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IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1857/PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

Capgemini Technology Services India Limited (earlier known as iGATE Global Solutions Ltd.) Plot No.14, Rajiv Gandhi Infotech Park, Hinjewadi, Phase-III, MIDC-SEZ, Village Man, Taluka Mulshi, Pune – 411057 PAN: AABCM4573E	Vs.	DCIT, Circle-11, Pune
Appellant		Respondent

आयकर अपील सं. / ITA No.1935/PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

ACIT, Circle-11, Pune	Vs.	Capgemini Technology Services India Limited (earlier known as iGATE Global Solutions Ltd.) Plot No.14, Rajiv Gandhi Infotech Park, Hinjewadi, Phase-III, MIDC-SEZ, Village Man, Taluka Mulshi, Pune – 411057 PAN: AABCM4573E
Appellant		Respondent

Assessee by	Shri C.H. Naniwadekar
Revenue by	Shri Mohit Jain & Shri Piyush Kumar Singh Yadav
Date of hearing	26-08-2022
Date of pronouncement	30-08-2022

आदेश / ORDER

PER R.S. SYAL, VP :

These two cross appeals – one by the assessee and the other by the Revenue - arise out of the order passed by the CIT(A)-1, Pune on 23-05-2017 in relation to the assessment year 2013-14.

2. Succinctly, the facts of the case are that the assessee is a company engaged in providing Software Development services and also IT enabled services. The e-return was filed declaring total income at Rs.6,98,02,52,640/- as per the normal computation and book profit u/s.115JB of the Income-tax Act, 1961 (hereinafter also called 'the Act') at Rs.7,08,45,55,209/-. Thereafter, the return was revised twice. The assessee claimed deduction u/s.10AA. The assessment was completed by determining the total income, under the regular provisions of the Act, at Rs.766,09,96,530/-.

I. <u>SET OFF OF LONG TERM CAPITAL LOSS OF AMALGAMATING COMPANY</u>

3. The first major issued raised by the assessee, through ground no. 9, is against not allowing brought forward long term capital loss of Rs.104,46,39,309/- in respect of erstwhile iGATE Computer Systems Limited (ICSL), which amalgamated with the assessee company w.e.f. 01-04-2012 under the Scheme approved by the Hon'ble High Court.

4. The factual matrix anent to this ground is that the assessee claimed brought forward long term capital loss of Rs.109.86 crore. On perusal of the details, the AO observed that a sum of

Rs.104,46,39,309/- was long term capital loss of the erstwhile ICSL which got amalgamated with the assessee company on the first day of the financial year under consideration. On being called upon to explain as to how such long term capital loss could be allowed set off against the assessee's income, it was submitted that the amalgamation took place w.e.f. 01-04-2012 and the Scheme of amalgamation, as approved by the Hon'ble High Court, provided through para 10(f) that the loss etc., of the amalgamating company shall be available to the amalgamated company. The AO took note of the provisions of section 72A of the Act, which provide for the set off and carry forward only of the brought forward loss and unabsorbed depreciation of the amalgamating company in the hands of the amalgamated company. He found such provision as not covering long term capital loss. He also did not find any force in the contention of the assessee about the applicability of section 74 of the Act. The ld. CIT(A) accorded his imprimatur to the view canvassed by the AO.

5. We have heard the rival submissions and gone through the relevant material on record. ICSL got amalgamated with the assessee company w.e.f. 01-04-2012. A copy of the Scheme of

arrangement, as approved by the Hon'ble High Court, has been placed at page 68 onwards of the paper book. As per the Scheme of arrangement u/s.391 and 394 of the Companies Act, 1956, it has been provided that all the assets and liabilities of the undertaking of the amalgamating company shall stand transferred and vest in and deemed to be the assets and liabilities of the amalgamated company. Clause 4(h) of the Scheme provides that all the benefits including entitlements and incentives of any nature whatsoever including tax concessions (not limited to income tax, unexpired credit for minimum alternate tax, minimum alternate tax, fringe benefit tax, sales tax) of the Transferor company shall be transferred to and vest in the Transferee Company and: `these shall relate back to the appointed date as if the Transferee Company was originally entitled to all benefits to such incentive schemes and policies subject to the continued compliance by the Transferee Company of all the terms and conditions'. Para 10(f) of the Scheme provides that: `with effect from the appointed date and up to and including the effective date, any exemption from or any assessment with respect to any tax which has been granted or made, or any benefit by way of set off or carry forward as the case may be of any unabsorbed depreciation or investment allowance

or other allowance or loss which has been extended to or is available to the Transferor Company under the Income Tax Act, 1961 shall be available to the Transferee Company.' On going through the approved Scheme of amalgamation, it is discernible that all the assets and liabilities of the amalgamating (transferor) company vested in the assessee-amalgamated (transferee) company, which "shall be claimed by the Transferee Company and these shall relate back to the appointed date as if the Transferee Company was originally entitled to all the benefits". It has further been provided that any exemption which was benefit by way of set off or carry forward, as the case may be, of any unabsorbed depreciation/investment allowance or "other allowance or loss" which is available to the Transferor Company shall be available to the Transferee Company. On an analysis of the relevant clauses of the Scheme, it is overt that any loss which was available to amalgamating company shall become available to the amalgamated company for necessary set off.

6. Even otherwise, the law of succession puts the successor in the shoes of the predecessor, as a result of which all the liabilities and assets of the predecessor fall upon or vest in the successor subject to the specific stipulations under the relevant statutes. The

liabilities of the predecessor under the Income-tax Act, 1961 (hereinafter also called `the Act') become the obligations of the successor. In the like manner, the successor becomes entitled to all the entitlements, benefits or privileges that had accrued to the predecessor under the Act subject to the restrictions, if any, under the Act.

7. At this juncture, it would be relevant to take note of the judgment of the Hon'ble Supreme Court in *CIT Vs. T. Veerabhadra Rao (1985) 155 ITR 152 (SC).* In that case, a partnership firm took over the business of an earlier firm and all the assets and liabilities of the predecessor firm passed on to the successor firm. The assets included a certain amount of debt due from a certain party to the predecessor firm. Later on, the amount became bad and the successor assessee-firm claimed deduction of the same as bad debt. The AO denied the deduction on the ground that the debt was due originally to the predecessor firm and hence, the successor-assessee could not claim the deduction. When the matter finally came up before the Hon'ble Supreme Court, it allowed the deduction by holding that if the debt had been taken into account in computing the income of the predecessor firm, which was subsequently written off as

irrecoverable by the successor-firm, the assessee-successor will be entitled to the deduction. It further laid down that: `it is not imperative that the assessee referred to in sub-clause (a) must necessarily mean the identical assessee referred to in sub-section (b). A successor to the pertinent interest of a previous assessee would be covered within the terms of sub-clause (b)'. This judgment emphasizes the point that the successor-in-interest becomes entitled to all the entitlements and deductions which were due to the predecessor firm subject to the specific provisions contained in the Act.

