

आयकर अपीलीय अधिकरण पुणे न्यायपीठ “ए” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “A”, PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No. 216/PUN/2015
निर्धारण वर्ष / Assessment Year :2010-11

Capgemini Technology Services India Limited,
(in the matter of iGate Computer Systems Limited,
(formerly Patni Computer systems Limited
amalgamated with iGate Global Solutions Limited
and name changed)
Level 2, Tower-III, Cybercity, Magarpatta City,
Hadapsar, Pune-411013

.... अपीलार्थी/Appellant

PAN: AABCP6219N

Vs.

The Dy. Commissioner of Income Tax,
Circle – 11, Pune

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 360/PUN/2015
निर्धारण वर्ष / Assessment Year :2010-11

The Dy. Commissioner of Income Tax,
Circle – 11, Pune

.... अपीलार्थी/Appellant

Vs.

Capgemini Technology Services India Limited,
(in the matter of iGate Computer Systems Limited,
(formerly Patni Computer systems Limited
amalgamated with iGate Global Solutions Limited
and name changed)
Level 2, Tower-III, Cybercity, Magarpatta City,
Hadapsar, Pune-411013

.... प्रत्यर्थी / Respondent

PAN: AABCP6219N

Assessee by : Shri C.H. Naniwadekar
Revenue by : Shri Rajeev Kumar, CIT

सुनवाई की तारीख /
Date of Hearing : 07.11.2017

घोषणा की तारीख /
Date of Pronouncement: 25.01.2018

आदेश / ORDER**PER SUSHMA CHOWLA, JM:**

The cross appeals filed by the assessee and the Revenue are against the order of DCIT (IT)-11, Pune, dated 31.01.2015 relating to assessment year 2010-11 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act').

2. The cross appeals filed by the assessee and the Revenue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. First, we shall take up the appeal of assessee in ITA No.216/PUN/2015.

The assessee has raised the following grounds of appeal :-

"In the facts and circumstances of the case and in law, the Learned Assessing Officer erred in making various additions / disallowances as under and further the Dispute Resolution Panel erred in conforming the said additions / disallowances and observations relating thereto made by the Assessing Officer

1. *In making addition of Rs.59,76,025/- to the total income, on account of interest chargeable on delayed receipts from the associated enterprises following adjustment made in the transfer pricing order u/s 92CA(3) of the Income-tax Act. The learned transfer pricing assessing officer erred:*
 - a. *In concluding that the sum of Rs.59,76,025/- is to be the arm's length compensation receivable by the assessee on account of interest chargeable on the amounts due from the associate entities beyond the credit period stipulated under the contract.*
 - b. *In not appreciating the facts obtained in the case and proposing adjustment without applying any specified method.*
 - c. *In not appreciating that on the basis of CUP method, no interest is recoverable from AE's since no interest is charged / recovered on delayed recoveries from Non-AEs also.*
 - d. *Without prejudice to the assessee's contention that no adjustment is required on account of delayed recoveries from AEs, in adding 3 basis points and 2 basis points towards guarantee cost to the average LIBOR rate for the purpose of computing the adjustment on account of delayed recoveries from AEs.*

2. *In respect of deduction u/s. 10A/10AA in respect of certain eligible undertakings of the Company:*
 - a. *In not allowing deduction u/s 10A/10AA in respect of various eligible undertakings established from A.Y. 2005-06 and onwards, amounting to Rs.261,15,09,975/-.*
 - b. *In assuming jurisdiction to disallow the deduction u/s 10A/10AA in respect of such undertakings by observing and holding that the new units/undertakings have been formed by splitting up of a business already in existence since the 1980s, and that the profits and gains of the units/undertakings subsequently setup by the Company are not eligible for deduction u/s 10A/10AA of the Income-tax Act 1961.*
 - c. *In denying the deduction u/s 10A/10AA in respect of such eligible undertakings on the basis of the nature of business etc.*
 - d. *In re-examining the conditions of eligibility of deduction u/s. 10A in respect of various undertakings established in earlier years. The Assessing Officer ought to have appreciated that the eligibility conditions in respect of splitting up of business already in existence is required to be complied with in the year of formation of the undertaking.*
 - e. *In relying on various observations and conclusions recorded in the assessment order for earlier years and thereby not allowing deduction u/s 10A/10AA in respect of such eligible undertakings.*
 - f. *In holding and concluding that new unit at Hyderabad is not exception to the stand taken by the Department and is clearly formed by the splitting up and the reconstruction of the existing business as provided in Section 10A(4)(ii) of the Act on the basis that some of the employees have been transferred to this unit and new unit is also carrying on the same business of software development / I T enabled services. Alternatively, not considering the Hyderabad unit as expansion of Pune unit which is also entitled to deduction u/s. 10A.*
3. *In not considering the new unit at TTC BPO as a separate and independent undertaking for the purpose of section 10A and holding that the unit at TTC BPO is formed by splitting up and reconstruction of the existing BPO business of the assessee which is being carried on at NDA 58 unit and thereby including the profits of the TTC BPO business in the profits of the NDA 58 unit for the purpose of allowing deduction u/s. 10A.*
4. *In making disallowance of Rs.11,92,04,968 u/s 40(a)(ia) in respect of datalink charges.*
5. *In making disallowance of Rs.72,10,172 u/s 40(a)(i) in respect of overseas payment for purchase of software and related payments.*
6. *The assessee craves leave to add to, withdraw or modify any of the grounds of appeal at the time of hearing."*

