assessee by the co-ordinate bench in AY

2015-16 in which it has been held as under:-

> We notice that an identical issue was decided against the assessee by the co-ordinate bench in AY 2010-11 to 2014-15. The facts relating to this issue has been discussed as under by the coordinate bench in the above said years:-
>
> "32.1 The facts relating to this issue are that M/s. Gartner Group maintains a data base and the same is allowed to be used by others on payment of license fee. The assessee has obtained license from M/s. Gartner Group for using the data base. The assessee did not deduct

tax at source from the license fee paid to the above said group. The AO, however, took the view that the payment so made is in the nature of royalty and hence the provisions of sec.9(1)(vi) are attracted. Hence the AO took the view that the assessee should have deducted tax at source from the above said payment and accordingly proposed to disallow the payment by invoking provisions of sec.40(a)(i) of the Act. Before the A.O., the assessee submitted that the license was used for the business carried on by the assessee outside India or for the purpose of earning income from any source outside India. Accordingly, it was contended that the payment made for the use of license would be covered by the exception given u/s 9(1)(vi) of the Act. However, the A.O. noticed that an identical issue has been examined by the jurisdictional Karnataka High Court in the assessee's own case reported in 355 ITR 284 and the issue has been decided against the assessee. Accordingly, the A.O. held that the payment made to M/s. Gartner Group is in the nature of royalty and assessee is liable to deduct TDS from the said payment u/s 195 of the Act. Since the assessee did not deduct TDS, the A.O. disallowed the payments made to Gartner Group in the years relevant to the assessment years 2010-11 to 2014-15 by invoking provisions of section 40(a)(i) of the Act.

……..

Accordingly, following the decision rendered by jurisdictional Hon'ble Karnataka High Court in the assessee's own case reported in 355 ITR 284 and also the decision rendered by Hon'ble Delhi High Court in the case of Havells India Ltd. (supra) we hold that the A.O. was justified in holding that the payment made to M/s. Gartner Group is in the nature of royalty within the meaning of section 9(1)(vi) of the Act and hence the assessee is liable to deduct tax at source from the said payment u/s 195 of the Act. In view of the default on the part of the assessee in not deducting the tax at source, the A.O. was justified in making the disallowance of payment made to M/s. Gartner Group by invoking provisions of section 40(a)(i) of the Act.

32.7 The assessee has raised one more alternative contention to press that the amount disallowed u/s 40(a)(i) of the Act would go to increase the profits of the undertakings and hence the eligible deduction u/s 10A/10AA/10Bof the Act would also get increased correspondingly. The Ld. A.R. submitted that the alternative

contention of the assessee gets support from the circular issued by CBDT. We notice that the alternative contention of the assessee was not considered by the AO and in view of the submissions made by Ld A.R, the same requires examination at the end of AO. Accordingly, we restore the above said alternative contention to the file of the A.O. in all the years i.e. assessment years 2010-11 to 2014-15 for examining it by following the circular of CBDT referred by Ld. A.R."

19.1 In AY 2010-11 to 2014-15, the Tribunal confirmed the disallowance made u/s 40(a)(i) of the Act for non-deduction of tax at source, following the decision rendered by the jurisdictional High Court in the assessee's own case. Since the assessee raised an alternative contention that the "profits of undertaking" eligible for deduction u/s 10A/10AA/10B of the Act will go to increase by the above said disallowance, the above said deduction should also be increased accordingly. The above said alternative contention was accepted by the Tribunal and the matter was restored to the AO.

19.2 Before us, the Ld A.R raised a new contention on this issue. He submitted that the Hon'ble Karnataka High Court had decided an identical issue against the assessee in the assessee's own case reported in 345 ITR 494 and for that purpose, the High Court had placed reliance on the decision rendered by it in the case of Samsung Electronics Ltd. However, the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Ltd has since been reversed by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs. CIT (CA Nos. 8733 – 8734/2018). Accordingly, he submitted that the decision rendered by Hon'ble Karnataka High Court is no more good law. Accordingly he submitted that the assessee is not liable to deduct tax at source from the payment made to M/s Gartner Group, since the said payment cannot be treated as "royalty" payments as per the decision rendered by Hon'ble Supreme court, referred above. Accordingly he prayed that this disallowance should be deleted.