8. At this juncture, we would like to accentuate that amalgamation is distinct from winding up. Whereas in winding up, the entity, as such, comes to an end along with the business that it was hitherto carrying; in amalgamation, only the entity carrying on the business either ceases to exist or is divested of its business, but the business continues albeit in the hands of another entity. All the assets and liabilities of the business of the amalgamating company devolve upon to the amalgamated company. The only difference which occurs is that the business which was earlier run by the amalgamating company is now continued by the amalgamated company. Thus, it is evident that

the *per se* existence of the business of the amalgamating entity does not extinct in amalgamation in contrast to the business coming to an end in the winding up. It is imperative to draw a line of distinction between `business' of an entity and the `entity' itself. When the business of the entity continues despite the closure of the entity or divesting of the business, then all the obligations and privileges attached to the business of the erstwhile entity, must go along with the business in the hands of the new entity carrying on such business, save as otherwise provided under the Act.

9. Adverting to the facts of the extant case, it is seen that the amalgamating company had long term capital loss of Rs.104.46 crore which vested in the assessee company along with all other assets and liabilities of ICSL. The assessee claimed set off of such long term capital loss of the amalgamating company, which the AO denied by relying on section 72A of the Act.

10. Section 72A with the heading: "Provisions relating to carry forward and set off of *accumulated loss* and unabsorbed depreciation allowance in amalgamation or demerger etc.," defines the term `accumulated loss' under sub-section (7) to mean: `so much of the loss of …. the amalgamating company …

under the head "Profits and gains of business or profession" (not being a loss sustained in a speculation business) which such …. amalgamating company….would have been entitled to carry forward and set off under the provisions of section 72 if the … amalgamation … had not taken place'. It is thus graphically clear from the prescription of section 72A, that it applies only in respect of accumulated losses and unabsorbed depreciation under the head "Profit and gains of business or profession". The benefit of accumulated loss and unabsorbed depreciation of the amalgamating company, which would have been otherwise available to the amalgamated company under the general law of succession, has been circumscribed by certain conditions set out in section 72A. This is a specific provision containing the conditions to be fulfilled for taking the benefit of accumulated loss and unabsorbed depreciation of the amalgamating company by the amalgamated company under the head "Profit and gains of business or profession". It is not as if section 72A is the only provision taking care of all the benefits, privileges or entitlements under the Act, originally pertaining to the amalgamating company now vesting in and passing on the amalgamated company. To reiterate and summarize, all the benefits under the Act due to the

amalgamating company devolve upon the amalgamated company because of succession. However, we need to find out the restrictions, if any, imposed by provisions of the Act upon availing such benefits.

11. Like section 72A, dealing exclusively with the loss under the head `Profits and gains of business or profession', section 35AB contains a specific provision dealing with amortization of expenditure of know-how in the case of amalgamation. This section provides that any expenditure incurred on acquiring any know-how for the purpose of business shall be amortized in six years beginning with the year in which the amount is paid. Sub-section (3) was inserted by the Finance Act, 1999 w.e.f. 01-04-2000 to provide that where there is transfer of an undertaking under scheme of amalgamation etc., and the amalgamating company is entitled to deduction under the section, then the amalgamated company etc., shall be entitled to claim deduction under the section in respect of such undertaking to the same extent and in respect of residual period as it would have been allowable to the amalgamating company on such amalgamation not taking place. This provision is clarificatory *qua* preliminary expenditure reiterating the-ever existing position of law on this

score that all the benefits and privileges etc. available to the predecessor-amalgamating company pass on to the successor-amalgamated company. Though sub-section (3) has been inserted w.e.f. 01-04-2000, the Pune Tribunal in *Kirloskar Oil Engines Ltd. Vs. JCIT (ITA Nos. 1039 and 1040/PUN/2000)* has held for the assessment years 1995-1996 and 1996-97 that the amalgamated company is entitled to deduction in respect of the residual period of expenditure on know-how incurred by the amalgamating company *de hors* sub-section (3) of section 35AB.

12. Similarly, the Tribunal in several decisions has held that MAT credit of the amalgamating company is to be allowed in the hands of the amalgamated company after amalgamation. The Chennai bench of the Tribunal in *ACIT Vs. M/s. Caplin Point Laboratories Ltd. (ITA No.667/Mds/2013)* has held, vide order dated 31-01-2014, that MAT credit is no different from the TDS credit and hence the carry forward of MAT credit of erstwhile company has to be allowed to the amalgamated company.

13. The upshot of the above discussion is that section 72A, like some other provisions distinctly dealing with the effects of amalgamation, exclusively applies to accumulated losses and unabsorbed depreciation of the amalgamating company in relation

to the income under the head "Profit and gains of business or profession". It is not a panacea for all the tax related issues of amalgamation, so as to have application insofar as the other tax entitlements, privileges or benefits in the hands of the amalgamating company, are concerned.

14. Section 74 deals with `Losses under the head `Capital gains". It specifically provides that where in respect of any assessment year, the net result of the computation under the head "Capital gains" is loss to the assessee, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year and clause (b) of sub-section (1) provides that: "insofar such loss relates to long term capital asset, it shall be set off against income, if any, under the head "Capital gain" assessable for that assessment year in respect of any other capital asset not being a short term capital asset". Clause (c) of section 74(1) provides that "if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on". Sub-section (2) of section 74 provides that no loss shall be carried forward under this section for more than eight assessment years immediately succeeding assessment year for which the loss was first computed. On going

through the directive of section 74, it becomes comprehensible that the amount of long term capital loss, not set off as per the relevant provisions, is carried forward to the following assessment years and so on for set off subject to other conditions including that of sub-section (2). In view of the fact that the business of the amalgamating company under amalgamation continues uninterruptedly by the amalgamated company, the benefit of such carry forward and set off earned by the business of the amalgamating company has to be allowed as per the mandate of section 74 to the amalgamated company, more so, when the Scheme of amalgamation as approved by the Hon'ble High Court specifically declares that benefits, *inter alia,* under tax laws `shall be transferred and vest in the Transferee Company….. as if the Transferee Company was originally entitled to all benefits'. The term "the assessee" as used in sub-section (1) of section 74, which was originally referring to the amalgamating company which suffered the loss, shall now substitute the amalgamated company to be considered as *the assessee* entitled to set off of the brought forward long term capital loss not only because of the Scheme of amalgamation so providing but also because of the assessee becoming a successor-in-interest of such loss. Going with the

phraseology of section 74, the sequitur is that the long term capital loss of the amalgamating company is available for set off in the hands of the assessee-amalgamated company. This ground is, thus, allowed.

II. <u>FRINGE BENEFIT TAX PAID IN AUSTRALIA</u>

15. Ground No.6 of the assessee's appeal is against not allowing deduction towards Fringe Benefit Tax (FBT) paid in Australia. The facts apropos this ground are that the assessee claimed deduction of Rs.9,84,270/- in respect of FBT paid in Australia both for the purposes of computation of income under regular provisions as well as book profits u/s.115JB of the Act. The AO refused to grant such deduction. The ld. CIT(A) allowed the benefit of deduction in the computation of book profit u/s.115JB by relying on Board Circular No.8/2005. However, the deduction was not allowed in the normal computation of income on the ground that it was hit by section 40(a)(ic) of the Act. Both the sides have come up in appeal on their respective stands.