4. The Id. AR for the assessee at the outset pointed out that the issue raised in the present set of appeals filed by the assessee and the Revenue are covered by different orders of the Tribunal in assessee's own case. We proceed to take up the issues ground wise.

5. The first issue raised in the assessee's appeal is against the adjustment made under the transfer pricing provision on account of interest on delayed recoveries of debtors' balances from Associated Enterprises (AEs).

6. Briefly, in the facts of the case, the assessee for the year under consideration had furnished the original return of income at Rs.1,24,88,80,670/-. The assessee thereafter, filed revised return of income at Rs.1,26,38,51,747/-. The books profit computed under section 115JB of the Act as per the original return of income was Rs.562,71 crores and that as per the revised return was Rs.562,22 crores. The assessee was engaged in providing software development services. The assessee had its subsidiaries in US, UK, Germany and branches at various places in the world. The assessee had entered into various international transactions and hence reference was made to the Transfer Pricing Officer (TPO) u/s. 92CA(1) of the Act. The TPO noted that the assessee was a provider of information technology services and BPO services for a variety of applications for companies around the globe. The software services were provided offshore and onsite. The assessee had offshore development centers primarily in India. The assessee also had wholly owned subsidiaries in USA, UK and Germany and branches in various overseas locations. The Assessing Officer noted that the majority of the business of the assessee was subcontracted from Patni Inc, Patni GmbH and Patni UK. The said overseas entities entered into contracts with the ultimate customer and, in turn, subcontract, the project to the assessee. In addition to the said subcontracted projects from overseas entities, the assessee also directly provided services to certain customers in Japan, South East Asia, Europe, Australia and India. The overseas entities of the assessee entered into offshore software development contracts and the entire contract was passed on to the assessee for execution. The details of international transactions entered into by the assessee during the year are tabulated at pages 2 and 3 of the TPO's order. The total

turnover of the assessee was 1734.80 crores, which included other income of Rs.117.34 crores. The sales to AEs were Rs.606.49 crores, which were about 34.95% of total sales. The assessee had benchmarked the international transactions by doing an analysis at segmental level. The assessee has applied the Transactional Net Margin Method (TNMM) and PLI of the assessee in software development services was at 31.34% (OP/OC) and in BPO Segment it was 25.22%(OP/OC). The TPO noted from details filed by the assessee that there existed substantial delay in realization of amounts due from its AEs and further it had not recovered any interest on delayed payments from its AEs during the year though, the assessee was recovering the interest on account of delayed payments from AEs during the assessment years 2003-04 to 2005-06. The assessee was thus show caused to explain as to why adjustment be not made in respect of delayed realization from AEs, taking interest at average six months LIBOR plus 300 basis point plus 200 basis point as guarantee commission. The assessee explained that it had filed an appeal before the Tribunal in respect of the adjustment proposed, which had allowed the claim of assessee, however, due to retrospective amendment in the definition of international transactions. The appeal filed by the Revenue before the Hon'ble Bombay High Court was set aside to the Tribunal. The assessee further explained that during the year there was no interest cost on borrowings. It also explained the status of interest charged to the profit and loss account. The assessee also pointed out that it had not charged any interest on delayed recoveries and thus there was no price which applied in a transaction between persons other than AEs, in uncontrolled conditions. Relying on different decisions of Tribunal the assessee pointed out that no adjustment of interest on account of delayed realization of debtors is to be made. The TPO rejecting the plea of assessee in view of similar issue being decided by the DRP held that the rate adopted for computing the proposed adjustment was 5.79% i.e. 0.79% being

average rate of LIBOR as above, plus 3% and guarantee cost thereupon at the rate of 2%. The TPO thus, proposed an adjustment of Rs.1,00,73,871/-. However, the same was restricted to difference in delay between average credit period to AEs and non-AEs to Rs.59,76,025/-. The Assessing Officer in the draft assessment order passed made the said adjustment, against which the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP confirmed the decision of TPO in this regard and hence, the Assessing Officer in the order passed u/s. 143(3) r.w.s. 144C(3) of the Act made addition of Rs.59,76,025/-.

