INCOME TAX : Foreign remittances on export sales that were realized within specified time limit of six (6) months and those export sales proceeds for which extension of time limit was applied for by assessee to authorized bankers and applications had not been rejected, would be eligible for deduction under section 10A

[2019] 107 taxmann.com 90 (Bangalore - Trib.)

IN THE ITAT BANGALORE BENCH 'C'

Deputy Commissioner of Income-tax, Circle-7 (1) (1), Bangalore

v.

Tecnotree Convergence Ltd.

N.V. VASUDEVAN, VICE-PRESIDENT
AND JASON P. BOAZ, ACCOUNTANT MEMBER
IT APPEAL NOS. 1447 & 1448 (BANG.) OF 2017 & OTHS.
[ASSESSMENT YEARS 2010-11 AND 2011-12]
JULY 3, 2019

Pradeep Kumar *for the Appellant.* **K.R. Vasudevan** *for the Respondent.*

ORDER

Jason P Boaz, Accountant Member - These are a set of four appeals; two appeals by the assessee for Assessment Years 2010-11 and 2011-12 and two cross appeals by the Revenue; directed against the separate orders of CIT(A)-15, Delhi dated 23.03.2017. Since common issues are involved, these appeals were heard together and we deem it appropriate to dispose them off together by way of this consolidated order, for the sake of convenience.

Assessment Year 2010-11

2. Briefly stated, the facts of the case are as under:-

2.1 The assessee filed its return of income for Assessment Year 2010-11 on 15.10.2010 declaring income of Rs.1,64,29,700/- after claiming deduction under section 10A of the Income Tax Act, 1961 (in short 'the Act'). Book profits under section 115JB of the Act were computed at Rs.30,49,80,031/-. The return was processed under section 143(1) of the Act and the case was subsequently taken up for scrutiny for Assessment Year 2010-11. The assessment was concluded under section 143(3) of the Act vide order dated 31.10.2014, wherein the assessee's income was determined at Rs.19,96,09,740/- in view of the following additions/disallowances:-

(*i*) Disallowance under section 40(a)(ia) of Export Commission claimed; for non-deduction of tax at source.	- Rs.4,18,21,648/-
(*ii*) Disallowance out of assessee's claim of deduction u/s section 10A of the Act	- Rs.14,13,53,193/-
(*iii*) Disallowance of capital loss under section 94(7) of the Act	

2.2 On appeal, the CIT(A)-15, Delhi, disposed off the same; vide order dated 23.03.2017, allowing the assessee partial relief.

3. Both Revenue and the assessee, being aggrieved by the order of CIT(A)-15, Bangalore, dated 23.03.2017 for Assessment Year 2010-11, have filed cross appeals before the Tribunal, which we now proceed to dispose off hereunder.

Assessee's appeal in ITA No.1519/Bang/2017 for Assessment Year 2010-11

4. In this appeal, the assessee has raised the following grounds:-

1. The order dated 31 March 2014 (`impugned order') passed by the Deputy Commissioner of Income Tax, Circle 16(1), New Delhi (hereinafter referred to as Ld. AO') under section 143(3) of the Income Tax Act, 1961 (Vice) and upheld by the Commissioner of Income-tax (Appeals)-15 Ld. CIT(A)1 is contrary to the facts and circumstances of the case and hence is bad in law.

Reduction in deduction claimed under section 10A of the Act

2. The CIT(A) has erred on facts and in law in upholding the order of the Ld. AO restricting deduction under section 10A of the Act to INR 14,99,61,185 as against INR 29,16,64,872 as claimed by the Appellant.

3. On facts and in law, the Ld. CIT(A) erred in upholding the order of the Ld. AO reducing INR 37,61,94,696 from export turnover (`ET') on the ground of non-realization for the purposes of computing deduction under section 10A of the Act.

3.1 That That the CIT(A) has failed to appreciate that it is settled law that if no communication is received to a request made to a statutory authority or its nominee, the request is deemed to be allowed. The CIT(A) has erred in not realizing that even if no explicit approvals were received from the RBI/ Authorized Dealer, it has to be read as implicit approval since no communication has been forthcoming. In light of the implicit approval, the CIT(A) has erred in upholding the exclusion from ET on the ground of non- realization.

3.2 Without prejudice to the above, the Ld. CIT(A) has erred in confirming the action of the Ld. AO to exclude export sales amounting to INR 3,37,06,901 from ET while computing the deduction under section 10A of the Act without appreciating the fact that the proceeds in respect of those sales were realised within the time limit prescribed under section 10A(3) of the Act.

3.3 Without prejudice to the above, the Ld. CIT(A) has erred in not directing the Ld. AO to amend the assessment order in terms of section 155(11A) of the Act to allow deduction under section 10A of the Act in respect of the export proceeds amounting to INR 2,87,99,885 which were subsequently received in convertible foreign exchange in India.

4. On facts and circumstances of the case, the Ld. CIT(A) has erred in upholding the action of the Ld. AO to exclude expenditure incurred in foreign currency amounting to INR 30,16,21,141 from ET while computing the deduction under section 10A of the Act without appreciating the fact that these amounts were neither included in the export invoices nor did they form part of ET.

5. On facts and circumstances of the case, the Ld. CIT(A) has erred in upholding the action of the Ld. AO to re-compute the deduction allowable under section 10A of the Act on the returned business income instead of assessed business income.

Disallowance of commission expense on account of non-deduction of tax at source

6. On the facts and circumstances of the case, the Ld. CIT(A) has erred in upholding the action of the Ld. AO to disallow export commission expense amounting to INR 4,17,10,537 and commission paid for hiring of apartments amounting INR 1,11,111 paid to non-resident parties under section 40(a)(i) of the Act without appreciating that such payments were not taxable in India.

Levy of interest under sections 234B and 234D of the Act

7. On the facts and circumstances of the case, the Ld. CIT(A) has erred in upholding the levy of interest under sections 234B and 234D of the Act.

Penalty

8. On the facts and circumstances of the case, the Ld. CIT(A) has erred in not directing the Ld. AO to drop the penalty proceedings initiated under section 274 read with section 271(1)(c) of the Act.

Relief

9. On the facts and circumstances of the case and in law, the Appellant prays that the Ld. AO be directed to grant all such relief arising from the preceding grounds as also all relief consequential thereto.

5. Ground Nos.1,2 and 9 (supra) are general in nature and since they require no adjudication, are accordingly dismissed as infructuous.

6. Ground Nos.3 (3.1 to 3.3) to 5 – Deduction under section 10A of the Act

6.1 Ground Nos. 3 to 5 (supra) are raised in relation to the computation of the deduction under section 10A of the Act.

Ground No.3 is in respect of the allowability of the deduction under section 10A of the Act on that portion of the export sales, whose realization has not happened within the time limit specified in law.