19.3 We heard Ld D.R on this issue and perused the record. We noticed that the co-ordinate bench had confirmed the disallowance following the decision rendered by the jurisdictional Hon'ble Karnataka High Court in the assessee's own case. It is the submission of the assessee that the Hon'ble High Court has decided an identical issue against the assessee following its own decision

rendered in the case of Samsung Electronics Ltd, which has since been revered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd. The decision in the above said case has been rendered by Hon'ble Supreme Court subsequent to the passing of the assessment order.

Accordingly, we are of the view that this issue requires fresh examination at the end of AO. Accordingly we restore this issue to the file of the AO with the direction to examine this issue afresh applying the principles laid down by Hon'ble Supreme Court in the case, referred above. If the AO comes to the conclusion that the decision rendered by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence P Ltd is applicable to the payments made to Gartner group and there is no requirement to deduct tax at source, then there is no requirement of making any disallowance u/s 40(a)(i) of the Act. However, if the AO comes to the conclusion that the above said decision of Hon'ble Supreme Court is not applicable and the assessee is liable to deduct tax at source, then the AO shall grant enhanced deduction u/s 10A/10AA/10B of the Act by increasing the profits of undertaking by the amount of disallowance so made. The assessee is given liberty to raise all contentions in this regard before the AO.

46. Respectfully following the above judgement of the co-ordinate bench of the Tribunal in assessee's own case cited supra we also send back to the file of the in above terms. The assessee is given liberty to raise all contentions in this regard before the AO.

47. The ground No. 18 to 18.1 relates to the disallowance of interest expenditure incurred on investment in Foreign Subsidiary u/s 115BBD of the Act of Rs. 9.22 crores. An identical issue has been examined by the co-ordinate bench in AY 2012-13 to 2014-15 and it was decided as under:-

"29.1 The facts relating to the issue are stated in brief. The A.O. noticed that the assessee has declared loss under the head "Income from other sources". On examination of the same, the A.O.

noticed that the assessee had borrowed ECB loan and invested the same in its overseas subsidiary named Wipro Cyprus Pvt. Ltd. He noticed that the interest expenditure relating to ECB loan has been claimed as expenditure under the head

Income from other sources, even though no foreign dividend income was received from its subsidiary company, cited above. Accordingly, the assessee has claimed loss.

29.2 The A.O. noticed that section 115BBD of the Act provided for taxation of dividend income received from foreign companies at concessional rate, however, subject to the condition that the Indian company should hold 26% or more right in the nominal value of the equity share capital of the foreign company. It is also provided in the said section that no expenditure shall be allowed against the dividend income under any provisions of the Act. The AO noticed that the assessee's shareholding in the foreign subsidiary was more than 26% and hence the provisions of section 115BBD of the Act are attracted. Accordingly, the A.O. took the view that the interest expenditure claimed by the assessee on the ECB loan is not allowable as deduction u/s 115 BBD of the Act, in view of the specific bar mentioned in that section. Accordingly, the AO disallowed the interest expenditure claimed by the assessee by invoking sec.115BBD of the Act.

29.3 Before Ld. DRP, the assessee placed its reliance on the decision rendered by Hon'ble Supreme Court in the case of Rajendra Prasad Mody (115 ITR 519) and contended that the expenditure is allowable, even if dividend income is not received during the year under consideration. However, the Ld. DRP took the view that the investment made by the assessee is not with the objective of earning dividend income but for the purpose of acquiring controlling interest in the company. It held that the interest expenditure is allowable u/s 57(iii) only if the investment had been made for the purpose of earning dividend income. In support of this proposition, the Ld. DRP placed its reliance on the decision rendered by Hon'ble Bombay High Court in the case of CIT Vs. Smt. Amritaben R. Shaw (238 ITR 777) and held that the expenditure incurred for acquiring controlling interest in the company is not allowable as deduction u/s 57(iii) of the Act. Accordingly, the Ld. DRP also confirmed the disallowance of interest expenditure incurred on ECB Loan. However, in the final assessment order passed for assessment year 2012-13, the A.O.