16. Having heard both the sides and gone through the relevant material on record, it is seen that the Board, vide Circular No.8/2015, has opined that the prohibition for claiming deduction in respect of FBT does not apply in the computation of book

profits u/s.115JB and the same has to be allowed as deduction in such computation. We therefore countenance the view taken by the ld. CIT(A) on this score. The Department's ground No.8 is not allowed.

17. As regards the assessee's contention for allowing deduction under the regular provisions of the Act as well, we find that section 40(a)(ic) stipulates that no deduction shall be allowed in respect of "any sum paid on account of fringe benefit tax under Chapter XIIH". The Chapter XIIH deals with income tax on FBT under the provisions of the Act. Section 115W is the first section of the Chapter, which is a definition clause. Clause (b) states that fringe benefit tax: `means the tax chargeable under section 115WA'. Section 115WA dealing with `Charge of fringe benefit tax' provides through sub-section (1) that: `In addition to the income-tax charged under this Act, there shall be charged for every assessment year commencing on or after the 1st day of April, 2006, additional income-tax (in this Act referred to as fringe benefit tax) in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year at the rate of thirty per cent on the value of such fringe benefits.' Ergo, it gets explicit that section 40(a)(ic)

talks of not allowing deduction for fringe benefit tax paid under the Act in the computation of business income. It does not refer to any fringe benefit tax paid abroad outside the ambit of the Act. Such latter tax cannot be brought within the purview of section 40(a)(ic) because it is not a FBT under Chapter XIIH. As a corollary, the amount of the FBT paid in Australia is eligible for deduction under the normal provisions of the Act.

18. Our view is fortified by the judgment of Hon'ble Bombay High Court in *Reliance Infrastructure Ltd. Vs. CIT (2017) 390 ITR 271 (Bom.)* holding that income tax paid in Saudi Arabia was allowable as deduction in computing the income under the provisions of the Act as the same was not taken benefit of by the assessee either under section 90 or 91 of the Act. This position stands accepted by the legislature as is manifest from the insertion of Explanation 1 to section 40(a)(ii) of the Act declaring: `that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.' This implies that the deduction of income tax

paid outside India will be admissible if no benefit of such tax has been availed either u/s 90 or 91.

19. The assessee in the instant case has not taken any benefit of the FBT paid in Australia and further unlike section 40(a)(ic) of the Act, it is also not hit by any specific provision calling for disallowance. On a parity of the reasoning, such FBT is held to be deductible. This ground of the assessee is, therefore, allowed.

III. FOREIGN TAX CREDIT

20. Ground No.10 of the assessee's appeal is against not allowing the credit for taxes i.e., inhabitant tax, enterprise tax etc., paid in Japan. The Department has also raised connected ground no. 10 by which it has assailed certain relief granted by the ld. CIT(A) on account of tax paid in Japan and other countries.

21. Pithily put, the facts of this issue are that the assessee claimed foreign tax credit. On perusal of the details, the AO observed that the amount of total claim, including tax paid in Japan, was Rs.13,05,33,028/-. He noticed that the assessee claimed credit for four types of taxes paid in Japan viz., Corporation tax, Local Corporation Taxes, Inhabitant Taxes –Surcharge and Enterprise tax – Income based aggregating to 5,15,69,314/- Yen. Noticing the language of the Double Taxation Avoidance Agreement

(DTAA) between India and Japan, the AO opined that it covered only Corporation taxes. As such, the credit was allowed only in respect of Corporation taxes of 3,55,02,000/- Yen. He further noticed that the assessee company claimed deduction u/s.10AA in respect of the eligible units. Turnover of these eligible units was 8.90% of the total turnover, which, in his view, meant that no Indian income-tax was paid to the extent of profits of the eligible units qualifying for deduction u/s.10AA. He held that the proportionate foreign tax credit in respect of income of 10AA units could not be allowed as deduction. The AO thus allowed total foreign tax credit of Rs.10,92,54,956/- as against the assessee's claim of Rs.13.05 crore. The ld. CIT(A) approved the action of the AO to the extent of allowing credit for taxes paid in Japan as per the DTAA, referring only to income-tax as well as corporation tax. He, however, accepted the assessee's alternate contention of allowing deduction u/s.37(1) in respect of such taxes paid in Japan. On the other foreign tax credit not allowed by the AO on the ground of income of 10AA units not suffering any tax in India, he relied on the judgment of the Hon'ble Karnataka High Court in *Wipro Ltd. Vs. DCIT (2016) 382 ITR 179 (Kar)* to hold that such credit was admissible. This is how, both the sides

have come up in appeal before the Tribunal on their respective stands.

22. We have heard both the sides and gone through the relevant material on record. The AO computed the amount of foreign tax credit available to the assessee as under:

Table No.1:

	(in Rs.)
Total claim by the assessee as per the submission made	13,05,33,028/-
Less : Reduction in respect of Japan taxes: Yen 5,15,69,314 less Yen 3,55,02,000/- x conversion rate of 0.66	1,06,04,427/-
Revised amount	11,99,28,601/-
Less : 8.90% in respect of 10AA units	1,06,73,645/-
Balance claim	10,92,54,956/-

23. The detail of foreign tax credit claimed by the assessee during the year, is as under:

Table No.2:

Branch	Tax payable on converted income in India	Amount of tax paid in foreign currency	Credit available being lower of two
Australia	1,14,58,119	1,87,730	1,05,94,642
Belgium	84,13,219	1,23,432	84,13,219
Canada	7,52,27,873	11,57,102	6,28,15,596
Japan	2,51,97,787	5,15,69,314	2,51,97,787
Switzerland	2,15,35,045	2,30,520	1,59,93,284
Malaysia	97,57,502	4,26,751	75,18,499
	15,15,89,547		13,05,33,028

24. The assessee has given further break-up of the amount of taxes paid in Japan in the following two tables:

Table No.3:

Particulars	Amt. JPY	Remarks	Eligibility for FTC
Corporation taxes	35,502,000	Taxes are based on the taxable income (@30% on JPY 118 Mio)	Yes Eligible
Local Corporation taxes	4,954,700	Taxes are based on the taxable income (4.19% on JPY 118 Mio)	Yes Eligible
Inhabitant taxes - surcharge	7,348,914	This is in the nature of surcharge on the taxes (@20.7% on the corporation taxes of JPY 35.5 Mio)	Yes Eligible
Inhabitant taxes – Capital base	1,210,000	These taxes are paid on the capital base	Not Eligible
Enterprise taxes – income based	3,763,700	Taxes are based on the taxable income (3.18% on JPY 118 Mio)	Yes Eligible
Enterprise taxes – Value added base	1,276,500	These taxes are paid on the Value added base (including taxable income of JPY 118 Mio)	Not Eligible
Enterprise taxes – Capital base	51,500	These taxes are paid on the capital base	Not Eligible
Total taxes	54,107,600		

Table No.4:

Particulars	Amt. in JPY	Remarks
Corporation taxes	35,502,000	Taxes are based on the taxable income (@30% on JPY 118 Mio)
Local Corporation taxes	4,954,700	Taxes are based on the taxable income (4.19% on JPY 118 Mio)
Inhabitant taxes – Surcharge	7,348,914	This is in the nature of surcharge on the taxes (@20.7% on the corporation taxes of JPY 35.5 Mio)
Enterprise taxes – income based	3,763,700	Taxes are based on the taxable income (3.18% on JPY 118 Mio)
	51,569,314	

25. On going through Table No.2, it can be seen that the total amount of credit on foreign taxes paid by the assessee in six

countries totals up to Rs.13,05,33,028/-, which is the opening figure taken by the AO in Table No.1. The AO did not allow credit of foreign tax totaling to Rs.2.13 crore (Rs.13.05 crore – Rs.10.92 crore), which has two parts.