Ground No.4 is raised on the issue of excluding the expenses incurred in foreign currency from export turnover while computing the deduction under section 10A of the Act.

Ground No.5 is raised in respect of the issue of computing the deduction under section 10A of the Act on the total assessed business income and not on the returned business income.

6.2 The facts of the matter, on the issue of the assessee's claim of deduction under section 10A of the Act for Assessment Year 2010-11, as emanate from the record are that the Assessing Officer (AO) in the course of assessment proceedings observed that the assessee had claimed deduction under section 10A of the Act of Rs.29,16,64,872/-; comprising Rs.3,74,77,430/- pertaining to its Gurgaon unit and Rs.25,41,87,442/- pertaining to its Bangalore units.

7. Ground Nos.3.1 to 3.3 – Deduction under section 10A of the Act on delayed realization of Export proceeds.

Ground No.3.1

7.1 On examination of this claim, the AO observed that the assessee had claimed exemption in respect of the remittances of export proceeds which were either not received in foreign currency within the prescribed time limit or there is no evidence whether extension has been allowed to the assessee by the designated authority to bring the foreign exchange in the extended time limit. Out of the total export sales, the assessee had admitted that an amount of Rs.33,25,491/- in respect of its Gurgaon units and Rs.37,28,69,205/- in respect of its Bangalore Units had not been realized within the due date; totally aggregating to Rs.37,61,94,696/-. Before the AO, the assessee contended that it had moved applications for extension of time before the authorized dealers and filed copies of the letters seeking extension of time filed by the assessee with the authorized dealers, as recorded by the AO at para 3.6 of the order of assessment. The AO, however, after discussing the provisions of section 10A(3) of the Act and the RBI Circular in this regard dated 28.01.2002, held that a specific extension letter from the authorized banker

is a must to claim the benefit under section 10A of the Act. Since no specific extension from the authorized banker was filed by the assessee, the AO denied the assessee the benefit of deduction under section 10A of the Act to the extent of the export sales, whose proceeds were not received within the six month period; i.e., amounting to Rs.37,61,94,696/- and reduced the same from the export turnover, while computing the deduction under section 10A of the Act.

7.2 Aggrieved by the order of the AO, the assessee carried the matter in appeal before the CIT(A); who upheld the AO's action and rejected the assessee's contentions.

7.3 Before us, the learned AR for the assessee submitted that this issue has been considered and decided in favour of the assessee's and against Revenue, and placed reliance, *inter alia,* on the following judicial pronouncements:-

(*i*) *Wipro Ltd.,* v. *DCIT* (2016) 382 ITR 179 (Kar);

(*ii*) *CIT* v. *Wipro GE Medical Systems Ltd.,* (206) 387 ITR 77 (Kar)

(*iii*) *Wipro Ltd.,* v. *DCIT* in ITA No.972/Bang/2011 dated 15.06.2012.

7.4 Per contra, the learned DR for Revenue supported the orders of the authorities below.

7.5.1 We have considered the rival contentions and carefully perused the record; including the judicial pronouncements cited. The basic facts not in dispute is that the proceeds of export sales to the extent of Rs.37,61,94,696/-were not received within the time limit specified; as has been recorded in the para 3.9 of Assessment Order. It is also not in dispute that the assessee had filed letters seeking extension of the time limit for receipt of the export sales proceeds; as has been recorded by the AO at para 3.6 of the order of assessment. It is also noted by AO in para 3.9 of the order of assessment that no extension of time has been allowed to the assessee to bring the export sale proceeds in foreign exchange after the period of 6 months from the end of the relevant previous year.

7.5.2 In the light of the above facts, the issue for consideration/adjudication before us is whether the assessee can be allowed deduction under section 10A of the Act in respect of such export sales, the proceeds of which have not been remitted in foreign exchange, which have not been received within the period stipulated in the Act. In this regard, we find that the Hon'ble Karnataka High Court in the case of *Wipro* v. *DCIT* [2016] 382 ITR 179 (Kar) has held that the assessee is entitled to the benefits of deduction under section 10A of the Act on such facts. The relevant portion of the aforesaid Hon'ble Karnataka High Court (*supra*) at para 146 thereof is extracted hereunder:-

> ***"REVENUE'S APPEAL - QUESTION No.7:***
>
> *"Whether the Appellate Authorities were correct in holding that the assessee will be entitled to claim deduction u/ s 10A of the Act in respect of foreign exchange which is yet to be received during the current assessment year for sale of software i. e , within six months contrary to Section .70A(3) of the Act as an application for extension had been filed and Section 155(11A) of the Foreign Exchange Management Act 1999 and RBI Rules were applicable?"*
>
> *[Question of law No.28 in ak Nos.907 86 909/2008; Question of law No.24 in ITA Nos.904 86 905/2008; Question of law No.8 in ITA Nos.210 & 21112009 and Question of law No.12 in ITA No.363/2009 (Department's appeal)]*
>
> *146. The facts are riot 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 and 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."

7.5.3 The facts of the case on hand are also similar to the aforesaid case of Wipro Ltd., (*supra*). The assessee has made exports and certain foreign remittances on export sales have not been received within the specified time limit of six (6) months and application for extension of time for receiving such foreign remittances have been filed with the authorized bankers and the applications have not been rejected. However, the foreign exchange remittances have been received and credited to the assessee's account. Respectfully following the aforesaid decision of the Hon'ble Karnataka High Court in the case of Wipro Ltd., (supra), we also hold that notwithstanding the fact that there is no express order granting approval by the authorized bankers extending the time limit of six months for receipt of foreign remittances on account of export sales, the assessee is entitled to the benefit of deduction under section 10A of the Act and consequently direct the AO, that those amounts, though realized belatedly, shall be included in the export turnover while computing the deduction under section 10A of the Act. Consequently, ground No.3.1 of the assessee's appeal is allowed.

7.6 Ground No.3.2

7.6.1 In ground No.3.2 (*supra*), the assessee contends that the AO has erred in excluding export sales amounting to Rs.3,37,06,901/- from export turnover, even though the proceeds of these export sales were realized within the time limit specified under section 10A(3) of the Act. As we have already held that those export sale proceeds that were realized within the time limit and those export sales proceeds for which extension of time limit was applied for by the assessee to the authorized bankers are eligible for deduction under section 10A of the Act, this ground is also covered by the aforesaid decision in the case of *Wipro Ltd.,* (382 ITR 179) (Kar). Consequently, ground No.3.2 raised by the assessee in this appeal is allowed.