7. The assessee is in appeal against the order of Assessing Officer.

8. The Id. AR for the assessee pointed out that TPO/AO had applied the rate of LIBOR plus 3% plus 2% guaranteed commission whereas the assessee had not given any guarantee to its AEs. Referring to the order of Tribunal in assessment years 2006-07 to 2009-10 dated 06.06.2016, the Id. AR for the assessee pointed out that the Tribunal applied the rate of LIBOR plus 3% and deleted the guarantee commission.

9. The Id. DR for the Revenue placed reliance on the order of authorities below.

10. We have heard the rival contentions and perused the record. We find that similar issue of charging of interest on delayed recoveries of debtors from AEs arose before the Tribunal in assessee's own case. The Tribunal while disposing of the consolidated appeals for assessment years 2005-06 to 2009-10 with lead order in ITA No.1338/PN/2010 relating to assessment year 2006-07, order dated 06.06.2016 held that the transactions of interest due on amounts outstanding from its AEs is to be benchmarked at LIBOR plus 300 basis point. The AO/TPO was directed to determine the adjustment, if any, to be made in the hands of the

assessee on account of interest chargeable on the amounts due from its AEs beyond the credit period of 25 days after allowing the benefit of interest recovered by the assessee from its AEs. The said issue was decided by the Tribunal in assessee's own case relating to assessment year 2005-06 and the Tribunal while deciding the appeal of assessee in ITA No.1338/PN/2010 relating to assessment year 2006-07, applied the said ratio and directed the AO/TPO to re-compute the addition. The relevant findings of the Tribunal are in paras 31 and 32 of the order dated 06.06.2016. Reference is being made to the findings of Tribunal, however, the same are not being reproduced for the sake of brevity. The AO/TPO is thus, directed to re-compute the adjustment, if any, on account of interest chargeable on the amounts due from AEs as per the directions of Tribunal in the earlier years. The ground of appeal No.1 raised by the assessee is thus, allowed for statistical purpose.

11. The second issue raised by the assessee is with regard to the denial of deduction u/s. 10A of the Act.

12. The brief facts relating to the issue are that the assessee had claimed deduction u/s. 10A of the Act in respect of 12 undertakings wherein one was a BPO and the deduction claimed was allowed u/s. 10A of the Act. Out of balance 11 undertakings, the deduction u/s. 10A was allowed in respect of 10 undertakings, however, no such deduction was allowed in respect of new undertaking as established at Hyderabad. The Assessing Officer and the Commissioner of Income Tax (Appeals) had denied the said deduction on the ground that the same was formed by splitting up by the earlier undertakings.

13. The Id. AR for the assessee pointed out that the undertaking at Hyderabad was established during the current year and was a new undertaking. The same

was established because of fall out of the concern Satyam Computers. He further pointed out that the assessee had purchased the land, plant and machinery. Even the customers were new and there was no transfer from any of the units. The assessee only transferred 213 employees from earlier undertakings i.e. 66% and 129 employees were newly employed i.e. 37%. Referring to the CBDT Circular it was pointed out by the Id. AR that benchmark provided is that it should be less than 50%. The total employees were 339 at the Hyderabad undertaking. He pointed out that the assessee did not fulfill the employee condition as per the CBDT circular but if the provisions of the Act were considered, there is no such condition. The project related to agricultural farm insurance and the assessee had to take up half complete works, on the fall out of the concern Satyam. He stressed that the Circular was clarificatory and not mandatory. He referred to the provisions of section 10A(2)(ii) of the Act and pointed out that it deals with location of infrastructure. He referred to the orders of Tribunal, placed at pages 102 and 103 of the paper book. On without prejudice basis he pointed out that this undertaking may be treated as expansion of assessee's existing unit at Pune and deduction u/s. 10A of the Act be allowed for remaining period.