26. The first part is a sum of Rs.1,06,04,427/-, being, foreign tax credit paid in Japan in respect of Local corporation taxes, Inhabitant taxes – surcharge and Enterprise taxes – income based, which figures are available from Table No.4. The currency in Japan has been converted into Indian rupees to work out the amount of Rs.1.06 core, which has not been allowed as foreign tax credit.

27. The second constituent of the foreign tax credit not allowed by the AO is Rs.1.07 crore (Rs. 2.13 crore minus Rs.1.06 crore), which is the proportionate amount of tax paid by the assessee in the six countries as noted in Table No.2 towards the sales made to such countries in respect of 10AA units in the proportion of such sale to total sales, computed at 8.90%.

28. This shows that the amount of foreign tax paid by the assessee in Japan in respect of Inhabitant tax – capital base, Enterprise tax – value added base and Enterprise tax – capital base, being, the figures emerging from Table No.3, which is the

subject matter of the assessee's ground, has been allowed by the ld. CIT(A) as deduction u/s 37(1) of the Act by specifically recording in para No.53 that: "However, I find force in the alternate claim of the appellant in respect of allowing inhabitant taxes, enterprise taxes etc. paid in Japan to be allowed u/s.37(1) of the I.T. Act". The assessee's ground No.10 is confined only to the action of the AO in not granting deduction for the foreign tax credit in respect of inhabitant tax, enterprise tax etc., paid in Japan, which amount has, in fact, been allowed by the ld. CIT(A) in the above terms. As the ld. CIT(A) has himself allowed such deduction, the ground raised by the assessee seeking the relief already allowed, becomes infructuous. The ld. AR was fair enough to accept this position.

29. Turning to the ground raised by the Revenue on this count, we find that the Department has assailed the impugned order on two scores.

30. The first objection of the Department is that the ld. CIT(A) erred in directing the AO to allow deduction under section 37(1) of the Act in respect of the taxes paid in Japan, which is the first part of the foreign tax credit as discussed above. The ld. CIT(A) directed to allow deduction u/s.37(1) in respect of Inhabitant tax,

Enterprise tax etc., paid in Japan. Since such a deduction is in respect of taxes for which no benefit of foreign tax credit has been allowed in terms of section 90/91 of the Act, the same has been rightly allowed u/s.37(1) of the Act in view of Explanation 1 to section 40(a)(ii) of the Act as discussed *supra* in the context of Fringe benefit tax paid in Australia. The grievance of the Revenue on this count is, ergo, repelled.

31. The second objection of the Revenue is against allowing foreign tax credit in respect of sales made by the assessee which were eligible for deduction u/s.10AA of the Act, which has been discussed above as the second part of foreign tax credit allowed by the ld. CIT(A). The AO did not allow foreign tax credit of Rs.1.07 crore, computed at 8.90% of the remaining foreign tax credit in respect of the sales made from the 10AA eligible units on the ground that since such income did not suffer tax in India because of its deduction u/s 10AA, the foreign tax credit to that extent could not be allowed. The ld. CIT(A) allowed the benefit of such foreign tax credit by following the judgment of Hon'ble Karnataka High Court in *Wipro Ltd. (supra).*

32. The ld. AR relied on the case of *Wipro Ltd. (supra)* to support the impugned order granting relief. This judgment has

been rendered in the context of section 90 of the Act. It would be apposite to consider the relevant parts of section 90, at the material time, providing as under:

> `**90.** (1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—
>
> (*a*) for the granting of relief in respect of—
>
> (*i*) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or
>
> (*ii*) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or'
>
> (b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be'

33. The essence of section 90 is that where India has entered into DTAA with a country, then India needs to provide relief in respect of taxes paid in the other country, depending upon the terms and conditions of the DTAA. Whereas, sub-clause (i) of section 90(1)(a) talks of granting relief in respect of income on which have been *paid both income tax under this Act and income tax in the other country;* sub-clause (ii) talks of granting relief in respect of income-tax *chargeable under this Act* and under the corresponding law in force in the other country. The Hon'ble Karnataka High Court in *Wipro Ltd. (supra)* considered a

situation in which the assessee had claimed deduction u/s.10A and the AO did not allow foreign tax credit paid in USA and Canada on the ground that such income was not taxed in India because of the availability of deduction u/s 10A. The Hon'ble High Court, while considering the prescription of sub-clause (ii) of section 90(1)(a), held that the same talks of income "*chargeable*" under this Act and does not mandate the actual payment of income tax. If income-tax is chargeable on certain income even though tax is not actually paid thereon because of certain deductions/exemptions, the requirement of sub-clause (ii) stands fulfilled. That is how, the benefit in respect of foreign tax paid in the USA was allowed. It also considered foreign tax credit paid in Canada in respect of income of 10A units but did not allow credit because of the language of the Article 23 of DTAA with Canada dealing with elimination of double taxation, specifically providing that the income should be "*subjected to tax both in India and Canada*". It is, thus manifest that *Wipro Ltd. (supra)* is confined to the interpretation of section 90.

34. *Au Contraire*, the ld. DR heavily relied on the judgment of the Hon'ble jurisdictional High Court in *Reliance Infrastructure (supra)* to contend that the ld. CIT(A) erred in following *Wipro*

Ltd. (supra) and allowing benefit of foreign tax credit despite the fact that income was not chargeable because of the availability of deduction u/s 10AA of the Act. This judgment has been rendered in the context of section 91 of the Act, relevant part of which reads as under:

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

35. It can be seen from the command of section 91 that India is obliged to allow credit for taxes paid in the countries with which it has not entered into any DTAA on *doubly taxed income*. We find that the second question before the Hon'ble Bombay High Court was whether the Tribunal was right in holding that the sum of Rs.47,30,951/-, being, the amount deducted u/s.80HHB and Rs.5,59,919/-, being, weighted deduction allowed u/s.35B were to be excluded for allowing foreign tax credit. The Hon'ble High Court answered the question in favour of the Revenue by holding that the amount of deduction claimed u/s.80HHB and section 35B

could not be construed as 'doubly taxed income' as it did not bear any tax in India. It is pertinent to note that the judgment deals with section 91 of the Act, which specifically talks of providing relief only in respect of `doubly taxed income', which language is at variance to some extent with that of section 90(1)(a)(ii). Before deciding the issue in favour of the Revenue, the Hon'ble jurisdictional High Court also took into account the judgment in *Wipro Ltd. (supra)* and held the same to be not applicable inasmuch as the question before the Hon'ble Karnataka High Court was on the interpretation of section 90 and the observations made in the context of section 91 in that case were held to be *obiter dicta*.