7.7 Ground No.3.3

7.7.1 In this ground (*supra*), the assessee contends that the CIT(A) has erred in not directing the AO to amend the order of assessment for Assessment Year 2010-11 under section 155(11A) of the Act to allow deduction under section 10A of the Act in respect of export sales proceeds which were received subsequently. Since we have already held earlier in this order (*supra*) that those export sales proceeds which were realized within the specified time limit as well as those export sales proceeds which were received subsequently and for which extension of time limit was applied to the authorized bankers are eligible for deduction under section 10A of the Act, this ground No.3.3 becomes infructuous and is accordingly dismissed.

8. Ground No.4 : Exclusion of Expenditure incurred in foreign currency from Export Turnover

8.1 In the course of assessment proceedings, the AO observed from Note No.16 of Schedule 16 of the financial statements that the assessee had incurred amounts totaling Rs.30,16,21,142/- (i.e., Rs.4,42,94,575/- and Rs.25,73,26,566/- for its Gurgaon and Bangalore units) as expenditure incurred in foreign currency. The AO, on examination thereof, was of the view that these expenditures had been

incurred by the assessee in relation to technical services rendered by it outside India and is therefore liable to be reduced from export turnover while computing the deduction under section 10A of the Act. Before the AO, the assessee contended that these are normal expenses incurred in the course of business and are not expenses incurred in relation to the rendering of technical services outside India and therefore are not liable to be reduced from export turnover. It was also submitted that since these expenses were not included in the export turnover reducing them from export turnover is not tenable. The AO, however, rejected the assessee's contentions and reduced these expenses from export turnover while computing deduction under section 10A of the Act.

8.2 On appeal by the assessee, the CIT(A) upheld the action of the AO in reducing these expenditures from export turnover. However, the CIT(A) accepted the alternate contention of the assessee that if these expenses are excluded from the export turnover, they should also be excluded from total turnover. In coming to this view, the CIT(A) relied on the decision of the Hon'ble Delhi High Court in the case of *CIT* v. *Genpact India* in ITA No.1519/2010 and 1076/2011.

8.3 Aggrieved by the decisions of the CIT(A), both the assessee and Revenue are in appeal before us. The learned AR for the assessee reiterated the submissions put forth before the authorities below that these expenses are normal business expenses and not incurred for rendering technical services outside India.

8.4 We have considered the rival contentions put forth on this issue. While the assessee has given some break-up of details of expenses incurred in foreign currency, the details do not establish that all of these expenses were not incurred for rendering technical services outside India; as claimed by the assessee. In the absence of details, the issue is only academic. Further, we do not consider it necessary to adjudicate on issue which is academic in nature, as the CIT(A) has addressed the assessee's grievance and allowed the alternate claim of the assessee on this issue. Consequently, ground No.4 raised by the assessee is dismissed as academic.

9. Ground No.5 : Deduction under section 10A of the Act to be on assessed income

9.1 In this ground (*supra*), the assessee contends that the AO erred in restricting the deduction under section 10A of the Act only to the extent claimed in the return of income, i.e., on returned income and that the AO ought to have computed the deduction under section 10A of the Act on the assessed income. In support of this proposition, the assessee placed reliance on the decision of the Hon'ble Karnataka High Court in the case of *CIT* v. *M/s. M. Pact Technology Services Pvt. Ltd.*, (since merged with Wipro Ltd.,) in ITA No.228/2013 dated 11.07.2018.

9.2.1 We have considered the rival contentions and carefully perused the material on record. We find from the impugned order of assessment that the AO has made certain disallowances under section 40(a)(i) of the Act, thereby increasing the business profits of the assessee. It is however seen that the AO has allowed the deduction under section 10A of the Act only to the extent claimed by the assessee in the return of income. On appeal, the CIT(A) rejected the contentions of the assessee on the ground that the disallowance under section 40(a)(i) of the Act would only artificially increase the business profits of the assessee and the benefit of Section 10A of the Act cannot be allowed for such artificial increase due to legal fiction.

9.2.2 We find that Courts and Tribunals have consistently held that the plain consequence of the disallowance/add back that is made by the AO, is an increase in the business profits of the assessee. The view of the CIT(A), that in computing the deduction under section 10A of the Act the addition made resulting in an increase of business profits ought to be ignored, is not tenable. No statutory provision to that effect having been made, the plain consequence of the disallowance made by the AO must follow and the deduction under section 10A of the Act should be allowed on the enhanced assessed income.

This principle has been reiterated by the Hon'ble Karnataka High Court in its decision in the case of *CIT* v. *M/s. M. Pact Technology Services Pvt. Ltd*., in ITA No.228/2013 dated 11.07.2018 wherein at paras 5 to 7 thereof, the Hon'ble Court has held as under:

5. In so far as the substantial question of law Nos.5 and 6 are concerned, learned counsel for the Revenue submitted that the ITAT in its Order dated Date of Judgment 11-07-2018 I.T.A.No.228/2013 Commissioner of Income Tax & Anr. v. M/s. M PACT Technology Services Pvt. Ltd.

21.12.2012 has recorded the findings, the relevant portion of which is extracted below for ready reference:-

14. Having heard both the parties and having considered their rival contentions, we find that the disallowance u/s 4oa (ia) is to be made of the expenses incurred and claimed by the assessee but before the payment of which, the assessee has failed to deduct tax at source. The genuineness of the expenditure is not in dispute. The dispute is whether TDS was to be made before making the payment. Without going into the nature of the transaction, we are inclined to accept the alternate plea of the assessee that the disallowance of the expenditure would automatically enhance the taxable income of the assessee and the assessee is eligible for the deduction u/s loA of the Income-tax Act on the enhanced income. Thus, this ground of appeal is allowed".

6. The relevant portion of the Circular No.37/2016 dated 02.11.2016 issued by the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India, relating to the subject:

Date of Judgment 11-07-2018 I.T.A.No.228/2013 Commissioner of Income Tax & Anr. v. M/s. M PACT Technology Services Pvt. Ltd.

Chapter VI-A deduction on enhanced profits, is quoted hereunder:

"The issue of the claim of higher education on the enhanced profits has been a contentious one. However, the courts have generally held that if the expenditure disallowed is related to the business activity against which the Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits. Some illustrative cases upholding this view are as follows:

[i] If an expenditure incurred by assessee for the purpose of developing a housing project was not allowable on account of non- deduction of TDS under law, such disallowance would ultimately increase assessee's profits from business of developing housing project. The ultimate profits of assessee after adjusting disallowance under section 4orallia] of the Act would qualify for deduction under section 8oIB of the Act. This view was taken by the courts in the following cases:

[a] Income-tax Officer-Ward 5[1] 1Keval Construction, Tax Appeal No.443 of Date of Judgment 11-07-2018 I.T.A.No.22-8-013 Commissioner of Income Tax & Anr. v. M/s. M PACT Technology Services Pvt. Ltd.