disallowed the interest expenditure by invoking provisions of section 115BBD of the Act only. The AO did not mention about the reasoning of 'acquiring of controlling interest" or sec. 57(iii) of the Act, while making the disallowance. Hence, we confine ourselves to the applicability or otherwise of sec.115BBD of the Act.

29.4 We heard the parties on this issue and perused the record. The provisions of section 115BBD of the Act reads as under:-

"115BBD. (1) Where the total income of an assessee, being an Indian company, for the previous year relevant to the assessment year beginning on the 1st day of April, 2012 28[or beginning on the 1st day of April, 2013] 28a[or beginning on the 1st day of April, 2014] includes any income by way of dividends declared, distributed or paid by a specified foreign company, the incometax payable shall be the aggregate of—

(a) the amount of income-tax calculated on the income by way of such dividends, at the rate of fifteen per cent; and

(b) the amount of income-tax with which the assessee would have been chargeable had its total income been reduced by the aforesaid income by way of dividends.

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing its income by way of dividends referred to in sub-section (1).

(3) In this section,—

(i) "dividends" shall have the same meaning as is given to "dividend" in clause (22) of section 2 but shall not include subclause (e) thereof;

(ii) "specified foreign company" means a foreign company in which the Indian company holds twenty-six per cent or more in nominal value of the equity share capital of the company."

The Ld. A.R. submitted that the provisions of section 115BBD are attracted only if the total income of the assessee "includes any

income by way of dividend" declared, distributed or paid by a specified foreign company. According to Ld A.R, availability of taxable dividend income during the previous year is the sin-quanon for invoking the provisions of sec.115BBD of the Act. He submitted that the assessee has not received any dividend income from specified foreign company during the years under consideration and hence the total income of the assessee does not include any taxable dividend income. In fact, the A.O. also has also not included any such dividend income while computing the total income. Accordingly, he submitted that the A.O. was not justified in invoking the provisions of section 115BBD of the Act. The Ld. A.R. submitted that the ratio of decision rendered by Hon'ble High Court of Delhi in the case of Cheminvest Ltd. (ITA 749/2014) is applicable to the facts of the present issue also, even though the said decision was rendered in the context of section 14A of the Act. He submitted that the Hon'ble Delhi High Court has held in the above said case that the provisions of sec.14A are attracted only if the assessee had received exempt income.

29.5 We have heard Ld D.R and perused the record. A careful perusal of provisions of section 115BBD would show that the same begins with the expression "where the total income of assessee, being an Indian company, includes any income by way of dividends declared, distributed or paid by a specified foreign company". Hence, there is merit in the submissions of Ld A.R that the primary condition to be satisfied for invoking section 115BBD of the Act is that the total income of the assessee should include any dividend income received/declared from/by a specified foreign company. There is no dispute with regard to the fact that the total income of the assessee for the years under consideration does not include any dividend income received/declared from/by a specified foreign company. Hence, the question of invoking provisions of section 115BBD of the Act does not arise. The decision rendered by Hon'ble Delhi High Court in the case of Chem invest Ltd. (supra), though rendered in the context of sec.14A of the Act, brings out the principle of interpretation of a provision. For the sake of convenience, we extract below the following observations made by Hon'ble Delhi High Court in the above said case.

"23. In the context of the facts enumerated hereinbefore the Court answers the question framed by holding that the expression does not

form part of the total income" in Section 14A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year."

Accordingly, we are of the view that the A.O. was not justified in invoking the provisions of sec.115BBD of the Act for making the impugned disallowance. Since the AO has not disallowed the interest expenditure on the reasoning given by Ld DRP, we do not find it necessary to address the same."