36. On a comparative analysis of sections 90 and 91, it transpires that

- Section 90(1) applies in the context of countries with which India has entered into DTAAs as against section 91 applying in the context of countries with which India has not entered into DTAA.

- Section 90 provides two types of reliefs, exemption of income [section 90(1)(b)] or allowing of foreign tax credit [section 90(1)(a)(i) and (ii)] depending upon the terms and conditions of

the DTAA. Whereas, most of the treaties, such as USA and Canada provides for relief in respect of foreign tax credit, some treaties, such as Poland and Bulgaria, provide for exemption of income. On the other hand, section 91 provides only foreign tax credit and not exemption of income.

- Section 91 specifically provides that only the "*doubly taxed income"* can be subjected to relief in respect of foreign tax paid in a country with which no DTAA exists. To the extent of section 91 providing for relief on "*doubly taxed income",* this language is somewhat similar to section 90(1)(a)(i) which also talks of income on which tax has been paid both in India and the other country and in contrast to the language of section 90(1)(a)(ii) which provides for allowing relief in respect of income tax "*chargeable*" under this Act, whether or not actually paid. Whereas income-tax may be chargeable on certain income under the Act but not actually payable because of certain deductions/exemptions, an income is said to be doubly taxed only when the income is both chargeable to tax as well as subjected to tax in India.

- Even the extent of relief of foreign tax credit is different in both the sections. Section 5 provides that the scope of total income of a

resident covers his world income, whether accruing or arising etc. in or outside India. Section 91 provides a limited credit for doubly taxed income `which is not deemed to accrue or arise in India'. In other words, it stipulates two things so as to qualify for relief, first, that the income should be doubly taxed in both the countries and second, that the income accruing or arising outside India on which tax is paid there, should not be deemed to accrue or arise in India. It is only when the income is exclusively accruing or arising outside India and is not also deemed to be accruing or arising in India, that it will be eligible for credit for tax paid in foreign country. On the other hand, Section 90 is more liberal in terms of granting foreign tax credit and does not require the income to be exclusively accruing or arising in foreign country. It simply states that where income is either taxed in both the countries or chargeable to tax in India and also in the other country that the benefit of foreign tax credit shall follow. There is no further requirement, like section 91, that the income bearing foreign tax should not be deemed to accrue or arise in India.

37. Having understood the *ratio* of both the decisions relied by the rival parties rendered in the context of sections 90 and 91, we turn to the facts of the instant case to examine how these are

placed. Table No.2 reproduced above indicates that the assessee paid foreign tax in six countries, viz., Australia, Belgium, Canada, Japan, Switzerland and Malaysia. India has entered into DTAAs with all such countries. As such, section 90 governs the allowability or otherwise of foreign tax credit in the extant case and as a corollary, section 91 goes out of reckoning, leaving the reliance of the ld. DR on *Reliance Infrastructure (supra)* superfluous.

38. Now we proceed to examine the availability or otherwise of the foreign tax credit in terms of section 90 of the Act in respect of the all the six countries, *in seriatim*.

39. The first country is Australia. Article 24 of the DTAA between India and Australia deals with elimination of double taxation. Para 4(a) of this Article provides as under:

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

40. On going through the language of para 4(a) of Article 24 of the DTAA between India and Australia, it is amply borne out that

the India is obligated to eliminate double tax by allowing relief in respect of taxes paid in Australia only in respect of income "*which has been subjected to tax both in India and Australia*". This case falls u/s 90(1)(a)(i) of the Act, which talks of granting relief in respect of `*income on which have been paid both income-tax under this Act and income-tax in that country*'. As the assessee did not pay any tax in India in respect of 10AA units sales made to Australia, the benefit of tax paid in Australia cannot be allowed against the Indian income tax liability of the assessee under Article 24.

41. The second country in which the assessee paid tax is, Belgium. Article 23 of the DTAA between the India and Belgium deals with elimination of double taxation. Para 2(a) of the Article reads as under:

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

42. A cursory glance at the language of para 2(a) of Article 23 between India and Belgium indicates that the elimination of the

tax paid in Belgium is contemplated in India. It calls upon India to allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in Belgium. There is no further requirement, like the DTAA between India and Australia seen above, that the income should be subjected to tax both in India and Belgium. The elimination of double taxation under this DTAA is governed by section 90(1)(a)(ii) of the Act, which simply contains requirement of *income-tax chargeable under this Act*' and under the corresponding law in force in Belgium. There is no further stipulation of actual payment of tax in India. As the income from 10AA units arising in Belgium is chargeable to tax in India, even though it is not subjected to tax because of the deduction provided by this section, the requirement of *chargeable under the Act* gets fulfilled. As the assessee admittedly paid tax on such income in Belgium, fulfilling the mandate of section 90(1)(a)(ii), the DTAA provides for granting relief by India of the tax paid on such income in Belgium. However, there is a cap that such deduction shall not exceed that part of the income-tax (as computed before the deduction is given), which is attributable to the income.

43. The next country from which the assessee got foreign tax credit is Canada. Article 23 of DTAA between India and Canada deals with elimination of double taxation. Para 3(a) of the Article, dealing with India, to the extent it is relevant for our purpose, reads as under:

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

44. This para again talks of allowing relief by India in respect of tax paid in Canada only when the income has been subjected to tax both in India and Canada. The language of this DTAA is similar to the treaty between India and Australia as discussed above. As the income from Canada in respect of 10AA units has not been subjected to tax in India because of the deduction, no benefit of tax paid in Canada thereon can be allowed under Article 23 of the DTAA.

45. The next three countries in which the assessee paid foreign tax are Japan, Swiss Federation and Malaysia. We have gone through the relevant Articles of the DTAAs between India and the

three countries dealing with elimination of double taxation by India in respect of taxes paid in such countries. Article 23(2)(a) of the DTAA between India and Japan provides for elimination of double taxation. Language of such para is similar to DTAA between India and Belgium. Similarly, Article 23 of the DTAA between India and Swiss deals with elimination of double taxation. The language of para 1(a) of Article 23, dealing with India providing relief of tax paid in Switzerland, is almost similar to the language of the DTAA between India and Belgium. Similar is the position regarding DTAA between India and Malaysia. Article 24 deals with elimination of double taxation. The language of para 2 of Article 24 providing for elimination of double taxation in the case of India is similar to the language of DTAA between India and Belgium. Thus, the credit for taxes paid by the assessee in Japan, Swiss Federation and Malaysia is eligible for credit subject to the limitation of such relief not exceeding that part of the tax (as computed before the deduction is given) which is attributable to the income which is taxed in Japan, Swiss and Malaysia.