2012, December 10 2012, Gujarat High Court [b] Commissioner of Income-tax-IV, Nagpur vs Sunil Vishwambharnath Tiwari, 2015, Bombay High Court [ii] If deduction under section 40A[3] of the Act is not allowed, the same would have to be added to the profits of the undertaking on which the assessee would be entitled for deduction under section 8o-IB of the Act."

7. Applying the same analogy, it can be held that if deduction u/s. 4o[a][ia] of the Act is not allowed, the same would have been to be added to the profits of the undertaking on which the Assessee would be entitled for deduction u/s. loA of the Act. This view is fortified by the decision of Bombay High Court in the case of 'Commissioner of Income Tax v. Gem Plus Jewellery India Ltd.,'

[2011] 33o ITR 175 [Bom] , wherein it is held thus:

Date of Judgment 11-07-2018 I.T.A.No.228/2013 Commissioner of Income Tax & Anr. v M/s. M PACT Technology Services Pvt. Ltd.

"13. By reason of the judgment of the Supreme Court in Commissioner of Income Tax v. Alom Extrusions Limited [2009] 319 ITR 306 the employer's contribution was liable to be allowed, since it was deposited by the due date for the filing of the return. The peculiar position, however, as it obtains in the present case arises out of the fact that the disallowance which was effected by the Assessing Officer has not, the Court is informed, been challenged by the assessee. As a matter of fact the question of law which is formulated by the Revenue proceeds on the basis that the assessed income was enhanced due to the disallowance of the employer's as well as the employees' contribution towards Provident Fund/ESIC and the only question which is canvassed on behalf of the Revenue is whether on that basis the Tribunal was justified in directing the Assessing Officer to grant the exemption under Section 10A. On this position, in the present case it cannot be disputed that the net consequence of the disallowance of the employer's and the employee's contribution is that the business profits have to that extent been enhanced. There was, as we have already noted, an add back by the Assessing Officer to the income. All profits of the unit of the assessee have Date of Judgment 11-07-2018 I.T.A.No.228/2013 Commissioner of Income Tax & Anr. v. M/s. M PACT Technology Services Pvt. Ltd., been derived from manufacturing activity. The salaries paid by the assessee, it has not been disputed, relate to the manufacturing activity. The disallowance of the Provident Fund/ESIC payments has been made because of the statutory provisions - Section 43B in the case of the employer's contribution and Section 36(v) read with Section 2(24)(x) in the case of the employee's contribution which has been deemed to be the income of the assessee. The plain consequence of the disallowance and the add back that has been made by the Assessing Officer is an increase in the business profits of the assessee. The contention of the Revenue that in computing the deduction under Section 10A the addition made on account of the disallowance of the Provident Fund/ESIC payments ought to be ignored cannot be accepted. No statutory provision to that effect having been made, the plain consequence of the disallowance made by the Assessing Officer must follow. The second question shall accordingly stand answered against the Revenue and in favour of the assessee."

9.2.3 The facts of the assessee's case on hand are similar to that of the cited case. In the case on hand also, the disallowance of expenses has been made under section 40(1)(i) of the Act towards non-deduction of tax at source and such disallowance automatically enhances the taxable income of the assessee and consequently the assessee is entitled for deduction under section 10A of the Act on such enhanced income. Therefore, respectfully following the decision of the Hon'ble Karnataka High Court in the case of *CIT* v. *M. Pact Technology Services Pvt. Ltd*., (*supra*), we hold that the deduction under section 10A of the Act shall be allowed on the assessed income. The AO is accordingly directed. Consequently, ground No.5 of the assessee's appeal is allowed.

10. Ground No.6 : Disallowance of commission expenses paid to Foreign Parties under section 40(a)(i) of the Act for non-deduction of tax at source on such payments.

10.1 In this ground (*supra*), the assessee assails the order of the CIT(A) in upholding the action of the AO in disallowing export commission expenses amounting to Rs.4,17,10,537/- and commission paid for hiring of apartments amounting to Rs.1,11,111/- paid to non-resident parties under section 40(a)(i) of the Act without appreciating that such payments were not taxable in India.

10.2 The facts of the matter, on this issue, that emanate from a perusal of the record, is that in the course of assessment proceedings, the AO observed that the assessee had made payments of commission aggregating to Rs.4,18,21,648/- in foreign currency, to non-resident/foreign parties, without deducting

tax at source under section 195 of the Act on such payments. The assessee contended that these payments were made to non-residents operating overseas; who do not have any presence in India and therefore there was no requirement to deduct tax at source on such payments. The AO, however, was of the view that, since the services were rendered in relation to the assessee's business carried out in India from undertakings eligible for deduction under section 10A of the Act, it is liable to be taxed in India and therefore held that the assessee was under obligation to deduct tax at source on such payments. As the assessee had not deducted tax at source on the said commission payments to non-residents, the AO invoked the provisions under section 40(a)(i) of the Act and disallowed these expenses claimed. On appeal, the CIT(A) upheld the order of the AO on this issue.

10.3.1 Before us, the learned AR for the assessee reiterated the submissions put forth before the authorities below. It is submitted that the only reason for disallowance of these expenses incurred on commission payments to non-residents is that TDS was liable to be deducted on these payments and which was not done. According to the learned AR, the details of the parties to whom the payments were made were admittedly submitted before the AO and as can be seen from the details, these parties are non-residents and have no permanent establishment (PE) or business connection in India. Therefore, according to the learned AR, since these payments having been made to non-residents for services rendered abroad, they are not taxable in India. In support of these contentions, the learned AR placed reliance on the following judicial pronouncements:-

(*i*) *Zanar Home Collection* v. *JCIT* [2015] 68 SOT 184 (Bangalore – Trib); and

(*ii*) *DCIT* v. *S. R. M. Agro Foods* [2016] 161 ITD 786 (Mumbai – Trib).

10.3.2 In the course of hearings before us, the amendments to Section 9 the Act, particularly the Explanations inserted in the Section, came up for discussion. The learned AR for the assessee submitted that the fundamental and primary requirement of Section 9 of the Act is that the income should accrue or arise in India; whether directly or indirectly through or from any business in India. According to the learned AR, this primary requirement has not undergone any change due to amendments made to the Section and the Explanations inserted at the end of the Section only dispensed with the requirement that was earlier read into the Section; that the non-resident should have a place of business or business connection in India or that the nonresident should have rendered services in India. Similarly, the Explanation 2A, inserted by Finance Act, 2018 has only expanded the scope of "business connection". However, the primary requirement that the income should accrue or arise in India has not been diluted.