14. The Id. DR placed reliance on the orders of authorities below.

15. We have heard the rival contentions and perused the record. The issue raised in ground of appeal No. 2 is against the claim of deduction u/s. 10A/10AA of the Act in respect of various eligible undertakings established by the assessee from assessment year 2005-06 onwards. The case of the Revenue was that new units/undertakings were formed by splitting up of the business already in existence and hence, not eligible for claiming the aforesaid deduction. The assessee is also aggrieved by the order of Assessing Officer in denying the said deduction to such eligible undertaking which have been allowed the deduction by the Tribunal in

earlier years. The assessee has claimed that it has 12 eligible undertakings in the current year and there is no dispute in respect of the BPO undertaking. Out of balance 11 undertaking, 2 undertakings established in assessment year 2005-06, and 5 undertakings were established up to assessment year 2004-05; one undertaking established in assessment year 2007-08, one undertaking established in assessment year 2009-10 and TTC (BPO) undertaking established in assessment year 2009-10. The Tribunal in assessee's own case vide consolidated order dated 06.06.2016, in ITA No. 1338/PN/2010 relating to assessment year 2006-07, ITA No. 1451/PN/2011 relating to assessment year 2007-08, ITA No. 2507/PN/2012 relating to assessment year 2008-09 and ITA No. 282/PN/2014 relating to assessment year 2009-10 had individually considered the various undertakings established by the assessee from year to year and had also relied upon the order of Tribunal in assessment year 2005-06 and directed the Assessing Officer to allow the deduction u/s. 10A of the Act to the said eligible units. The only new undertaking which has been established in the current year is at Hyderabad. Following the parity of reasoning as in the earlier years, we direct the Assessing Officer to allow the deduction u/s. 10A of the Act in respect of various undertakings established by the assessee from year to year, except new undertaking at Hyderabad which we shall decide separately. As per the undertakings claimed as TTC (BPO) the same was established in assessment year 2009-10 and the Tribunal has in ITA No. 282/PN/2014 vide paras 90 and 91 held that since, the assessee satisfies the employee condition as per the CBDT Circular No. 14/2004 dated 08.10.2014 held that there was no justification in denial of deduction u/s. 10A of the Act. The assessee has raised the issue of denial of deduction u/s. 10A in respect of TTC (BPO) by way of ground of appeal No. 3 and hence, the same is allowed.

16. Now, the only issue which is left, is, with regard to undertaking established during current year at Hyderabad. The assessee has pointed out that the technical personnel engaged in the said unit were as under :

Total Employees	Transferred Employees	New Employees	% of Transferred
339	213	126	66%

17. The assessee has pointed out that the said undertaking was established at Hyderabad because of the fall out of concern Satyam, wherein the assessee had purchased the land and also purchased plant and machinery. The customers were also new and no asset was transferred from any of the old units except for the technical personnel engaged at Pune Unit. The Id. AR for the assessee fairly conceded that the assessee does not fulfill the condition laid down by the CBDT circular vis-à-vis the employee transferred from the existing undertaking; but as per the Act there was no such condition imposed. He further stated that the Circular was not mandatory. However, we find that in all the earlier years the case of the assessee was that it had fulfilled the condition of transfer of employees laid down as prescribed by the CBDT and consequently it was entitled to claim the deduction u/s. 10A of the Act as the new undertaking established by it was not an extension of the existing unit. A perusal of the consolidated order of Tribunal for earlier years would show that the claim of the assessee in respect of new undertaking established from year to year, on which the assessee had claimed the deduction u/s. 10A of the Act, had been allowed on the basis of said CBDT Circular. Accordingly, we find no merit in the plea of the assessee in this regard. The assessee had referred to the provisions of section 10A(2)(ii) of the Act and proviso therein. Section 10A(2)(ii) states that this section applies to any undertaking which fulfills the condition that it was not formed by the splitting up, or the reconstruction, of a business already in existence. The proviso laid down that this condition shall not apply in respect of any undertaking which is formed as a result of the

reestablishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section. Section 33B of the Act talks of a business of any industrial undertaking carried on in India was discontinued in any previous year by reason of extensive damage to, or destruction of, any building, machinery, plant or furniture owned by the assessee because of natural calamities i.e. riot, civil disturbance, accidental fire, explosion; or action by an enemy or action taken in combating an enemy. The section provides that thereafter, at any time before the expiry of three years from the end of such previous year, the business is re-established, reconstructed or revived by the assessee, he shall be allowed a deduction of a sum by way of rehabilitation allowance equivalent to the percentage provided therein. The case of the assessee before us is that it had established the new undertaking in Hyderabad because of the fall out the concern Satyam Computers. It is not the case that the said concern Satyam Computers which had rehabilitated itself or revived itself. The assessee or its Director have no connection with Satyam Computers. The provisions of section 33B of the Act are not attracted. Thus, the claim of the assessee in this regard is rejected.