46. It can thus be seen that out of tax paid by the assessee in six countries, it is entitled to foreign tax credit only from Belgium,

Japan, Swiss and Malaysia. The foreign tax paid by the assessee in the remaining two countries, namely, Australia and Canada, does not qualify for credit.

47. The AO computed the ineligibility of foreign tax credit at 8.90% of revised amount of foreign tax credit as per Table I drawn above by considering the proportionate sales made by the 10AA units to these six countries vis-à-vis total sales of the assessee. This working made by the AO cannot be upheld because of the discussion made above about the question for consideration not being the deductibility of such income from Indian income-tax, but the credit in respect of tax paid on such income in six countries. Thus, we need to find out the precise amount of foreign tax in respect of sale of 10AA units made to Australia and Canada, which cannot be allowed credit. However, such amount, though not available for credit, will be eligible for deduction u/s.37(1) of the Act, as being not hit by section 40(a)(ia) of the Act in line with our decision on the first part of the ground raised by the Department. The taxes paid in other four countries, namely, Belgium, Japan, Swiss and Malaysia in respect of sale of 10AA units, will be available for credit in terms of the relevant Article of the concerned DTAAs as discussed *supra*. We,

therefore, set-aside the impugned order and remit the matter to the file of the AO for deciding this issue accordingly. Needless to say, the assessee will be allowed reasonable opportunity of hearing.

IV. <u>MAT CREDIT OF AMALGAMATING COMPANY</u>

48. Ground No.11 of the assessee's appeal is against not allowing MAT credit available in the hands of erstwhile ICSL which was amalgamated with the assessee company w.e.f. 01-04-2012. Going with his view of not allowing set off of long term capital loss in the hands of amalgamating company in terms of section 72A of the Act, the AO held that, in the absence of any specific provision entitling the amalgamated company to avail MAT credit of amalgamating company, no such credit could be allowed in the hands of the amalgamated company. The ld. CIT(A) concurred with the view expressed by the AO.

49. We have heard the rival submissions and scanned through the relevant material on record. The AO has denied the claim, at the threshold, on the ground that the MAT credit of the amalgamating company is not covered u/s 72A of the Act. He has not referred to the non-fulfillment of any other eligibility condition for claiming such credit.

50. The facts of this ground are materially similar to the ground of not allowing set off of long term capital loss available in the hands of the amalgamating company discussed *supra*. While allowing such ground above, we have found that the eligible business of the amalgamating company continued and thus got transferred to the amalgamated company. The business, as such, did not cease to exist. All the benefits and privileges available to the amalgamating company have been held to pass on to the successor amalgamated company. In view of the fact that the Hon'ble High Court approved the Scheme of amalgamation by also specifically providing that credit for minimum alternate tax shall be claimed by the Transferee company, there remains no doubt whatsoever that MAT credit of the amalgamating company has to be allowed in the hands of the amalgamated company.

51. Now, we will examine if the Act contains any restriction on the allowability of the MAT credit in the hands of the amalgamating company. Section 115JAA deals with tax credit in respect of tax paid on deemed income relating to certain companies. Sub-section (2) provides that where any amount of tax is paid u/s.115JA by an assessee, being, a company for an assessment year, then credit in respect of tax so paid shall be

allowed to him in accordance with the provisions of this Act. Because of the assessee-amalgamated company stepping into the shoes of the amalgamating company, it will satisfy the requirement of allowing credit to `him' in accordance with the provisions of this section. The above position of allowing MAT credit of the amalgamating company in the hands of the amalgamated company seems to have been accepted by the legislature when we read sub-section (7) of section 115JAA containing a specific prohibition, which provides that: "In case of conversion of a private company or unlisted public company into a limited liability partnership under the Limited Liability Partnership Act, 2008 (6 of 2009), the provisions of this section shall not apply to the successor limited liability partnership." This provision indicates that the Parliament wanted to restrict the allowing of MAT credit to the successor only on conversion of a company into LLP and not any other case of succession, including the amalgamation. Had the intention of the legislature been not to allow MAT credit of the amalgamating company, it would have specifically covered the cases to amalgamation in addition to the cases of conversion of a company into LLP. In view of the specific provision contained in sub-section (7) prohibiting the

MAT credit only in case of a conversion of a private company into a limited liability partnership and not extending such prohibition to the cases of amalgamation, there is no doubt that the MAT credit earned by the amalgamating company has to be allowed in the hands of the amalgamated company. We, therefore, hold that the MAT credit of the amalgamating company has to be allowed in the hands of the amalgamated company. This ground is, therefore, allowed.

V. OTHER ISSUES

52. Ground No.3 of the Revenue's appeal is against allowing assessee's claim of deduction of Rs.85,89,36,700/- u/s. 10AA of the Act in respect of three undertakings. The AO observed that the assessee claimed deduction u/s.10AA in respect of three undertakings belonging to the erstwhile ICSL. He noticed that the matter regarding the eligibility for deduction u/ss.10A/10AA was subject matter of dispute in the assessment of the erstwhile ICSL since A.Y. 2004-05, in which it was held that it was a case of mere expansion or sub-letting of the existing business and hence, the benefit u/s.10A was not available. The ld. CIT(A) overturned the assessment order on this score.

53. Having heard both the sides and gone through the relevant material on record, we find that this issue came up for consideration in the hands of erstwhile iGATE Global Solutions Ltd. for earlier assessment year, including, A.Y. 2012-13. The Tribunal, following its decision for earlier years, held the assessee to be entitled to the benefit of deduction u/s.10A as the new units were not split-up of the existing units. In view of the clear decision of the Tribunal holding that the erstwhile 3 units of the amalgamating company were newly established units and hence, eligible for deduction u/s.10AA, we do not find any infirmity in the impugned order in granting such deduction in the hands of the assessee, as the very foundation, being, the three units were not newly established, does not exist in view of the orders passed by the Tribunal in earlier years in the hands of the amalgamating company.

54. Ground No.4 of the Revenue's appeal is against the direction of the ld. CIT(A) to allow deduction u/s.10AA in respect of Pune unit without appreciating the fact that such deduction was not claimed in the original return of income but was claimed in the revised return of income and further Form No. 56F was uploaded at the time of filing of the revised return.

55. The facts of this ground are that the AO did not allow deduction u/s.10AA in respect of three units of the amalgamating company, which issue has been discussed above. He gave another reason for making the disallowance in respect of Pune unit, which is subject matter of the instant ground. Such other reason for making disallowance was that the assessee did not claim deduction u/s.10AA in respect of this unit in the original return. The assessee claimed deduction of Rs.5,23,54,148/- in respect of such unit only in the revised return and further Form No.56F was also uploaded at the time of filing of the revised return. The ld. CIT(A) overturned the assessment order on this score.