10.4.2 Per contra, the learned DR for Revenue emphatically supported the orders of the authorities below.

10.5.1 We have carefully considered the rival contentions on the issue before us and perused and carefully considered the material on record; including the judicial decisions cited. The facts related to the issue before us, are not in dispute. The assessee has made the impugned payments to non-residents in various countries for services rendered outside India. The fact of the payments and the nature of the payments are not in dispute. The only contention of the AO is that since the services were rendered in relation to the business of the assessee in India, the payments for such services rendered are liable for deduction of tax at source thereon and since TDS was not done thereon, the payments are liable for disallowance under section 40(a)(i) of the Act.

10.5.2 Section 195 of the Act deals with the deduction of tax at source from out of the payments made to non-residents. Under Section 195 of the Act, an obligation is cast on a person making payment to a non-resident of any sum, which is chargeable to tax under the provisions of the Act, to deduct tax at the time of payment of such sum or at the time of credit thereof to the account of the payee, whichever is earlier. In terms of the aforesaid provision, tax is required to be withheld in respect of payments to non-residents only if such payment is chargeable to tax in India. The Hon'ble Apex Court in the case of

GE India Technology Centre (P) Ltd., v. *CIT* (327 ITR 456) (SC), explaining its earlier decision rendered in the case of *Transmission Corporation of AP* v. *CIT* (239 ITR 587) (SC), held that only if the income is chargeable to tax in India in the hands of the non-resident recipient, would tax be required to be deducted at source from such payment. Various Courts and Tribunals have followed the aforesaid decision of the Hon'ble Apex Court and have consistently held that in the absence of any activity in India by a non-resident commission agent, the commission does not accrue or arise in India and is not taxable in India.

10.5.3 Explanation – 2 added to Section 195 of the Act by Amendment introduced by Finance Act, 2012 w.e.f. 01.04.1962 reads as under:-

> *"[Explanation 2 – For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has –*
>
> *(i) a residence or place of business or business connection in India; or*
>
> *(ii) any other presence in any manner whatsoever in India."*

This Explanation has only added a further fiction in respect of the person making payment to a non-resident and not the person receiving the payment, i.e., non-resident agent who is receiving the payment.

10.5.4 To elaborate further, Section 195 of the Act can be divided into three limbs:-

(*a*) Any person responsible for paying to non-resident, not being a company (i.e., the assessee company in case on hand)

(*b*) There has to be payment of any other sum chargeable under the provisions of the Act.

(*c*) The recipient of the payment has to be non-resident (i.e., Foreign commission agent in the case on hand).

So the person responsible to pay to the non-resident is the assessee in the case on hand, as stated in limb "a" above and therefore as per Section 195(1) of the Act, he is under obligation to deduct tax on payment made to non-resident; provided the payment is chargeable to tax as laid down in limb "b". This Explanation – 2 (supra) clarifies that the person who is obliged to comply with sub-section (1) of Section 195 of the Act has to make the deduction of tax at source thereunder. Thus, the obligation to deduct tax shall extend to all persons, both resident or non-resident, whether or not the non-resident person has –

(*i*) A residence or place of business connection in India; OR

(*ii*) Any other presence in any manner whatsoever in India.

Hence, this Explanation (supra) is only to define and clarify the opening words of Section 195(1) of the Act which reads : "any person responsible for paying to non-resident." Therefore, it only defines the person responsible for paying to non-resident and not the payee i.e., the non-resident to whom the payment is being made.

10.5.5 It is, therefore, imperative to first analyze whether the commission paid by the assessee to the non-resident commission agents are chargeable to tax in India. If the answer to the said question is in the affirmative, only then the provisions relating to the withholding of tax under section 195 of the Act shall be applicable/attracted.

As per Section 5(2) of the Act, a non-resident is liable to be taxed in India in respect of:

(*a*) income received or is deemed to be received in India in such year by or on behalf of such person; or

(*b*) income accrues or arises or is deemed to accrue or arise in India during such year.

Section 5(2) of the Act, the charging section for taxing non-resident income, provides for two conditions (supra). The first condition of receipt of income in India is not applicable to the case on hand, as the non-resident agents have not received the commission in India. However, the second condition i.e., of whether the income accrues or arises or is deemed to accrue or arise in India, requires to be examined.

10.5.6 Section 9 of the Act provides for the income that is deemed to accrue or arise in India. It creates a legal fiction and provides that certain income shall be deemed to accrue or arise in India. The plain language of Section 9(1)(i) of the Act provides that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, shall be deemed to accrue or arise in India.

10.5.7 Applying the above provisions of the Act to the factual matrix of the case on hand, the question that needs to be addressed is whether the income earned by the foreign commission agents accrues or arises from any business connection in India. In this regard, the Hon'ble Apex Court in its decision in the case of *CIT* v. *Toshoku Ltd.*, [1980] 125 ITR 525 (SC) held that the commission amounts which were earned by non-residents for the services rendered outside India cannot be deemed to be incomes that have either accrued or arisen in India.

10.5.8 The Explanations introduced to explain and expand the scope of "business connection" in Section 9(1) of the Act are as under:-

"[Explanation 2.—For the removal of doubts, it is hereby declared that 'business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,—

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the nonresident; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or habitually secures orders in India, mainly or wholly for the nonresident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

***Provided** that such business g¯n¯ration shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business."*

"Explanation 2A.—For the removal of doubts, it is hereby clarified that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—

(a) transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be

prescribed; or

(b) systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means."

"Explanation 3.—Where a business is carried on in India through a person referred to in clause (a) or clause (b) or clause (c) of Explanation 2, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India."

From a plain reading of these explanations, it is clear that it is applicable only if the non-residents have income accruing or arising to them in India and the transactions happen in India. As such, in our view, these Explanations (supra) are not applicable to the facts of the case on hand, where the commission agents are non-residents and the impugned payments are made for services rendered outside India.

10.5.9 The explanation at the end of Section 9 of the Act introduced by Finance Act, 2010, w.e.f. 01.06.1976 reads as under:-

"Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,—

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India."

As can be seen from the above, this Explanation applies to clause (v), clause (vi) and clause (vii) of sub section (1) of section 9of the Act, (i) which relates to income by way of interest, royalty and "fees for technical services." In the case on hand, it is the commission income of the non-resident for the services rendered outside India and therefore this Explanation has no application to the facts of the assessee's case.