18. Now, coming to an alternate plea raised by the assessee on without prejudice basis that the undertaking at Hyderabad may be treated as expansion of the existing unit at Pune, from where the employees were transferred. We find that the assessee had been held to be entitled to claim the deduction u/s. 10A of the Act in respect of Pune unit. Accordingly, we direct the Assessing Officer to allow the said deduction u/s. 10A of the Act to Hyderabad unit being expansion of Pune unit for the remaining period, as eligible to the Pune unit. The grounds of appeal No.2 and 3 raised by the assessee are thus, partly allowed.

19. The issue in ground of appeal No. 4 raised by the assessee is against the disallowance made u/s. 40(a)(ia) of the Act in respect of datalink charges. The Id. AR for the assessee pointed out that no TDS is required to be deducted on the aforesaid datalink charges as per the combined order of the Tribunal in ITA Nos. 1301 to 1303 & 1616/PN/2013 relating to assessment years 2007-08 to 2010-11 against order passed u/s. 201(1)/201(1A) of the Act.

20. We find that the Tribunal in ITA Nos. 1301 to 1303 & 1616/PN/2013 while deciding the appeals relating to assessment years 2007-08 to 2010-11 after deliberating upon the issue and relying on the various decisions of the different High Courts and Apex Court vide paras 15 to 25 adjudicated the issue and held as under :

“25. Now coming to the facts and circumstances of the present case, the assessee had furnished the explanation before the Assessing Officer and also filed written submissions before the CIT(A) vide letter dated 01.04.2013 along with Flow chart / Diagram of how the DATA links works which is placed at pages 24 to 26 of the Paper Book. The assessee also placed on record the sample copies of purchase orders at pages 27 onwards under which, it was explained that the perusal of the bills would reflect the basis of charges, rates, etc. which were fixed / agreed upon and finally billed by the DATA link providers and it was vehemently stated that the same does in no way indicate involvement or otherwise of human intervention in the DATA link process. In view thereof, in the absence of any human intervention between the assessee and the services provided by the DATA link provider, it cannot be said that the payment made by the assessee was for technical services. Merely because for maintenance purpose certain human intervention was provided, cannot lead to the surmise that the DATA link charges paid to various telecom service providers, were in the nature of technical services governed by the provisions of section 194J of the Act. The DATA link charges were paid for utilizing the standard facilities which were provided by the individual service providers by way of use of technical gadgets which were made available vide DATA link satellite link line established from one service provider to be carried over to the other service provider, does not involve technical services as there was only interconnection of the networks to the equipments of other service providers. In the absence of any human intervention for transmitting the DATA through such DATA link satellite link line, the payments made for utilizing such services was not in the nature of technical services governed by section 194J of the Act. Accordingly, we reverse the finding of CIT(A) in this regard and hold that DATA link charges of Rs.8,32,46,468/- were not liable for tax deduction at source under the provisions of section 194J of the Act. In view thereof, the grounds of appeal No.1 (a) and (b) are allowed. Since there was no requirement to deduct tax at source under section 194J of the Act, there was no liability upon the assessee and there was no failure on part of assessee for non-deduction of tax at source and consequently, the assessee was not liable to pay interest under section 201(1A) of the Act. The ground of appeal No.1(c) raised by the assessee is allowed.”

21. The year under appeal before us is assessment year 2010-11 and the Tribunal in the appeal against the order passed u/s. 201(1)/201(1A) of the Act while deciding the stand of the Revenue that the assessee has defaulted in not deducting tax at source out of datalink charges paid, had held that the payments made for utilizing such services was not in the nature of technical services governed by section 194J of the Act. Once, the same have been held to be not in the nature of technical services, then there is no requirement for deduction of tax at source. Hence, the assessee is not liable for any disallowance u/s. 40(a)(ia) of the Act. Thus, we delete the disallowance made by the Assessing Officer in this regard and the ground of appeal No. 4 raised by the assessee is allowed.

22. Now, coming to the ground of appeal No. 5 which is against the disallowance made u/s. 40(a)(i) of the Act in respect of overseas payment for purchase of software and related payments. We find that the Revenue had filed an appeal relating to assessment years 2008-09 to 2010-11 being ITA Nos. 1172 to 1174/PN/2013 against the order passed u/s. 201(1)/201(1A) of the Act in respect of the payment made for transfer of user rights of software and availing other services such as maintenance of software training etc. The Tribunal vide order dated 10.04.2015 after taking note of the various payments made, held that the assessee was not liable to deduct tax at source on such payments. Once, the assessee had been held not to deduct tax at source there is no merit in making any disallowance u/s. 40(a)(ia) of the Act. Accordingly, we delete the disallowance made by the Assessing Officer in this regard. The ground of appeal No. 5 raised by the assessee in appeal is thus, allowed.