56. It is seen that an additional reason given by the AO for not allowing deduction u/s.10AA in respect of the Pune unit is that such deduction was not claimed in the return filed u/s.139(1). Since the deduction was claimed by means of the revised return and Form No.56F was also uploaded at that time, deduction u/s.10AA was not allowed. Sub-section (8) of section 10AA provides that the provisions of sub-section (5) and (6) of section 10A shall apply to the articles or things or services referred to in sub-section (1). Sub-section (5) of section 10A, in turn, provides

that the deduction under this section shall not be admissible for any assessment year beginning on or after 01-04-2001, unless the assessee furnishes in the prescribed form, along with return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of section 288. It is clear from the command of sub-section (5) of section 10A that the assessee is required to furnish the audit report in the prescribed form along with the return of income. There is no reference to the filing of such return u/s.139(1) or u/s.139(5) of the Act. The Finance Act, 2020 has carried out an amendment to sub-section (5) of section 10A by providing that the report of the auditor in the prescribed form should be filed before the specified date referred to in section 44AB, which, in turn, refers to section 139(1) of the Act. Thus, for the period anterior to the amendment carried out by the Finance Act, 2020, the only requirement was to furnish the audit report in the prescribed form along with the return of income. Such return of income may be u/s.139(1) or u/s.139(5). Since the assessee claimed deduction by filing the revised return u/s.139(5) and also uploaded the requisite audit report in Form No. 56F along with that, no infirmity can be found in the impugned order

in accepting the assessee's claim in this regard. This ground is, therefore, not allowed.

57. Ground No.5 of the Revenue's appeal is against the direction of the ld. CIT(A) to delete the disallowance u/s.10AA(9) r.w.s.80IA(10) of the Act. The facts apropos this issue are that the assessee declared margin of 17.80% on sales to the Associated Enterprises. While determining the ALP, the assessee chose certain comparables giving average margin of 11.72%. The AO held that the assessee earned excess margin of profit on such software sales at 6.80% (17.80% - 11.72%). By applying such excess percentage of margin to the sale made by the assessee to its AEs, he worked out the excess profit of Rs.7,38,72,275/-. Applying the provisions of section 10AA(9) r.w.s.80IA(10), he held that the amount of deduction u/s.10AA was to be reduced to this extent. The ld. CIT(A) overturned the assessment order by relying on the orders passed for earlier years.

58. The provisions of section 10AA(9) r.w.s.80IA(10) can obviously be applied by the AO, but, before that it is incumbent upon him to demonstrate that the assessee derived higher profit on account of its arrangement with the Associated Enterprises in such a manner that the same produced more than the ordinary

profit. Without doing so, the AO cannot make addition by taking note of section 10AA(9) of the Act. Since the AO has simply compared the profit margin of the assessee from the transactions with the AE and that earned by the comparables, it cannot be said that the mandate of section 10AA(9) r.w.s.80IA(5) is fulfilled because the AO has not proved any arrangement with its AEs so as to produce more than ordinary profits in the hands of the assessee. It is further seen as an admitted position that similar issue came up for consideration before the Tribunal in assessee's own case for immediately preceding assessment year, namely, 2012-13. A copy of such order has been placed on record at page 162 of the paper book. Relevant discussion has been made in para 8 and ultimately the view point of the ld. CIT(A), in deleting similar addition, has been countenanced. As the facts and circumstances for the year are similar to those of the preceding year, we uphold the impugned order on this issue.

59. The first ground raised by the assessee as well as the Revenue is against the computation of deduction u/s.10AA *qua* telecommunication charges. Certain telecommunication expenses were incurred by the assessee in relation to the delivery of its software abroad, which it did not exclude from the export

turnover as well as total turnover in the computation of deduction u/s 10AA. The AO reduced the amount of telecommunication expenses from the export turnover only. The ld. CIT(A) directed to exclude such amount - both from export turnover as well as total turnover. Whereas the assessee is aggrieved by the exclusion of such costs from both the turnovers, the Revenue wants their inclusion only in the total turnover.

60. Having heard both the sides and gone through the relevant material on record, it is seen that similar issue came up for consideration before the Tribunal in assessee's own case for the immediately preceding assessment year, namely, 2012-13. Vide order dated 09-11-2021, the Tribunal in ITA No. 1043/PUN/2017 and ITA No.1116/PUN/2017 has upheld the view point of the ld. CIT(A) on this score. Respectfully following the precedent, we countenance the impugned order on this score and dismiss the grounds raised by the assessee as well as by the Revenue in this regard.

61. Ground No.2 of the assessee as well as the Revenue is against the exclusion of expenditure on providing technical services abroad from export turnover as well as total turnover in the computation of deduction u/s.10AA of the Act. The assessee

did not exclude this amount from the export as well as total turnover. The AO excluded it only from export turnover. The ld. CIT(A) directed its exclusion from both the export as well as total turnover. Both the sides have come up in appeal against the impugned order on this issue.

62. It is seen that similar issue came up for consideration before the Tribunal in assessee's own case for the immediately preceding assessment year. The Tribunal has upheld the view taken by the ld. CIT(A) on this score. Following the same, we dismiss the grounds raised both by the assessee as well as the Revenue.

63. Ground No.3 of the assessee's appeal is against the decision of the ld. CIT(A) on deputation of technical manpower (DTM). The AO did not allow deduction u/s.10AA on on-site/deputation of technical manpower software services which resulted in reduction of deduction by Rs.88,56,874/-. The AO, following his order for earlier years, reduced the amount of deduction accordingly. Similar course of action was adopted by the ld. CIT(A) as well.

64. Having regard to the facts of the instant case, we find that this issue is no more *res integra* in view of the decision taken by the Tribunal in the immediately preceding assessment year, in

which the assessee has been entitled to deduction u/s.10AA on the amount of profit on on-site/deputation of technical manpower services. Following the same, we overturn the impugned order on this score. This ground is allowed.

65. Ground No.4 of the assessee's appeal is against allocation of interest expenditure of Rs.71,95,967/- to section 10AA undertakings for the purpose of computing deduction under this section. The assessee, in computation of deduction u/s.10AA, did not allocate certain expenses, including interest on loan, to the eligible undertakings and claimed deduction u/s.10AA on the enhanced amount of profits. The ld. CIT(A) sustained the action of the AO.

66. This issue is covered against the assessee by the order of the Tribunal for the immediately assessment year. The ld. AR candidly admitted that the facts and circumstances for the instant year are similar. Following such view, we uphold the impugned order on this score. This ground is not allowed.

67. Ground No.7 of the assessee's appeal is against not allowing deduction of Rs.28,20,289/- in respect of provision for doubtful advances written back while computing total income as well as book profit u/s.115JB of the Act.

68. The facts of this ground are that the assessee company wrote back a sum of Rs.28,20,289/- on account of provision for doubtful advances. Such amount was claimed as deduction under the normal provisions of the Act as well as in the computation of book profit u/s.115JB. On being called upon to explain as to how the amount was eligible for deduction, the assessee submitted that this amount was in respect of erstwhile iGATE Computer Systems Ltd., which had made provision for doubtful loans and advances in earlier years and such provision was *suo motu* added back in the computation of total income as well as book-profit u/s.115JB. As the assessee wrote back the amount of provision in the year under consideration by means of credit to its Profit and loss account by a sum of Rs.28.20 lakh, the same should not be charged to tax. The AO jettisoned the claim of the assessee on the ground that it could not correlate the figures of provision created in earlier years and not claimed as deduction with the amount of provision written back in the year in question. This view was affirmed in the first appeal.