10.5.10 In view of the factual and legal matrix of the case, as discussed above, we hold that as the services are provided outside India, the commission payments made by the assessee to non-residents cannot be treated as income deemed to accrue or arise in India and therefore the provisions of Section 195 of the Act are not applicable in the case on hand. In order to invoke the provisions of Section 195 of the Act, the income should be chargeable to tax in India. In the case on hand, since the commission payments to non-residents are not chargeable to tax in India, therefore the provisions of section 195 of the Act are not applicable/attracted. In this view of the matter, we hold that the action of the AO in invoking the provisions of section 40(a)(ia) of the Act to disallow the impugned payments is unsustainable and the said disallowance is deleted. Consequently, ground No.6 of the assessee's appeal is allowed.

11. Ground No.7 – Charging of interest under section 234B and 234D of the Act

11.1 In this ground (supra), the assessee denies itself liable to be charged interest under section 234B and 234D of the Act. The charging of interest is consequential and mandatory and the AO has no discretion in the matter. This proposition was upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC). We, therefore, uphold the AO's action in charging the aforesaid interest. We, however, direct the AO to re-compute the interest chargeable under section 234B and 234D of the Act while giving effect to this order.

12. Ground No.8

12.1 In this ground (supra), the assessee challenges the initiation of penalty proceedings under section 274 r.w.s. 271(1)(c) of the Act. Since no penalty under section 271(1)(c) of the Act has been levied by the AO in the impugned order, this ground is premature and non-maintainable and is accordingly dismissed.

13. In the result, the assessee's appeal for Assessment Year 2010-11 is partly allowed.

Revenue's appeal in ITA No.1447/Bang/2017 for Assessment Year 2010-11

14.1 In this appeal, Revenue has raised the following grounds:

1. *The order of the learned CIT(A) is opposed to law and facts of the case.*
2. *Whether on the facts and circumstances of the case, the CIT(Appeals) was justified in law in holding that the expenditure incurred towards expenses incurred in foreign currency attributable to delivery of computer software for providing technical services outside India to be excluded both from export turnover and total turnover for the purpose of computation of deduction u/s 10A of the Act, whereas such exclusion is permitted to arrive at the export turnover only as per the definitions given in sec. 10A of the Act and total turnover has not been defined in the section?"*
3. *"The CIT(A) erred in not considering the appeal of the Revenue against the order of the jurisdictional High Court in the case of CIT v. Tata Elxsi Ltd., which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Apex Court"?*
4. *For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.*
5. *The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above.*

14.2 The grounds raised by Revenue in this appeal (supra), all relate to the issue of exclusion of expenses incurred in foreign currency from both export turnover and total turnover, while computing the deduction under section 10A of the Act. The CIT(A) held that, the expenses incurred in foreign currency which was reduced from export turnover by the AO shall also be excluded from the total turnover and in doing so, followed the judgment of the Hon'ble Delhi High Court in the case of *CIT* v. *Genpact India* (*supra*).

14.3 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncement cited. he jurisdictional High Court of Karnataka in the case of *CIT* v *Tata Elxsi Ltd* (349 ITR 98) (Kar) has held that when certain expenses are excluded from the export turnover for the purposes of computing deduction admissible under the Act; like u/s. 10A of the Act, such expenses are also to be excluded from total turnover, as export turnover is a part of total turnover. The decision in the case of *Tata Elxsi Ltd* (*supra*) has also been followed by the Hon'ble Court in its order in the case of *DCIT* v *Motor Industries Co. Ltd.,* (ITA No. 776/2006, 744/2007 and 1155/2006 dated 13.06.2014), holding that if any expenditure is sought to be removed from export turnover, then it should also be reduced from total turnover for the purposes of computing the eligible deduction u/s. 10A of the Act. This issue is no longer res integra, and has been decided in favour of the assessee and against revenue by the decision of the Hon'ble Apex Court in the case of *CIT* v. *HCL Technologies Ltd*. [2018] 93 taxmann.com 33 (SC); wherein at paras 19 to 21, it has been held as under :-

"19. In the instant case, if the deductions on freight, telecommunication and insurance attributable

to the delivery of computer software under Section10A of the IT Act are allowed only in Export Turnover but not from the Total Turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the Respondent which could have never been the intention of the legislature.

20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.

21. On the issue of expenses on technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total turnover."

14.4 In this legal and factual matrix of the case, as discussed above, respectfully following the decision of the Hon'ble Apex Court in the case of *CIT* v. *HCL Technologies Ltd.*, (*supra*) , we direct the AO to allow assessee' s claim for deduction under Section 10A of the Act. Consequently, the grounds raised by revenue are dismissed.

15. In the result, Revenue's appeal for Assessment Year 2010-11 is dismissed.

Assessee's appeal in ITA No.1520/Bang/2017 – Assessment Year 2011-12

16. In this appeal, the assessee has raised the following grounds:-

1. *The order dated 9 March 2015 (`impugned order') passed by the Deputy Commissioner of Income Tax, Circle 25(1), New Delhi (hereinafter referred to as `Ld. AO') under section 143(3) r.w.s 92CA(4) of the Income Tax Act, 1961 (`Act') and upheld by the Commissioner of Income-tax (Appeals) — 15 1'Ld. CIT(A)'] is contrary to the facts and circumstances of the case and hence is bad in law.*

Reduction in deduction claimed under section 10A of the Act

2. *The CIT(A) has erred on facts and in law in upholding the order of the Ld. AO restricting deduction under section 10A of the Act to INR 26,37,87,412 as against INR 37,90,37,279 as claimed by the Appellant.*

2.1 *On facts and circumstances of the case, the Ld. CIT(A) has erred in upholding the action of the Ld. AO to exclude expenditure incurred in foreign currency amounting to INR 20,61,56,297 from export turnover (`ET') while computing the deduction under section 10A of the Act without appreciating the fact that these amount were neither included in the export invoices nor did they form part of ET.*

2.2 *On the facts and circumstances of the case, the Ld. CIT(A) has erred in upholding the action of the AO to exclude income arising from write back of certain liabilities and amounts recovered from employees amounting to INR 43,26,725 and INR 1,02,874 respectively while calculating business profits for computation of deduction under section 10A of the Act.*

2.3 *On facts and circumstances of the case, the Ld. CIT(A) has erred in not adjudicating on the ground that deduction allowable under section 10A of the*

Act ought to be re-computed with reference to the assessed business income and not the returned business income.