23. Now, coming to the appeal filed by the Revenue. The Revenue in ITA No.360/PUN/2015 has raised the following grounds of appeal:-

- 1 *The Ld. DRP has erred in directing the Assessing Officer to delete disallowance u/s 10A(7) r.w.s 80IA(10) when in fact the assessee has earned substantial excessive profits as discussed in Assessment Order.*
- 2 *The Ld. DRP erred in directing the Assessing Officer to delete the ESOP cost on the basis of the special Bench of ITAT Bangalore decision in the case of Biocon Limited even though the issue has not reached finality and being notional.*
- 3 *The Ld. DRP erred in directing the Assessing officer to delete the disallowance made u/s 14A r.w. Rule 8D even though the assessee has earned substantial amount of tax free dividend and has disallowed meager amount u/s 14A on estimated basis.*
- 4 *The Ld. DRP has erred in directing the AO to grant set off of losses from undertaking eligible to claim deduction u/s.10A with the assessee's other business income before setting it off against the profits of undertaking eligible to claim deduction u/s.10A.*
- 5 *The Ld. DRP has erred in allowing deduction u/s.10A in respect of 8 units out of two units Akruiti and Millennium business Park without appreciating that the approving authority i.e. Software Technology Park of India (STPI) had approved the above two units as expansion of existing units on the basis of the assessee's application stating these units to be expansion of the existing units, thereby, not fulfilling the condition laid down u/s.10A(2) of the Act. The Department has filed SLP against the order of the Hon'ble High Court on same issue for the A.Ys. 2002-03 to 2004-05.*

24. The first issue raised by the Revenue is against deletion of disallowance made u/s. 10A(7) r.w.s. 80IA(10) of the Act.

25. The learned Authorized Representative for the assessee at the outset pointed out that the said issue is covered by the order of Tribunal in assessee's own case for assessment years 2006-07 to 2009-10, order dated 06.06.2016. The Tribunal while deciding the ground of appeal No.4 raised in ITA No.1338/PN/2010, relating to assessment year 2006-07, order dated 06.06.2016 decided the issue in respect of invoking the provisions of section 10A(7) r.w.s. 80IA(10) of the Act. The Tribunal after referring to the order of DRP in assessment years 2010-11 and 2011-12 and the ratio laid down by the Pune Bench of Tribunal in the case of M/s. Honeywell Automation India Ltd. Vs. DCIT in ITA No.18/PN/2011, relating to assessment year 2006-07, order dated 21.02.2015 restored the issue back to the file of Assessing Officer with direction to verify the records and if under identical circumstances, the DRP has decided the issue in favour of assessee for

assessment years 2010-11 and 2011-12, then the same be decided in the light of said directions.

26. In the facts relating to the year under consideration, the Assessing Officer observed that the applicability of provisions of section 10A(7) of the Act for claiming deduction on more than ordinary profits is relevant. The Assessing Officer noted the net profit margin of the assessee was at 31.34%. However, the mean margin of comparables selected for benchmarking the international transactions worked to 12.40%. The Assessing Officer was of the view that disallowance under section 10A(7) r.w.s. 80IA(10) of the Act is warranted in the case. The case of assessee was that there must be an arrangement between the assessee and other person and also the assessee must make more than ordinary profits out of such arrangements in order to invoke the applicability of section 10A(7) r.w.s. 80IA(10) of the Act. The Assessing Officer however, rejecting the plea of assessee recomputed the profits of BPO business and worked out the disallowance under section 10A(7) of the Act on protective basis at Rs.83,09,16,123/-. The disallowance under section 10A of the Act in respect of BPO business was worked out at Rs.85,95,207/-. The DRP deleted the disallowance made under section 10A(7) r.w.s. 80IA(10) of the Act, against which the Revenue is in appeal before us.

27. We find that the issue is squarely covered by the order of Tribunal in the case of M/s. Honeywell Automation India Ltd. Vs. DCIT (supra) and also in the case of assessee. The Assessing Officer has invoked the provisions of section 10A(7) of the Act while comparing margins shown by the assessee with mean margins of comparables. Admittedly, there is no arrangement of earning more than ordinary profits pointed out by the Assessing Officer and in the absence of such arrangement, the provisions of section 10A(7) of the Act, are not attracted. We find no merit in ground of appeal raised by the Revenue in this regard. We uphold the

order of DRP in directing the Assessing Officer to delete the disallowance made under section 10A(7) r.w.s. 80IA(10) of the Act though on protective basis. The ground of appeal No.1 raised by the Revenue is thus, dismissed.