69. The assessee has lodged a clam for deduction of a sum of Rs.28,20,289/- on the ground that it was a write back of the provision created by the erstwhile ICSL which was not claimed as

deduction in the computation of total income as well as computation of book profit u/s.115JB of the Act at the time of its creation in the respective years. If that is a fact, then, in principle, its reversal during the year under consideration, obviously, cannot be included in the total income as well as book profits. However, the onus is on the assessee to correlate the amount of provision created in the earlier year by the erstwhile ICSL and not claimed as deduction with the amount of provision written back during the year under consideration by the assessee. The ld. AR submitted that all the necessary details are available and the matter may be considered by the AO. In such circumstances, we direct the AO to examine such details which the assessee is now proposing to file to prove its case and then decide accordingly in terms of the discussion made above.

70. Ground No.8 of the assessee's appeal is against the confirmation of disallowance of Rs.71,65,523/- out of Finance Lease charges. The assessee claimed deduction of Rs.2,58,58,545/- on account of finance lease charged paid. During the course of assessment proceedings, the AO observed that a sum of Rs.71,65,523/- was credited to the said account against the narration "re-class during the year". The nature of re-

classification was not explained. The AO allowed deduction towards lease rentals for a sum of Rs.1,86,93,022/- as against Rs.2.58 crore claimed by the assessee, thereby reducing the claim to the extent of re-classed amount of Rs.71,65,523/- credited to the account. The ld. CIT(A) echoed the assessment order on this point.

71. It is seen that the assessee credited Rs.71.65 lakh to the Finance lease charges account by giving narration that the amount was re-classed during the year, but claimed deduction for the gross amount without reduction to that extent. Once the amount of finance lease charges was reduced by the assessee by means of credit to the account, the same ought to have been reduced for the purpose of claiming deduction as well, unless proved otherwise. The ld. AR fairly admitted that no detail of re-classification of Rs.71.65 lakh was available. In such circumstances, we uphold the impugned order in not allowing deduction of Rs.71.65 lakh as finance lease charges. This ground is not allowed.

72. Ground No.6 of the Revenue's appeal is against the deletion of addition made by the AO u/s.14A of the Act.

73. The facts of this ground are that the assessee earned exempt income from mutual funds amounting to Rs.9,80,400/-. The

assessee *suo motu* disallowed a sum of Rs.1,72,539/- u/s.14A of the AO. The AO, after recording proper satisfaction, applied rule 8D to work out the amount disallowable at Rs.2.55 crore. After reducing the amount earlier offered by the assessee as disallowable u/s.14A, the AO made an addition of Rs.2,53,65,287/-. The ld. CIT(A) deleted the addition.

74. We have heard the rival submissions and gone through the relevant material on record. It is seen that the AO has recorded proper satisfaction before making the disallowance u/s.14A. This view accords with the similar view taken by the Tribunal in assessee's own case for the A.Y. 2011-12. Further, it is pertinent to note that the total amount of exempt income earned by the assessee is only to the tune of Rs.9,80,400/-. The Hon'ble Delhi High Court in *Cheminvest Ltd. vs. CIT (2015) 378 ITR 33 (Del)* has held that if there is no exempt income, there can be no question of making any disallowance u/s 14A of the Act. Similar view has been taken by the Hon'ble Delhi High Court in *CIT vs. Holcim India P. Ltd. (2014) 90CCH 081-Del-HC*. More recently the Hon'ble jurisdictional High Court in *Pr. CIT VS. Kohinoor Projects Pvt. Ltd. (2020) 425 ITR 700 (Bom)* has held that in the absence of any exempt income, there cannot be any disallowance

of expenses u/s 14A of the Act. Thus the disallowance has to be restricted to the extent of exempt income of Rs.9,80,400/-. As the assessee has *suo motu* offered disallowance of Rs.1,72,539/-, we sustain the further disallowance at Rs.8,07,861/- (Rs.9,80,400 – Rs.1,72,539). This ground is, therefore, partly allowed.

75. Ground No. 7 of the Revenue's appeal is against allowing depreciation of Rs.19,84,571/- on goodwill. The AO, following his order for earlier years, disallowed the amount of depreciation on goodwill. The ld. CIT(A) allowed the same.

76. It is seen that this issue came up for consideration before the Tribunal in assessee's own case for the A.Y. 2011-12. Copy of such order has been placed on record. Relevant discussion has been made at para 18 onwards of the order, in which the matter has been restored to the AO with certain directions. Similar view has been followed by the Tribunal in the immediately preceding assessment year, namely, 2012-13 by remitting the matter to the file of the AO for deciding it in conformity with the guidelines laid down by the Tribunal in earlier years. We also take similar view and send the matter to the file of the AO for deciding this issue in conformity with the directions given for earlier years.

77. Ground No.9 of the Revenue's appeal is against the deletion of addition of Rs.9,19,83,168/- on account of delisting expenses. The assessee incurred expenses for delisting of the shares of the erstwhile ICSL, which was a listed company and got amalgamated with the assessee company w.e.f. 01-04-2012. In support of the deduction, the assessee relied on CBDT Circular dated 26-08-1965 issued vide F.No.10/67/65-IT(A-1). The AO did not allow the deduction on the ground that said circular provided for deduction in respect of listing expenses and not the delisting expenses. The ld. CIT(A) accepted the assessee's contention by relying on the order passed by the Delhi Bench of the Tribunal in the case of *Eicher Motors Ltd. Vs. DCIT (ITA No.207/Del/2013* dated 12-12-2014.

78. Having heard both the sides and gone through the relevant material on record, it is seen that the deductibility of delisting expenses has been decided by the Delhi Bench of the Tribunal in assessee's favour in *Eicher Motors Ltd. (supra).* No contrary view has been placed on record by the ld. DR. Respectfully following the Tribunal order, we uphold the impugned order on this score.

79. Ground No.5 of the assessee's appeal is against the treatment given by the authorities to the amount of foreign exchange fluctuation gain of Rs.3,33,88,214/- of overseas branches credited to Reserves. The AO treated such amount as part of total income. The ld. CIT(A) restored the matter to the file of the AO for following the direction given in the appellate order for the A.Y. 2010-11.

80. After considering the rival submissions and perusing the relevant material on record, it is seen that the Tribunal for the A.Y.2011-12 held that the amount of foreign exchange fluctuation gain relatable to the items of revenue field should be considered as includible in the total income and the part relatable to the items in capital field should be excluded. As the ld. CIT(A) has directed to follow such view, we do not find any reason to interfere with the impugned order on this score. This ground is, therefore, not allowed.

81. The additional ground raised by the assessee was not pressed by the ld. AR. The same is, therefore, dismissed as not pressed.

82. In the result, both the appeals are partly allowed.

Order pronounced in the Open Court on 30th August, 2022.

Sd/-	Sd/-
(PARTHA SARATHI CHAUDHURY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 30th August, 2022
Satish

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u>:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-1, Pune
4. The Pr.CIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "C" / DR 'C', ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	26-08-2022	Sr.PS
2.	Draft placed before author	29-08-2022	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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