Disallowance of commission expense on account of non-deduction of tax at source

3. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in upholding the action of the Ld. AO to disallow export commission expense paid to non-resident parties under section 40(a)(i) of the Act without appreciating that such payments were not taxable in India.*

Levy of interest under section 234B of the Act

4. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in upholding the levy of interest under section 234B of the Act.*

Penalty

5. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in not directing the Ld. AO to drop the penalty proceedings initiated under section 274 read with section 271(1)(c) of the Act.*

Relief

6. *On the facts and circumstances of the case and in law, the Appellant prays that the Ld. AO be directed to grant all such relief arising from the preceding grounds as also all relief consequential thereto.*

17. The Ground Nos.1 and 6 (*supra*) are general in nature and therefore no adjudication is called for thereon. These grounds are accordingly dismissed as infructuous.

18. Ground 2(2.1) – Deduction under section 10A of the Act – Exclusion of expenses incurred in foreign currency

18.1 This issue has been considered and adjudicated in pre paragraphs 8 to 8.4 of this order while disposing off ground No.4 of the assessee's appeal for Assessment Year 2010-11 (supra). As the facts are similar in this year, the decision rendered by us for Assessment Year 2010-11 would also be applicable for this Assessment Year 2011-12. As in the earlier Assessment Year 2010-11, in this year also, the AO has reduced the expenses incurred in foreign currency from the export turnover while computing the deduction under section 10A of the Act. While upholding the AO's action, the CIT(A) has allowed the assessee's alternate claim that if such expenses are excluded from export turnover, they should also be excluded from the total turnover.

18.2 We have considered the rival contentions put forth on this issue. While the assessee has given some break-up of details of expenses incurred in foreign currency, the details do not establish that all these expenses were not incurred outside India as claimed by the assessee. In the absence of details, the issue is only academic and we do not consider it necessary to adjudicate this issue as the CIT(A) has addressed the assessee's grievance and allowed the assessee's claim raised on this issue. Consequently, ground No.2.1 of assessee's appeal is dismissed as academic.

19. Ground No.2.2 – 'Other Income' to be included for computing deduction under section 10A of the Act

19.1.1 In the course of assessment proceedings, the AO observed that the assessee had claimed deduction under section 10A of the Act in respect of amounts of Rs.1,02,874/- recovered from employees and liabilities of Rs.1,15,51,997/- written back; which have been grouped under the head "other Income" in the audited accounts. The AO was of the view that these amounts, not being derived from the export of computer software, excluded them from the export income while computing the

deduction under section 10A of the Act. On appeal, the CIT(A) upheld the action of the AO.

19.1.2 Before us, the learned AR of the assessee submitted that this issue has been considered and decided by the Hon'ble Karnataka High Court 19.1.1 in the case of *CIT* v. *Hewlett Packard Global Soft Ltd*., [2017] 87 taxmann.com 182 (Karnataka) (FB), wherein it was held that all profits and gains of 100% EOU, including incidental income by way of interest on bank deposits or staff loans would be entitled to 100% exemption/deduction under section 10A or 10B of the Act. It was further submitted that the ITAT – Delhi Bench in the case of *Headstrong Services India Pvt. Ltd.,* v. *DCIT* [2016] 66 taxmann.com 185 (Delhi – Trib.) in its order held that when items were claimed as deduction in earlier years from the eligible income; which went to reduce the eligible income in that year; when the amount is now reversed/written back, the same should also be made eligible for the benefit of deduction under section 10A of the Act.

19.2 The learned DR supported the orders of the authorities below.

19.3 We have considered the rival contentions put forth before us on this issue and perused the judicial pronouncements cited (supra). We find that the principles laid down in the above-mentioned judicial pronouncements of the Hon'ble Karnataka High Court in the case of *CIT* v. *Hewlett Packard Global Soft Ltd.*, (i) and of the Delhi Bench of ITAT in the case of *Headstrong Services India Pvt. Ltd.,* v. *DCIT* (*supra*) squarely apply to the facts of the assessee in the case on hand. The items of income grouped under the head "Other Income' and the write back of liabilities arise out of the business of the assessee and therefore are to be included as business income, while computing the deduction under section 10A of the Act. Consequently, ground No.2.2 of assessee's appeal is allowed.

20. Ground No.2.3 – Deduction under section 10A of the Act on assessed income

20.1 The very same issue i.e., that the assessee is to be allowed deduction under section 10A of the Act on assessed income has been adjudicated at pre paragraphs 9 to 9.2.3 of this order while disposing off ground No.5 of assessee's appeal for Assessment Year 2010-11 (supra). All facts being similar, the same would apply this year, i.e., Assessment Year 2011-12 also. In the decision rendered by us for Assessment Year 2010-11 (supra), it has been held that when disallowance of expenses has been made under section 40(a)(i) of the Act for failure on the part of the assessee to deduct tax at source on such payment and such disallowance automatically enhances the taxable income of the assessee, then the assessee is entitled for deduction under section 10A of the Act on the enhanced assessed income. As the facts of the matter before us for this year are also similar to those in Assessment Year 2010-11, respectfully following the aforesaid decision of the Hon'ble Karnataka High Court in the case of *CIT* v. *M. Pact Technology Services Pvt. Ltd*., (*supra*), we hold that the deduction under section 10A of the Act shall be allowed on the assessed income for this year also. Consequently, ground No.2.3 of the assessee's appeal is allowed.

21. Ground No.3 – Disallowance of commission paid to foreign parties under section 40(a)(i) of the Act

21.1 The issue raised in this ground (supra) has been considered and adjudicated by us in pre paragraphs 10 to 10.5.10 of this order while disposing off ground No.6 of the assessee's appeal for Assessment Year 20120-11. As the facts of the matter are similar for this Assessment Year 2011-12 also, the finding rendered by us therein would equally apply for this year also.

21.2 In the decision/finding rendered for Assessment Year 2010-11 (supra), it has been held that as the services are provided outside India, the commission payments made to non-residents cannot be treated as income deemed to accrue or arise in India and therefore the provisions of Section 195 of the Act have no application and are not attracted in the case on hand. In order to invoke the provisions of Section 195

of the Act, the income in question should be exigible to tax in India. In the case on hand, the commission payments to non-residents are not chargeable to tax in India and therefore the provisions of Section 195 of the Act are not applicable/attracted. Therefore, in our view, the action of the AO in invoking the provisions of Section 195 of the Act to disallow the impugned payments of commission to non-resident parties under section 40(a)(i) of the Act is unsustainable and therefore is to be deleted for Assessment Year 2011-12. Consequently, ground No.3 of the assessee's appeal is allowed.