28. The issue in ground of appeal No.2 raised by the Revenue is against deletion of disallowance made on account of ESOP cost.

29. The learned Authorized Representative for the assessee in this regard submitted that the said issue was also covered by earlier order of Tribunal for assessment years 2006-07 to 2009-10, dated 06.06.2016. The Tribunal while deciding the appeal in ITA No.282/PN/2014, relating to assessment year 2009-10 noted the contention of assessee that the issue of expenditure incurred on ESOP cost was decided by the DRP in subsequent assessment year and was also decided by the Special Bench of Tribunal in bunch of appeals in Biocon Ltd. Vs. DCIT with lead order in 368/Bang/2010, relating to assessment year 2003-04, order dated 16.07.2013. The Tribunal thus, directed the Assessing Officer to verify the claim of assessee and in case ESOP cost has been allowed in succeeding year, then same may be allowed in the hands of assessee in assessment year 2009-10 also. The learned Authorized Representative for the assessee before us has pointed out that the issue is covered and following the same parity of reasoning, we remit this issue back to the file of Assessing Officer to follow the directions of Tribunal in assessment year 2009-10 and decide the issue accordingly. The ground of appeal No.2 raised by the Revenue is thus, dismissed.

30. The ground of appeal No.3 raised by the Revenue is against deletion of additional disallowance under section 14A of the Act read with rule 8D of the Income Tax Rules, 1962 (in short 'the Rules').

31. Brief facts relating to the issue are that the assessee for the year under consideration had earned dividend income of Rs.54,11,33,097/-. The said dividend income was claimed as exempt. The assessee had made investment in shares of overseas subsidiary companies, bonds and mutual funds. The dividend from foreign subsidiaries was taxable in India and also interest earned on bonds. The assessee had not made any investment in shares of Indian companies. The assessee claims that it had made investments in other than equity oriented mutual fund scheme. Thus, the capital gain on redemption of such mutual fund units was taxable either as long term or short term capital gain. In the case of growth scheme, the assessee claimed not to be entitled to receive any dividend. The assessee further pointed out that the dividend was received / reinvested only in case of dividend option schemes of mutual funds. However, in such case also, capital gains were taxable. The assessee had disallowed sum of Rs.50 lakhs being expenditure incurred relating to exempt income earned as per provisions of section 14A of the Act. The assessee explained that no part of interest was attributable to earning of exempt income except interest of Rs.1,89,990/-. The said computation of disallowance under section 14A of the Act was filed on without prejudice basis. The assessee also gave working under Rule 8D of the Rules and pointed out that no disallowance is to be made in this regard. The Assessing Officer however, computed the disallowance under section 14A of the Act read with Rule 8D of the Rules at Rs.5,18,32,323/-. The Assessing Officer observed that apart from the investments in overseas subsidiaries where the dividend was taxable, investments made by the assessee in mutual funds was not taxable and had earned huge tax free dividends. The DRP on an appeal filed by the assessee noted that the Assessing Officer could invoke the provisions of Rule 8D of the Rules after meeting the conditions laid down in section 14(2) of the Act. The DRP observed that the Assessing Officer without mentioning as to on which grounds, he does not accept

the correctness of assessee's claim had proceeded to compute the disallowance under Rule 8D of the Rules, whereas the assessee had itself disallowed Rs.50 lakhs under section 14A of the Act. Hence, the disallowance made by the Assessing Officer was deleted by the DRP, against which the Revenue is in appeal.

32. The learned Departmental Representative for the Revenue pointed out that the perusal of assessment order at page 43 would reflect the total investments in mutual funds was Rs.2358 crores, on which dividend income earned was Rs.54.11 crores. The assessee had disallowed Rs.50 lakhs on adhoc basis, whereas the Assessing Officer had computed the disallowance as per Rule 8D of the Rules. Our attention was drawn to para 10 of the draft order to point out that disallowance was made after recording satisfaction under section 14(2) of the Act. In this regard, the learned Departmental Representative for the Revenue placed reliance on the order of the Hon'ble High Court of Delhi in *Indiabulls Financial Services Ltd. Vs. DCIT* (2016) 76 taxmann.com 268 (Del).

33. The learned Authorized Representative for the assessee on the other hand, pointed out that the assessee before the Assessing Officer has filed detailed note, copy of which is placed at page 67 of the Paper Book. However, there was no rebuttal to the working of disallowance. He stressed that the satisfaction as referred by the learned Departmental Representative for the Revenue was not satisfaction at all.