Following the above said decision, we direct the AO to delete the disallowance u/s 115BD of the Act, if the assessee has not received any dividend during the year under consideration.

48. Considering the rival submissions and in assessee's own case cited supra , we are of the view that the A.O. was not justified in invoking the provisions of sec.115BBD of the Act for making the impugned disallowance, accordingly, we direct the AO to delete the disallowance u/s 115BBD of the Act, if the assessee has not received any dividend during the year under consideration."

49. Ground No. 19 relates to claim for deduction of Education Cess as expenditure. This ground is liable to rejected in view of the amendment brought in by Finance Act 2022 inserting specific provision in the Income tax Act providing for disallowance of Education Cess. A similar issue has been decided against the assessee by the co-ordinate bench of the Tribunal in assessee's own case, In view of this, we also dismiss the ground No. 19 raised by the assessee.

50. Ground No. 20 relates to the AO not following the directions issued by the DRP vide its Directions. This ground urged in the appeal has two aspects to it.

51. Firstly, the assessee is contending that although the DRP directed that the deduction under S.10AA ought to be recomputed by adding back the disallowance of wages capitalized, the AO did not give effect to the said direction. On examining the DRP's directions, we find that such a direction was in fact issued by the DRP vide para 3.7 at page 8 of the directions. However, we find that while computing the deduction allowable under S.10AA, the said direction of the DRP has not been given effect to. We, therefore, direct the AO to comply with the aforesaid direction of the DRP vide para 3.7 at page 8 of the directions and to, accordingly, recompute the deduction allowable to the assessee under S.10AA of the Act.

52. The second aspect of ground No.20 pertains to the DRP's direction that foreign taxes in the nature of VAT or GST have not been added back to the Export Turnover while computing the deduction under S.10AA which has however not been given effect to by the AO in the final assessment order. On examining the DRP's directions, we find that such a direction was in fact issued by the DRP vide para 13 at page 61 of the directions. However, we find that while computing the deduction allowable under S.10AA, the said direction of the DRP has not been given effect to. We, therefore, direct the AO to comply with the aforesaid direction of the DRP vide para 13.1 at page 61 of the directions and to, accordingly,

recompute the deduction allowable to the assessee under S.10AA of the Act.

53. Ground No. 21 relates to claim for credit of TDS credit on the basis of additional TDS certificates. The AO did not grant TDS credit on the reasoning that the said TDS amount were not reflected in Form

26AS and the ld. DRP has also rejected the objection filed before them. If the deductor of TDS has filed the Statement of TDS with the Income tax department, then the said TDS will automatically reflect in Form 26AS. If there is failure on the part of the deductor to file statement of TDS, then it will not be reflected in Form 26AS. In our considered view, the assessee cannot be penalised for the fault of the TDS deductor in not filing statement of TDS. It is also possible that the deductor of TDS would have filed the statement of TDS belatedly. Accordingly, we are of the view that this issue requires verification at the end of AO. Accordingly, we restore this issue to the file of AO with the direction to examine the claim of the assessee and allow TDS credit in accordance with law.

54. Ground No. 22 relates to the Assessee's claim that the AO did not grant MAT credit of brought forward losses from the previous years when the tax liability was determined under the normal provisions of the Act. We find that when this issue was raised before the DRP, the DRP did not examine the Assessee's claim on the ground that it did not amount to a variation made by the AO to the returned income and that, therefore, it could not adjudicate

upon the same. Without going into the merits of the matter, we find that this is an issue that requires to be examined by the AO afresh. Accordingly, we are of the view that this issue requires verification at the end of AO.

Accordingly, we restore this issue to the file of AO with the direction to verify the claim of the assesse and accordingly grant MAT credit in accordance with law.

55. Ground No. 23 is consequential in nature.

56. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Pronounced in the open court on this 14th day of June, 2023.

Sd/-	Sd/-
(BEENA PILLAI)	(LAXMI PRASAD SAHU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 14th June, 2023.

VG/SPS /*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.