22. Ground No.4 – Charging of interest under section 234B of the Act

22.1 In this ground (*supra*), the assessee denies himself liable to be charged interest u/s 234B of the Act. The charging of interest is consequential and mandatory and the AO has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC) and I, therefore, uphold the action of the AO in charging the assessee the aforesaid interest u/s 234B of the Act. The AO is, however, directed to re-compute the interest chargeable u/s 234B of the Act, if any, while giving effect of this order.

23. Ground No.5

23.1 In this ground (*supra*), the assessee challenges the initiation of penalty proceedings under section 274 r.w.s. 271(1)(c) of the Act. Since no penalty under section 271(1)(c) of the Act has been levied by the AO in the impugned order, this ground is premature and non-maintainable and is accordingly dismissed.

24. In the result, the assessee's appeal for Assessment Year 2011-12 is partly allowed.

Revenue's appeal in ITA No.1448/Bang/2017 for Assessment Year 2011-12

25. In its appeal for Assessment Year 2011-12, Revenue has raised the following grounds:

1. *The order of the learned CIT(A) is opposed to law and facts of the case.*
2. *"Whether on the facts and circumstances of the case the CIT(A) is justified in law in not(considering the provisions of Section 36(1) of the I. T. Act"?*
3. *"Whether on the facts and circumstances of the case the CIT(A) is justified in law in considering that the contribution of PF remitted by the employer after due date prescribed is not in contravention to the provisions of section 43B of the I. T. Act"?*
4. *Whether on the facts and circumstances of the case, the CIT(Appeals) was justified in law in holding that the expenditure incurred towards expenses incurred in foreign currency attributable to delivery of computer software for providing technical services outside India to be excluded both from export turnover and total turnover for the purpose of computation of deduction u/s 10A of the Act, whereas such exclusion is permitted to arrive at the export turnover only as per the definitions given in sec. 10A of the Act and total turnover has not been defined in the section?"*
5. *"The CIT(A) erred in not considering the appeal of the Revenue against the order of the jurisdictional High Court in the case of CIT v. Tata Elxsi Ltd., which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Apex Court"?*
6. *For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.*

7. The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above.

26. Ground Nos. 1, 6 and 7 (*supra*), being general in nature and not urged before us are rendered infructuous and accordingly dismissed.

27. Ground Nos. 2 and 3 – Disallowance of employees' contribution to Provident Fund (PF)

27.1 The facts of the matter on this issue, as emanate from the material on record, are that in the course of assessment proceedings, the AO noticed that the employees' contribution to PF for the months of April, May and October, 2010 were deposited belatedly; beyond the period stipulated under the respective Act. On being queried in this regard, the assessee contended that these amounts have been paid before the due date for filing the return of income and therefore no disallowance is called for. The AO, however, rejected the assessee's contention and held that the assessee can be allowed deduction thereof, only if the employees' contribution to PF is paid before the date specified i.e., 20th of the following month. On appeal, the CIT(A) allowed the assessee's claim by relying on the decision of the Hon'ble Delhi High Court in the case of *CIT* v. *AIMIL Ltd.*, [2010] 321 ITR 508 (Del HC).

27.2 Aggrieved by the order of the CIT(A), Revenue has carried the matter in appeal before us. After having heard the rival contentions in the matter and considering the judicial precedents in the matter, we find that this issue has been decided by the Hon'ble Karnataka High Court in the case of *CIT* v. *Sabari Enterprises* [2008] 298 ITR 141 (Kar), which has been followed by the Hon'ble Karnataka High Court in the case of *CIT* v. *Spectrum Consultants India Pvt. Ltd*., in WA No.4077/2013 (T-IT) dated 09.12.2013. In the aforesaid decisions (*supra*), the Hon'ble Court has held that the employer shall get deduction for payment of employees' contributions to PF provided they are deposited before the due date for filing the return of income under section 139(1) of the Act. It has further held that Parliament has not made any distinction between employees' contribution and employer's contribution to PF and that the above conditions/time specified for payment thereof apply to both these contributions to PF. Respectfully following the aforesaid judgments of the Hon'ble Karnataka High Court in the case of Sabari Enterprises (supra) and Spectrum Consultants India Pvt. Ltd., (supra), we uphold the decision of the CIT(A) and dismiss ground Nos.2 and 3 of Revenue's appeal.

28. Ground Nos. 4 and 5 – Deduction under section 10A of the Act – Export turnover/total turnover

28.1 The grounds raised by Revenue in this appeal (supra), all relate to the issue of exclusion of expenses incurred in foreign currency from both export turnover and total turnover, while computing the deduction under section 10A of the Act. The CIT(A) held that, the expenses incurred in foreign currency which was reduced from export turnover by the AO shall also be excluded from the total turnover and in doing so, followed the judgment of the Hon'ble Delhi High Court in the case of *CIT* v. *Genpact India* (*supra*).

28.2 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncement cited. he jurisdictional High Court of Karnataka in the case of *CIT* v *Tata Elxsi Ltd* (349 ITR 98) (Kar) has held that when certain expenses are excluded from the export turnover for the purposes of computing deduction admissible under the Act; like u/s. 10A of the Act, such expenses are also to be excluded from total turnover, as export turnover is a part of total turnover. The decision in the case of *Tata Elxsi Ltd* (*supra*) has also been followed by the Hon'ble Court in its order in the case of *DCIT* v *Motor Industries Co. Ltd.,* (ITA No. 776/2006, 744/2007 and 1155/2006 dated 13.06.2014), holding that if any expenditure is sought to be removed from export turnover, then it should also be reduced from total turnover for the purposes of computing the eligible deduction u/s. 10A of the Act. This issue is no longer res integra, and has been decided in favour of the assessee and against

revenue by the decision of the Hon'ble Apex Court in the case of CIT V. HCL Technologies Ltd. (2018) 93 taxmann.com 33 (SC); wherein at paras 19 to 21, it has been held as under :-

> *"19. In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under Section10A of the IT Act are allowed only in Export Turnover but not from the Total Turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the Respondent which could have never been the intention of the legislature.*
>
> *20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.*
>
> *21. On the issue of expenses on technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total turnover."*

28.3 In this legal and factual matrix of the case, as discussed above, respectfully following the decision of the Hon'ble Apex Court in the case of *CIT* v. *HCL Technologies Ltd.* (*supra*) , we direct the AO to allow assessee's claim for deduction under Section 10A of the Act. Consequently, the grounds raised by Revenue are dismissed.

29. In the result, Revenue's appeal for Assessment Year 2011-12 is dismissed.

30. To sum up, Assessee's appeals for Assessment Years 2010-11 and 2011-12 are partly allowed and Revenue's cross appeals for Assessment Years 2010-11 and 2011-12 are dismissed.

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