34. We have heard the rival contentions and perused the record. The Assessing Officer while passing the assessment order in para 10 had observed that the assessee had earned significant amount of tax free dividends and in the computation of income, the assessee has disallowed sum of Rs.50 lakhs under

section 14A of the Act. Then, reference is made to the Note filed by the assessee on expenditure disallowable under section 14A of the Act. The Assessing Officer thereafter, takes note of the contents of said explanation and observed as under:-

"I have gone through the submissions made by the assessee. It is observed that apart from investments in the overseas subsidiaries (where there is no tax-free income since the dividend is also taxable) the investments made by the assessee are in mutual funds. The entire investment in mutual fund is in non-equity scheme. In respect of investment in mutual funds, except for growth funds, the company receives tax free dividend. The amount of dividend received by the company is substantial. This is a clear case for application of Rule 8D. Hence, the contention of the assessee cannot be accepted. The disallowance u/s 14A is required to be made by applying Rule 8D. As per the working of disallowance u/s 14A as per Rule 8D, the amount of disallowance comes to Rs.5,68,32,323/-. The assessee has already disallowed Rs.50,00,000/- in the computation of income."

35. The requirement of section 14(2) of the Act is that the Assessing Officer is to record as to why the disallowance made by the assessee i.e. Rs.50 lakhs under section 14A of the Act is not correct. The Assessing Officer takes note of the disallowance, considers the explanation of assessee and holds that the contention of assessee cannot be accepted. The preliminary satisfaction to be recorded by Assessing Officer, before making disallowance under section 14A of the Act read with Rule 8D of the Rules, is missing in the case; in the absence of the same, there is no merit in the disallowance made by the Assessing Officer. We find support from the ratio laid down by the Hon'ble Supreme Court in *Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT & Anr.* (2017) 394 ITR 449 (SC).

"37. We do not see how in the aforesaid fact situation a different view could have been taken for the assessment year 2002-03. Sub-sections (2) and (3) of section 14A of the Act read with rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of section 14A(2) and (3) read with rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."

(underline provided by us for emphasis)

36. The ratio laid down by the Hon'ble High Court of Delhi in *Indiabulls Financial Services Ltd. Vs. DCIT (supra)* is thus, not applicable. The ground of appeal No.3 raised by the Revenue is thus, dismissed.

37. The next ground of appeal is in respect of setting off of losses of 10A undertakings against other business income. The said issue as per the assessee is squarely covered by the order of Tribunal and the Hon'ble Bombay High Court in assessee's own case in earlier years. Reliance was placed on the order of Tribunal for assessment years 2006-07 to 2009-10, dated 06.06.2016.

38. We find that similar issue arose before the Tribunal in assessee's own case and while deciding the appeal for assessment year 2006-07, the Tribunal held that the said issue stands covered by the decision of Hon'ble Bombay High Court in assessee's own case, which had been followed by the Tribunal in assessment year 2005-06. The Tribunal also observed that no SLP was filed by the Revenue before the Hon'ble Supreme Court. The relevant findings of the Tribunal are in paras 46, 47 and 48. We are making reference to the said findings but the same are not being reproduced for the sake of brevity. We find that the Revenue in an appeal filed before the Hon'ble Bombay High Court in ITA No.1148 of 2012, relating to assessment year 2002-03 had raised the issue in respect of set off of losses against business profits including specific provisions of section 10A(6) of the Act and also taking note of provisions of section 10A(8) of the Act. The Hon'ble Bombay High Court vide order dated 28.02.2013 held that both the issues were covered against the Revenue and in favour of assessee in line with the earlier order of Hon'ble Bombay High Court dated 01.07.2011 and 28.02.2013. Following the same parity of reasoning, we find no merit in the ground of appeal No.4 raised by the Revenue and the same is dismissed.

39. The last issue raised by the Revenue vide ground of appeal No.5 is against the order of CIT(A) in allowing deduction under section 10A of the Act in respect of two units. We have already decided this issue in assessee's appeal and also the Tribunal in assessment year 2006-07 had allowed deduction under section 10A of the Act in respect of two units in paras 80 and 81 of the order dated 06.06.2016. Since the issue stands covered and following the same parity of reasoning, we find no merit in the ground of appeal No.5 raised by the Revenue.

40. In the result, appeal of assessee is partly allowed and the appeal of Revenue is dismissed.

Order pronounced on this 25th day of January, 2018.

Sd/- (ANIL CHATURVEDI)	Sd/- (SUSHMA CHOWLA)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 25th January, 2018.

RK / GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT (TP/IT), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune