

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

**BEFORE SHRI R.S. SYAL, VICE PRESIDENT**  
**AND**  
**SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER**

**आयकर अपील सं. / ITA No.2395/PUN/2017**  
**निर्धारण वर्ष / Assessment Year : 2011-12**

Capgemini Technology Services India Limited,  
(earlier known as iGATE Global Solution Ltd.),  
Plot No. 14, Rajiv Gandhi Infotech Park,  
Hinjewadi, Phase-III, MIDC-SEZ, Village-Man,  
Taluka-Mulshi, Pune-411057

PAN : AABCM4573E

.....अपीलार्थी / Appellant

**बनाम / V/s.**

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

.....प्रत्यर्थी / Respondent

**आयकर अपील सं. / ITA No.2624/PUN/2017**  
**निर्धारण वर्ष / Assessment Year : 2011-12**

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

.....अपीलार्थी / Appellant

**बनाम / V/s.**

Capgemini Technology Services India Limited,  
(earlier known as iGATE Global Solution Ltd.),  
Plot No. 14, Rajiv Gandhi Infotech Park,  
Hinjewadi, Phase-III, MIDC-SEZ, Village-Man,  
Taluka-Mulshi, Pune-411057

PAN : AABCM4573E

.....प्रत्यर्थी / Respondent

Assessee by : Shri C.H. Naniwadekar  
Revenue by : Shri Anurag Srivastava

सुनवाई की तारीख / Date of Hearing : 14-09-2021

घोषणा की तारीख / Date of Pronouncement : 26-10-2021

**आदेश / ORDER****PER S.S. VISWANETHRA RAVI, JM :**

These cross appeals filed by the assessee and Revenue against the common order dated 21-08-2017 passed by the Commissioner of Income Tax (Appeals)-13, Pune [‘CIT(A)’] for assessment year 2011-12.

2. We note that the issues raised in both the appeals are similar basing on the same identical facts. Therefore, with the consent of both the parties, we proceed to hear both the cross appeals together and to pass a consolidated order for the sake of convenience.

3. First, we shall take up appeal in ITA No. 2395/PUN/2017 filed by the assessee.

4. Ground No. 1 raised by the assessee challenging the action of CIT(A) in confirming the exclusion of telecommunicating expenses and internet usage charges from the export as well as total turnover while computing deduction u/s. 10AA of the Act in the facts and circumstances of the case.

5. Heard both the parties and perused the material available on record. The AO reduced the telecommunication expenses and internet usage expenses only from export turnover. The CIT(A) considering the submissions of the assessee and directed the AO to reduce telecommunication expense and internet usage from total turnover in computing deduction u/s. 10AA of the Act. A similar issue came up before this Tribunal in assessee’s own case for A.Y. 2010-11, wherein we note

that the Co-ordinate Bench, while taking into consideration the order dated 05-08-2019 passed in IT(TP)A No. 286/Bang/2013 in assessee's own case held that any amount reduced from export turnover should also be reduced from the amount of total turnover in the computation of deduction u/s. 10AA of the Act. The Co-ordinate Bench discussed the issue in detail from Para Nos. 12 to 14 which are at Page No. 172 of the paper book. The relevant portion of the Para No. 14 is reproduced here-in-below for ready reference :

*"14. The Ld. Counsel for the assessee submitted that this issue is covered in favour of the assessee by the decision of the Co-ordinate Bench of the Tribunal in ITA No.342/PUN/2014 for assessment year 2009-10 in assessee's own case wherein vide Para 43 and 44, the Tribunal on the issue has held as follows:*

*"43. Ground No.5 of the assessee's appeal is against reducing telecommunication charges and internet usage charges totalling Rs.9,82,28,337/- from only the „Export turnover" in computing deduction u/s.10A. Ground No.1 of the Revenue's appeal is against the direction of the ld. CIT(A) that link charges and internet usage charges be reduced from „Export turnover" and also from „Total turnover".*

*44. This issue also came up for consideration before the Tribunal in relation to the A.Y 2007-08. Vide its order dated 05-08-2019 in IT(TP)A. No.286/Bang/2013, the Tribunal has held that any amount reduced from „Export turnover" should also be reduced from the amount of „Total turnover" in the computation of deduction u/s.10A of the Act. Following the same, we allow the assessee's ground and dismiss that of the Revenue."*

*Respectfully following the decision mentioned herein above, we allow ground No.2 raised by the assessee and dismiss ground No.2 of appeal of the Revenue on this count."*

6. The ld. DR did not bring on record any contrary view or order against the order of this Tribunal. Therefore, we hold that any amount reduced from export turnover should also be reduced from the amount of total turnover in the computation of deduction u/s. 10AA of the Act. Thus, ground No. 1 raised by the assessee is allowed.

7. Ground No. 2 raised by the assessee challenging the action of CIT(A) in confirming exclusion of expenditure on account of technical services from the export as well as total turnover while computing deduction u/s. 10AA of the Act in the facts and circumstances of the case.

8. Heard both the parties and perused the material available on record. The AO found that the assessee has incurred certain expenditure in relation to the providing of technical services abroad. According to him, the said expenses were incurred in foreign exchange, need to be reduced from the export turnover and an amount of Rs.138,72,08,837/- was reduced from export turnover only for the purpose of computation of deduction u/s. 10AA of the Act. The CIT(A) basing on his own order in A.Y. 2010-11, directed the AO to reduce from the total turnover also vide its finding at Para No. 2.2.3 of impugned order. A similar issue came up before this Tribunal for A.Y. 2009-10, wherein, we note that this Tribunal held that the amount of foreign exchange expenses be excluded from export turnover and total turnover also. Again in A.Y. 2010-11, this Tribunal followed the same reasoning rendered in A.Y. 2009-10 and held the expenditure incurred in foreign exchange need to be excluded from total turnover also.

9. The ld. DR did not bring on record any contrary view or order against the order of this Tribunal. Therefore, we hold that any amount of foreign exchange expenses reduced from export turnover should also be reduced from the amount of total turnover in the computation of deduction u/s. 10AA of the Act. Thus, ground No. 2 raised by the assessee is allowed.

10. Ground No. 3 raised by the assessee challenging the action of CIT(A) in confirming the view of AO in holding an amount of Rs.2,25,18,608/- disallowed on account of onsite/deputation of technical manpower (DTM) software services is not eligible for deduction u/s. 10AA of the Act.

11. We note that the assessee computed 100% profits ascribed towards onsite/deputation of technical manpower as deduction u/s. 10A/10AA of the Act. The AO discussed this issue in detail from Page Nos. 10 to 50 and held the said amount is not eligible to claim deduction u/s. 10A/10AA of the Act vide Para No. 10.48 of its order and reduced the same from eligible profits. The CIT(A) observed that the assessee furnished master service agreement and opined that it is of no use as it governs the service conditions, employees benefits and liabilities and it does not deal with the issue as to how particular project for which the employees were deputed to onsite, held that the assessee has not established the direct and intimate nexus with the working of deduction and confirmed the disallowance made by the AO.

12. We note that the similar issue came up before this Tribunal in assessee's own case for A.Y. 2010-11 which is at Page No. 179 of the paper book. This Tribunal in A.Y. 2010-11 while granting relief to the assessee considered the order of this Tribunal for A.Y. 2007-08 being IT(TP)A No. 286/BANG/2013 for A.Y. 2007-08. The relevant portion at Para Nos. 16 to 28 are reproduced here-in-below for ready reference :

*"16. Ground nos.7 to 9 deal with another aspect of computation of deduction u/s.10A of the Act, being, the deletion of disallowance of Rs.14,61,44,712/- towards reduction of income from Deputation of Technical Manpower (DTM) and Onsite activities from the purview of eligible income u/s.10A of the Act. Succinctly, the facts of this issue are that the AO required the assessee to submit the Scope of works (SOWs) in respect of agreements for software development for which deduction was claimed u/s 10A. The assessee filed the same, on perusal of which the AO observed that the majority were onsite contracts without any STP/SEZ link to the Indian*

business and further inferred that the assessee was engaged in the business of Deputation of Technical Manpower to its clients. The assessee tendered a reply furnishing copies of Master Service Agreements (MSAs) along with SOWs and their correlation with several invoices, which did not find favour with the AO. The Officer noticed that DTM contract receipts were one of the major components of the revenue receipts of the assessee, under which software engineers were sent to the US or Europe for working in companies on short term basis. He further observed that on an average, such companies abroad were paying to the assessee US\$ 6000 for each of the software professionals, against which the assessee was paying equivalent of approximately US\$ 4000 to them. He further held that the services rendered by the professionals at locations abroad were not under the control and supervision of the assessee. In the ultimate analysis, the AO recomputed the amount of deduction u/s.10A by considering the amount of deduction originally worked at Rs.62,06,33,422/-, from which a sum of Rs.2,43,57,452/-, being 4% of profits ascribed to Deputation of Technical Manpower business was reduced and a further sum of Rs.12,17,87,260/-, being 20% of profits ascribed to onsite software services not related to STP undertakings in India was reduced, which brought down the amount of revised deduction u/s.10A to Rs.47,44,88,710/-. The Ld. CIT(A) accepted the assessee's claim and overturned the action of the AO on this point.

17. Having heard both sides and gone through the relevant material on record, it is observed that the AO reduced profit relatable to Deputation of Technical Manpower (DTM) and Onsite software services allegedly not related to STP undertakings in India at ad hoc 4% and 20% of the eligible software development income u/s 10A of the Act as computed by him. Primarily, no reason has been attributed by the AO as to how 4% and 20% rates were determined for reducing the amount of deduction on account of DTM and onsite activities.

18. The assessee earned income from software development activity in all of its six eligible units. The question which falls for our consideration is as to whether the AO was right in holding that a part of consideration received by the assessee from the Deputation of Technical Manpower (DTM) activities and Onsite activities should be excluded from the eligible revenue?

19. Section 10A is a special provision in respect of newly established undertakings in free trade zones etc. Sub-section (1) of this section provides for a deduction of profits and gains as are derived by an undertaking from the export, inter alia, of computer software for a specified period. It is not disputed that the assessee satisfied all the requisite conditions for becoming eligible to deduction under this section, which is apparent from the action of the AO in himself allowing deduction to some extent. The dispute is only to restricting the amount of deduction in respect of the alleged profits derived by the assessee from DTM and onsite charges, which in the opinion of the AO, were not derived from export of computer software.

20. The assessee is engaged in the business of computer software development from its eligible units. At this stage, it would be apposite to consider the meaning of 'Computer software' given in Explanation 2(i) of section 10A as: '(a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or (b) any customized electronic data or any product or service of similar nature, as may be notified by the Board, - which is transmitted or exported from India to any place outside India by any means'. It transpires from the definition of the 'computer software' that it has two clauses. The first clause deals with a computer programme which is recorded on any disc or tape etc., which may usually be off the shelf product or in other words, a product which is available as such with the assessee and is not required to be customized. The second clause deals with a customized electronic data or any product, which is required to be tailor-made. Whereas the first clause encompasses a computer programme which has already been developed by the assessee on a standard basis and is exported as such, the second clause covers developing a new computer software as per the specific requirements of the customer.

21. One has to pass through various stages to develop a computer software, such as, Conceptualization, Planning, Designing, Developing, Testing and then Maintaining. In the Conceptualization stage, the requirements of the customer are first identified to form a view of the work to be done. In the Planning stage, an



overall plan of proceeding with is formalized. In the Designing stage, blueprint of the work to be done is drawn. In the Development stage, which is also called coding stage, the actual work is started for translating the plan into action. It is one of the most important stages of software development. In this stage, the work is divided into several modules/programmes, each of which is independently developed and coded. This activity of development of modules and coding may be done simultaneously or one after another, depending upon the nature of module and its placement or setting within the overall product. The development stage produces a final software product, which is then tested on stringent standards to ensure that it measures up to the required specifications. Once the computer software or the product passes through the testing stage, it is given to the customer for actual use. Any product so developed may need maintenance and then upgradation with the passage of time. A close scrutiny of the life cycle of a customized software, as discussed above, discerns that a lot of interaction is required between the computer software developer and the customer, which is almost present in most of the stages of software development, starting with conceptualization itself. In developing a computer software of large magnitude, it is quite possible that a Software Developer may have to visit the site of the customer several times for having an on the spot information and properly appreciating the needs so as to make the final product compliant with the requirements. There can be several other reasons necessitating a customer abroad insisting a software developer in India to develop software fully or partly at his site overseas. The stage of testing in a customized software can be properly done only at the site of the customer. The nitty-gritty of the matter is that a customized software cannot be ordinarily developed without spending some time on site with the customer. Considering the objective of deduction u/s 10A and realizing practical issues and difficulties, the Finance Act, 2001 inserted Explanation 3 w.e.f. 1.4.2001 providing: 'For the removal of doubts, it is hereby declared that the profits and gains derived from on site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.' The Explanation contains a deeming provision and gives a practical solution to the problem by providing that profits from on site development of computer software and services for development of software outside India shall be deemed to be the profits and gains derived from the export of computer software outside India. Undeterred by the Explanation 3, some of the authorities kept on refusing the claim of the assesses u/s 10A, as is the case under consideration, to the extent of the profits derived from onsite development of computer software and rendering of services by technical manpower outside India. The CBDT had to step in by issuing a Circular no.1/2013 dated 17.1.2013 providing that (a) : 'it is clarified that the software developed abroad at a client's place would be eligible for benefits under the respective provisions, because these would amount to 'deemed export' and tax benefits would not be denied merely on this ground' and (b) 'that profits earned as a result of deployment of Technical Manpower at the client's place abroad specifically for software development work pursuant to a contract between the client and the eligible unit should not be denied benefits under sections 10A, 10AA and 10B provided such deputation of manpower is for the development of such software and all the prescribed conditions are fulfilled.' It was brought to the notice of the CBDT that the AOs were not even following the clarification given in the Circular dated 17.1.2013. Once again, the CBDT issued Instruction no. 17/2013 dated 19.11.2013 clarifying that: 'The undersigned is directed to convey that the field authorities are advised to follow the contents of the Circular in letter and spirit. It is also advised that further appeals should not be filed in cases where orders were passed prior to issue of Circular but the issues giving rise to the disputes have been clarified by the Circular'. There is hardly any need to accentuate that income-tax authorities are mere implementing agencies of the Parliament intent expressed through the enactment. They cannot suo motu usurp the power to indirectly legislate by not following the mandate of the provisions. Other income-tax authorities are bound to follow the command of the CBDT given through Circulars, even if they are not personally agreeable with the same.

22. On going through the directive of the Explanation 3 and the Circulars issued by the CBDT, which are binding on the authorities under the Act, it is vivid that the benefit of deduction under section 10A caters not only to profits earned from export simplicitor of computer software but also to any profits and gains derived from onsite development of computer software and also services for development of software

rendered outside India. So long as there remains a live link between onsite development of computer software and services for development of software with the development of software from the eligible undertaking, the consideration awarded for onsite development for computer software and rendering services for development of services outside India cannot be excluded from the purview of deduction u/s.10A. However, what is essential for such onsite development or rendering of software development services outside India to qualify for the benefit of deduction is that these should be in furtherance of the development of the software product undertaken by the eligible enterprise. If onsite services are de hors the product which the assessee undertook to deliver to the foreign customer, then any profit and gain arising from such services cannot be considered as eligible for deduction. The determinative test to qualify for the benefit of deduction, in our considered opinion, is that the rendition of onsite services etc. outside India by the assessee should be an integral part of the overall computer software development project, which the assessee undertook to do for its foreign customer. So long as the onshore activities etc. performed outside India remain in furtherance of the final product to be delivered, there can be no doubt on the eligibility of profit from such activities for deduction.

23. The AO has drawn a table on page 24 of his order which gives a comparative number of professionals working onsite and offshore totalling 5062. Out of this, only 725 professionals worked outside India onsite and remaining 4337 worked offshore in India only. No evidence has been placed on record to demonstrate that the employees of the assessee sent abroad for rendering onsite services were working under the direct control and supervision of the overseas customers and further that their services were alien to the agreements for software development projects which the assessee had undertaken to perform, generating the income otherwise deductible u/s 10A of the Act. Rather the position of the employees of the assessee working outside India under its own control and guidance has been acknowledged by the AO in his order for the A.Y. 2009-10 and the ld. DR could not controvert that the nature of business in such later year was any different from that for the year under consideration.

24. To fortify the view point of the AO, the ld. DR placed on record a copy of the sample agreement between the assessee and its customers. This Consulting Service Agreement was entered into between the assessee and Royal Bank of Canada on 15-05-2006. Clause 1 of the Agreement gives description of Services and states that the assessee has agreed to perform the services of: 'Technical system analysis for Capital Markets Client Authentication Infrastructure Consolidation as well as RBC Express TruePass upgrade projects'. Dates of commencement and completion have been given as 15-05-2006 and 31-10-2006 respectively. Charges have been given in Clause 3 of the Agreement as hourly rates below \$66 for two Technical System Analysts. Clause 3.2 provides that the assessee may invoice the Bank monthly for work performed during the previous month. Clause 4 states the number of personnel assigned to perform the services, which the assessee may replace with the Bank's approval. Place for service has been given as Toronto, Ontario.

25. A perusal of the above clauses of the Agreement divulges that the assessee undertook to perform Technical systems analysis for Capital Markets Client Authentication Infrastructure Consolidation as well as RBC Express TruePass upgrade projects of its customer namely, RBC. The duration for completion of the project was fixed at 5 ½ months. Entire services were to be provided onshore at the premises of the customer in Canada. 'Background and Scope' of the Agreement shows that Royal Bank of Canada required two Resources in the role of TSAs from the assessee to work on the migration of the existing security/client authorization and authentication and infrastructure from Capital Markets Platform to a Centralized RBC Platform. Next para provides that one iGate Resource will be working on existing RBC Express projects until end of August and the other iGate Resource will be working on CM Stage 1. Then both the persons were to work together on CM Stage 2 project for delivering the needful. A careful perusal of the Agreement reveals that DTM and onsite software services rendered through the 2 iGate Resources wholly related to the project undertaken by the assessee pursuant to the Agreement. This deciphers that the DTM and onsite software services rendered by the assessee were in relation to the main service undertaken by it to be performed as per the first clause of the Agreement, income from which has been otherwise held as eligible for



deduction. Notwithstanding that, the ld. AR, in reply to ld. DR's reliance on Consulting service agreement with Royal Bank of Canada, invited our attention towards another Agreement with Royal Bank of Canada dated 16-06-2005 in which services were to be rendered wholly in India. Showing to the same reference number of 2005164 in both the Agreements, viz., the one relied by the ld. DR and the one submitted by him, the ld. AR explained that there is one umbrella agreement with Royal Bank of Canada and these are subagreements, under which some part of the services were rendered in India while others onshore outside India. This fortifies the view point of the assessee that even the onshore services rendered abroad have link with agreement for services from eligible units in India.

26. On circumspection of the sample copy of the Agreement, filed by the ld. DR, between the assessee and Royal Bank of Canada as a representative of all such similar Agreements, it turns out that the assessee entered into Masters Service Agreement with several customers outside India. There was a specific tenure within which the assessee was to develop and deliver computer software or render the eligible service. A total consideration was received by the assessee under such Master Service Agreements. The AO has excluded a part of such total consideration as attributable to DTM and onsite software services by treating the same as unrelated to STP undertakings in India. The two amounts disqualified by the AO at Rs.2.43 crore and Rs.12.17 crore are part of the total consideration agreed between the assessee and its overseas customer for development of computer software or rendering of the eligible service, income from which has otherwise been held to be eligible for deduction u/s.10A. We fail to comprehend as to how a part of the total consideration as per Master Service Agreement with several customers can be separated as relatable to Deputation of Technical Manpower business and onsite software development services unrelated to STP undertakings. Such DTM and onsite software services are part and parcel of the overall computer software development projects which the assessee undertook and income from which has been otherwise held to be eligible for deduction u/s.10A. Such disqualified amounts are not independent of consideration for computer software development or rendering other eligible service, which has otherwise been conferred with deduction u/s.10A of the Act. The situation would have been otherwise if the assessee had rendered onsite software services or sent some manpower on deputation to customers outside India without having any linkage with the computer software development projects undertaken by it. As in the facts under consideration, there is only one composite amount of consideration for the eligible computer software development, in our considered opinion, the ld. CIT(A) was fully justified in rejecting the AO's point of view in bifurcating such consideration into two parts, namely, the one which is eligible towards computer software and the other which is not eligible towards DTM and onsite software services.

27. There is another aspect of the matter. The ld. DR. harped on the language of section 10A(1) of the Act to contend that only the profits and gains 'derived by' the eligible undertaking from export of computer software etc. are eligible for deduction. He laid a great deal of emphasis on the expression 'derived from' used in the provision as an opening gate for eligibility of deduction. It was contended that since income from DTM and onsite services was not derived from export of computer software, the same did not qualify for the benefit of deduction.

28. This contention, in our considered, is sans merit. There are two reasons. The first is that the Explanation 3 is a deeming provision, which specifically brings profits and gains derived from on site development of computer software and services for development of software outside India within the meaning of 'the profits and gains derived from the export of computer software outside India'. The second is that sub-section (1) of section 10A containing the words 'derived from' is not an exhaustive provision in itself. The expression 'profits ... derived ...from .. export of ... computer software' employed in sub-section (1) of section 10A of the Act has been further elaborated in sub-section (4) to mean: 'the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.' The expression 'profits of the business of the undertaking' as used in sub-section (4), in fact, gives meaning to the expression 'derived... from ... export of ... computer software' as used in sub-section (1) and amplifies the scope of the latter by mitigating the rigor and making the provision

*liberal and more inclusive. There is no gainsaying that 'profits of the business of the undertaking' are not only the profits derived from the export of computer software but also those which are attributable to the business of undertaking. So long as there exists a direct link between the eligible undertaking and some income, the same is profit of the business of undertaking, even if may not be derived from the export of computer software etc. Without accepting, even if we presume the contention of the ld. DR as correct that income from DTM and onsite software services rendered abroad cannot be considered as derived from the export of computer software, it, in any case, will have to be regarded as 'profits of the business of the undertaking'. In view of the foregoing discussion, we uphold the impugned order on this score."*

13. We note that, in assessee's own case i.e. IGATE Global Solution Ltd. as it was then in A.Y. 2007-08, being in IT(TP)A No. 286/BANG/2013, on transfer, Pune Benches of ITAT discussed the issue in great detail and turned down the contention of Revenue that the income from onsite/DTM was not derived from export of computer software and is not qualified for deduction u/s. 10A/10AA of the Act. Further, the Co-ordinate Bench held that Explanation 3 is a deeming provision, which specifically brings profits and gains derived from on site development of computer software and services for development of software outside India within the meaning of the profits and gains derived from the export of computer software outside India which means that not only the profits and gains derived by the eligible undertaking from export of computer software are eligible for deduction but also profits and gains derived from onsite development of computer software and services for development of software outside India.

14. Further, the words "derived from" contained in sub-section (1) of section 10A is not an exhaustive provision and it has been further elaborated in sub-section (4) to mean the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.

The Co-ordinate Bench opined when there exists a direct link between the eligible undertaking and some income, the same is profit of the business of undertaking, even if may not be derived from the export of computer software etc. The proposition as enunciated by the Co-ordinate Bench in assessee's own case i.e. iGATE Global Solution Ltd, as it was the then, in A.Y. 2007-08 has been followed by this Tribunal in assessee's own case in A.Y. 2010-11, therefore, we hold that the income from onsite/DTM rendered abroad is considered to be derived from the export of computer software, is eligible for deduction u/s. 10A/10AA of the Act.

15. Both the parties consented that the facts in the year under consideration with that of A.Y. 2010-11 are similar. Therefore, following the order of Co-ordinate Bench in assessee's own case for A.Y. 2010-11, we hold that onsite/deputation of technical manpower (DTM) software services are part of export turnover. Thus, Ground No. 3 raised by the assessee is allowed.

16. Ground No. 4 raised by the assessee challenging the action of CIT(A) in directing the AO to ascertain is as to whether the foreign exchange gain falls on capital account and revenue account in the facts and circumstances of the case.

17. Heard both the parties and perused the material available on record. The AO noticed that the credit balance to an extent of Rs.3,30,46,000/- in the balance sheet on account of foreign currency monetary difference. According to him, the said amount not credited to the profit and loss account but taken to reserves account. It was explained that the said

foreign exchange gain is in respect of foreign branches which was treated as non-integral foreign operation and the said treatment is in accordance with the accounting practices. The AO opined that the foreign operations are part and parcel of the overall company's operations and cannot be regarded as separate or independent operations and accordingly an amount of Rs.1,28,46,335/- being amount credited in the year under consideration as held as taxable. The ld. CIT(A) directed the AO to ascertain the amount of foreign exchange gain on capital account and on the revenue account and to delete the addition on account of furnishing of gain on capital account. It is clear from the impugned order that the ld. CIT(A) sent the matter back to the file of AO for making addition only in respect of foreign exchange gain on revenue account. The claim of the assessee is on the same line as has been directed by the ld. CIT(A) to be done, accordingly, we, therefore, dismiss the ground taken by the assessee.

18. Ground No. 5 raised by the assessee challenging the action of CIT(A) in confirming the disallowance of depreciation of Rs.35,28,126/- in the facts and circumstances of the case.

19. Heard both the parties and perused the material available on record. We note that the assessee claimed depreciation of Rs.35,28,126/- by way of a revised return of income. The ld. AR, C.H. Naniwadekar submits that the assessee purchased the business from IT&T Limited during the Financial Year 2003-04, for a consideration of Rs.18,88,10,000/-. Till A.Y. 2010-11, goodwill is amortized in the books and was disallowed for tax computation. The assessee claimed no depreciation on the same. The Hon'ble Supreme Court in the case of Smifs Securities Ltd. held that

acquired goodwill is an intangible asset and eligible for depreciation u/s. 32 of the Act. During the year under consideration, the assessee claimed depreciation by placing reliance in the case of Smifs Securities Ltd. and referred to Table No. 3 at Page No. 53 of the final assessment order which is as under :

| Financial Year | Working to arrive at opening WDV for FY 2010-11 |                    |             |
|----------------|-------------------------------------------------|--------------------|-------------|
|                | Opening WDV                                     | Depreciation @ 25% | Closing WDV |
| 2003-04        | 105,724,413                                     | 26,431,103         | 79,293,310  |
| 2004-05        | 79,293,310                                      | 19,823,327         | 59,469,982  |
| 2005-06        | 59,469,982                                      | 14,867,496         | 44,602,487  |
| 2006-07        | 44,602,487                                      | 11,150,622         | 33,451,865  |
| 2007-08        | 33,451,865                                      | 8,362,966          | 25,088,899  |
| 2008-09        | 25,088,899                                      | 6,272,225          | 18,816,674  |
| 2009-10        | 18,816,674                                      | 4,704,169          | 14,112,506  |

20. In the light of the above table, we note that the assessee has shown opening Written Down Value (WDV) at Rs.10,57,24,413/- (Rs.18,88,10,000/- + Rs.83,085,587/-) for F.Y. 2003-04 and by claiming depreciation @ 25% shown closing WDV at Rs.7,92,93,310/-. Likewise from F.Ys. 2004-05 to 2009-10 the assessee worked out depreciation @ 25% and for the year under consideration for A.Y. 2010-11 (F.Y. 2009-10) shown closing WDV at Rs.1,41,12,506/-. The contention of the ld. AR is that the assessee by mistaken belief did not claim the depreciation from F.Y. 2003-04 but by placing reliance in the case of Smifs Securities Ltd. claimed depreciation. He referred to Agreement which is at Page No. 4 of the paper book. On perusal of the said Agreement at Page No. 8 which clearly shows that the IT&T Ltd. decided to sell its affiliates to Mascot



Systems Ltd. The definition of affiliate is reflected in Article 1 at Page No. 9 of the paper book. Likewise the definition of Businesses, Business Intellectual Property and Goodwill are reflected at Page Nos. 10 and 12 of the paper book. The Financial of the assessee are at Page No. 45 of the paper book which clearly shows the purchase of contact centre and facility management businesses of IT&T Ltd. by way of a business purchase by the assessee for a consideration. Further, the Balance Sheet at Page No. 57 clearly shows the goodwill at Rs.10,57,24,414/- as on 31-03-2003. The ld. DR placed reliance on the order of CIT(A). We note that the CIT(A) confirmed the order of AO only on the ground that there was no evidence to suggest that the assessee paid Rs.10,57,24,413/- towards goodwill. As discussed above that the assessee acquired entity IT&T Ltd. and taken overall net worth of its assets, totaling to Rs.10,57,24,413/- which clearly evidenced in the financials of assessee in the Agreement at Page No. 8 of the paper book. Likewise, the assessee also shown the total consideration at Rs.10,57,24,413/- as goodwill under acquisition in the Balance sheet at Page No. 57 of the paper book. Therefore, we find the order of CIT(A) is incorrect in holding that no evidences showing acquisition in the F.Y. 2003-04. In the facts and circumstances of the case as discussed above, we find force in the arguments of the ld. AR that the assessee is entitled to claim depreciation on goodwill. However, the depreciation on goodwill only on the written down value of the goodwill starting from F.Y. 2003-04 onwards. The assessee placed on record a chart which has been reproduced at Page No. 53 of the assessment order by which the opening written down value of the F.Y. 2003-04 at Rs.105,724,413/- and after depreciation allowing @ 25% the closing written down value at Rs.79,293,310/-. In the same way the written down value has been

computed in each of the succeeding year and for F.Y. 2009-10 arrived at Rs.14,112,506/-. Thus, it well constitutes the opening written down value of goodwill for the F.Y. 2010-11 relevant to A.Y. 2011-12 i.e. the year under consideration. We, therefore, direct the AO to grant depreciation @ 25% on written down value of the goodwill at Rs.14,112,506/-. Thus, ground No. 5 raised by the assessee is allowed for statistical purpose.

21. Ground No. 6 raised by the assessee challenging the action of CIT(A) in confirming the denial of carry forward of long term capital loss in the facts and circumstances of the case.

22. During the course of draft assessment proceedings, the assessee shown short term capital gains at Rs.80,78,318/-. The AO observed that the said amount is net of short term capital loss of Rs.52,86,898/-. According to AO, the said short term capital loss is disallowable u/s. 94(7) of the Act. The assessee sought time for filing working as many of the mutual fund investments were in daily/periodic dividend schemes which are reinvested. According to AO, the assessee did not file such working but given liberty to file the same at the time of final assessment order. The assessee filed such working during the course of final assessment proceedings and the AO found variation in amounts under short term capital gains, short term capital loss and long terms capital loss. The AO held the variation in amounts were held to be chargeable to tax but did not allow the carry forward under long terms capital loss. The CIT(A) confirmed the view of the AO.

23. Heard both the parties and perused the material available on record. We note that the assessee furnished details of workings regarding the numerous transactions of dividends. Upon which the AO found variation in short term capital loss/gain as under :

| Particulars | Amount as per return filed/draft assessment order | Revised Amount | Differential | Remarks                                                  |
|-------------|---------------------------------------------------|----------------|--------------|----------------------------------------------------------|
| STCG        | 1,33,65,215                                       | 1,59,94,063    | 26,28,847    | To be offered for Tax                                    |
| STCL        | (52,86,898)                                       | (59,28,195)    | (6,14,296)   | (No impact since entire loss is disallowable u/s. 94(7)) |

24. On perusal of the above, we note that the assessee declared short term capital gain at Rs.1,33,65,215/- and during the course of final assessment proceedings, the AO found difference of capital gain of Rs.26,28,847/- (Rs.1,59,94,063/- - Rs.1,33,65,215/-) and held the said difference in amount as chargeable to tax. Further, the AO also found differential amount in short term capital loss at Rs.6,14,296/- (Rs.59,28,195/- - Rs.52,86,898/-) and held the same as disallowable u/s. 94(7) of the Act. We note that the AO held the capital gain of Rs.26,28,847/- to be chargeable to tax without there being any revised return of income but only finding the same during the course of assessment proceedings. Likewise, the AO also held an amount of Rs.6,14,296/- disallowable without there being any revised return of income, we note that the assessee accepted the same.

25. Further, the AO found variation in long term capital loss as under :

| Particulars | Amount as per return filed/draft assessment order | Revised Amount | Differential | Remarks                                      |
|-------------|---------------------------------------------------|----------------|--------------|----------------------------------------------|
| LTCL        | 4,19,81,110                                       | 10,36,89,685   | 6,17,08,575  | To be carried forward to the subsequent year |

26. On perusal of the above, we note that the assessee claimed long term capital loss in the return of income at Rs.4,19,81,110/- but, however, during the course of final assessment proceedings, the AO worked out at Rs.10,36,89,685/-. The AO allowed carried forward of loss to an extent of Rs.4,19,81,110/- only as against the amount in difference found by him at Rs.10,36,89,685/- by holding there was no provision in the Act to carry forward such loss. We note that the AO held in the final assessment order that the assessee neither claim such amount in its original return of income nor by filing a revised return of income. Admittedly, there was no revised return of income filed by the assessee seeking carry forward of loss to an extent of Rs.10,36,89,685/- which was found during the course of final assessment proceedings but, however, denied carry forward to the subsequent year in the absence of revised return of income. The contention of the Id. AR is that without there being any revised income, the AO held the difference of amount under short term capital gain as chargeable to tax and the difference in short term capital loss disallowable u/s. 94(7) of the Act, but the AO arbitrarily denied carried forward of long term capital loss to the extent difference of amount found during the assessment proceedings is, in our opinion, illegal.

27. We note that the assessee declared positive income of Rs.2,69,76,05,308/- before deduction u/s. 10A of the Act in the original return of income but, however, the AO completed assessment under book profit u/s. 115JB of the Act since the tax payable under normal provisions of the Act is low. During the course of draft assessment proceedings also the assessee was given liberty to produce reconciliation or workings of transactions relating to dividend, accordingly, in final assessment

proceedings, the assessee furnished the said workings and the AO found short term capital gains at Rs.1,59,94,063/- as against gains declared in original return of income at Rs.1,33,65,215/-. The difference of which at Rs.26,28,847/- held liable to tax. In the same way, the difference in short term capital loss of Rs.6,14,296/- disallowed, but, he did not allow carry forward of revised amount of long term capital gains of Rs.10,36,89,685/- but only allowed Rs.4,19,81,110/- which was claimed in the original return of income, by holding there is no provision in the Act. The CIT(A) confirmed the view of AO. If we accept the interpretation rendered by both the authorities below, definitely, it would frustrate the object contemplated u/s. 80 of the Act. Section 80 of the Act explains that no loss which has not been determined in pursuance of a return filed shall be carried forward in accordance with the provisions of sub-section (3) of section 139 of the Act. Admittedly, there was no return of loss u/s. 139(3) of the Act as the assessee declared positive income u/s. 139(1) of the Act. Even then, in our opinion that when the AO found variation in long term capital loss he should have allowed carry forward of such loss in the assessment proceedings itself, because, When the he taxed the difference in amount under short term capital gain and also disallowed short term capital loss u/s. 94(7) of the Act, definitely, in our opinion, the AO should have allowed carry forward of differential amount under long term capital loss and for denying the same, in our opinion, is not justified. Therefore, we direct the AO to allow carry forward the difference of amount of Rs.6,17,08,575/- (Rs.10,36,89,685/- - Rs.4,19,81,110/-). Thus, ground No. 6 raised by the assessee is allowed for statistical purpose.

28. Ground No. 7 raised by the assessee challenging the action of CIT(A) in not directing the AO to allow the foreign tax credit of Rs.11,76,27,728/- in the facts and circumstances of the case.

29. Heard both the parties and perused the material available on record. The assessee claimed double tax credit of Rs.11,76,27,728/-. The AO restricted the same at Rs.7,32,63,047/- at the proportionate rate of tax @ 18% under book profit. It was claimed before the CIT(A) that the AO allowed tax credit only on the double tax and no credit under DTAA was provided. We note that the CIT(A) directed the AO to obtain documents as required under Rule 128(8) of the Income Tax Rules and to give benefit of foreign tax credit. It is seen that the several issues came up for consideration in assessee's own case for A.Y. 2009-10. The relevant discussion has been made on Pages 20 onwards going up to Page No. 30 of the order. Since, the facts and circumstances of the instant ground are similar to those of the earlier years as discussed in the aforesaid order for A.Y. 2009-10 in the said impugned order and remit the matter back to the file of AO for re-deciding this issue in conformity with the relevant discussion given by the Tribunal in the said order. Needless to say the assessee shall be offered reasonable opportunity of hearing. Thus, ground No. 7 raised by the assessee is allowed for statistical purpose.

30. The assessee also raised **additional ground** of appeal seeking deduction paid towards Education Cess under Finance Act while computing the taxable income. The ld. AR submits that the above ground raised by the assessee is purely legal ground and raised for the first time before this Tribunal. Since, the Education Cess paid by the assessee



available with the respondent revenue which does not require any further examination of facts and prayed to allow the additional ground. Further, he submitted that this Tribunal taking support from the decision of Hon'ble High Court of Bombay in the case of Sesa Goa Ltd. reported in 423 ITR 426 directed the AO to allow deduction paid towards Education Cess.

31. After hearing both the parties, we note that the assessee paid Education Cess while computing the taxable income. The Hon'ble High Court of Bombay in the case of Sesa Goa Ltd. (supra) was pleased to hold that the Education Cess is an allowable expenditure as per the provision of the I.T. Act. The relevant portion of the order of Tribunal in ITA No. 1578/PUN/2017 for A.Y. 2011-12 in the case of M/s. Advik Hi-Tech Pvt. Ltd. is reproduced here-in-below for ready reference :

*"12. The assessee has also preferred additional ground which reads as follows:*

*"The Ld. AO be directed to allow deduction of Rs.12,91,464/- paid towards Education Cess under Finance Act while computing the taxable income under normal provision of the IT Act."*

*13. We find that this issue is squarely covered by the decision of the Hon'ble Bombay High Court in the case of Sesa Goa Limited Vs. The Joint Commissioner of Income Tax, Tax Appeal No.17 of 2013 wherein it has been observed and opined by the Hon'ble Bombay High Court as follows:*

*"22. Applying to the aforesaid principles, we find that the legislature, in Section 40(a)(ii) has provided that "any rate or tax levied" on "profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". There is no reference to any "cess". Obviously therefore, there is no scope to accept Ms. Linhares's contention that "cess" being in the nature of a "Tax" is equally not deductible in computing the income chargeable under the head "profits and gains of business or profession". Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in Section 40(a)(ii) of the IT Act.*

*23. If the legislature intended to prohibit the deduction of amounts paid by an Assessee towards say, "education cess" or any other "cess", then the legislature could have easily included reference to "cess" in clause (ii) of Section 40(a) of the IT Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by the assessee towards the "cess", when it comes to computing income chargeable under the head "profits and gains of business or profession".*

*The Hon'ble Bombay High Court observing on the impugned order of the ITAT has reasoned at Para 33 of the said order that the Tribunal has observed*

that since “cess” is collected as a part of the income tax and fringe benefit tax, therefore, such “cess” is to be construed as “tax”. However, the Hon’ble Bombay High Court held that there is no scope for such implications when construing a taxing statute. Even though, “cess” may be collected as a part of income tax, that does not render such “cess” either rate or tax, which cannot be deducted in terms of the provisions in Section 40(a)(ii) of the Act. The mode of collection is really not determinative in such matter. Therefore, it was held that amount “cess” paid is deductible from total income of the assessee.

14. The Pune Bench of the Tribunal in the case of DCIT Vs. Bajaj Allianz General Insurance Company Limited, ITA Nos.1111 & 1112/PUN/2017 for the assessment years 2013-14 & 2014-15 dated 25.07.2019 on the issue has held and observed as follows:

“13. On hearing both the parties on this issue, we find that this issue is covered one by the decision of the Hon’ble High Court of Judicature for Rajasthan Bench at Jaipur in the case of Chambal Fertilisers and Chemicals Ltd. Vs. JCIT, Range -2, Kota wherein substantial question of law No.3 is relevant in this regard (Para 3) and the same was adjudicated by the Hon’ble High Court at Para 12 of the judgment. The Hon’ble High Court on this issue held the said question No.3 is answered in favour of the assessee. For the sake of completeness, the said Paragraph is extracted as under:

“12. We have heard counsel for the parties.

On the third issue in appeal no.52/2018, in view of the circular of CBDT where word “Cess” is deleted, in our considered opinion, the tribunal has committed an error in not accepting the contention of the assessee. Apart from the Supreme Court decision referred that assessment year is independent and word Cess has been rightly interpreted by the Supreme Court that the Cess is not tax in that view of the matter, we are of the considered opinion that the view taken by the tribunal on issue no.3 is required to be reversed and the said issue is answered in favour of the assessee.”

From the above, it is evident that education Cess, which is not disallowable item, on its payment, the cess is an allowable expenditure as per provision of section 40(a)(ii) of the Act. Considering the settled nature of the issue as per the ratio laid down in the above referred case by the Hon’ble High Court of Judicature for Rajasthan Bench at Jaipur, ground of Cross objection No.4 is allowed.”

That therefore, from the legal perspective, the issue of „education cess“ is an allowable expenditure as per provisions of Section 40(a)(ii) of the Income Tax Act, 1961 (hereinafter referred to as „the Act“) and placing reliance on the decision of the Hon’ble Bombay High Court (supra.), we allow the additional ground of appeal raised by the assessee.”

32. Therefore, in view of the above decision, we direct the AO to allow deduction in respect of Education Cess paid by the assessee. Accordingly, the additional ground raised by the assessee is allowed.

33. In the result, the appeal of assessee is allowed for statistical purpose.

34. Now, we shall take up appeal in ITA No. 2624/PUN/2017 filed by the Revenue.

35. With respect to Ground Nos. 1 and 2 raised by the Revenue, the ld. AR submitted that identical grounds were raised by the Revenue in A.Y. 2010-11 in assessee's own case and the Tribunal dismissed the same vide order dated 05-03-2020. The ld. DR did not dispute the same. Accordingly, ground Nos. 1 and 2 raised by the Revenue are dismissed.

36. With respect to Ground Nos. 3 and 4 raised by the Revenue, the ld. AR submitted that identical grounds were raised by the Revenue in A.Y. 2010-11 in assessee's own case and the Tribunal dismissed the same vide order dated 05-03-2020. The ld. DR did not dispute the same. Accordingly, ground Nos. 3 and 4 raised by the Revenue are dismissed.

37. Ground No. 5 raised by the Revenue challenging the action of CIT(A) in deleting the disallowance made by the AO u/s. 14A r.w. Rule 8D in the facts and circumstances of the case.

38. Heard both the parties and perused the material available on record. We note that the assessee earned dividend income of Rs.15,67,42,780/- and made disallowance of expenditure on its own to an extent of Rs.4,04,755/-. The AO not satisfied with the said disallowance, by invoking the procedure under Rule 8D made further disallowance under Rule 8D(2)(ii) to an extent of Rs.5,08,319/- and under Rule 8D(2)(iii) to an extent of Rs.1,31,18,543/-, totaling to Rs.1,40,31,617/- which is inclusive of assessee's own disallowance. The CIT(A) deleted the said disallowance

by holding that the AO made said disallowance without recording any satisfaction why the disallowance made by the assessee on its own is incorrect. The ld. AR placed on record of the decision of this Tribunal in assessee's own case for A.Y. 2011-12 and referred to Para No. 17 of the paper book. The main contention of the ld. AR is that the AO required to record satisfaction before proceeding to apply the method prescribed under Rule 8D of the Rules. We note that the AO observed in Para No. 8.1 of its order *"It is seen as per the computation of income that the assessee company has offered only an amount of Rs.4,04,755/- being 25% of the salaries of the investment department officials is disallowed u/s. 14A of the Income Tax Act. As per the Balance sheet filed, the assessee has had substantial amounts of tax exempt investments in the form of amounts invested in mutual funds"*. We consider the said observance of the AO is non-satisfaction to the disallowance made by the assessee and considering the same having not satisfied requested the assessee to explain why the disallowance should not be made u/s. 14A of the Act, in response to which, the contentions of the assessee was reproduced in the assessment order from Page Nos. 7 to 8 and considering the same the AO held *"the said offer of disallowance by the assessee company cannot be accepted as the assessee ought to have computed the disallowance u/s. 14A read with Rule 8D of the Rules."*, it is, therefore, in our opinion, the contention of the ld. AR is that there was no satisfaction recorded by the AO as confirmed by the CIT(A) regarding the disallowance made by the assessee on its own is incorrect and we find that the AO categorically held that the disallowance made by the assessee is not acceptable, thereby, the submission of ld. AR is rejected.

39. Coming to the consolidated order for A.Y. 2011-12, we note that this Tribunal clearly observed “*The perusal of the assessment order does not reflect the Assessing Officer to have recorded satisfaction as to why suo-motu disallowance made by the assessee at Rs.50 lakhs is not sufficient to cover disallowance of expenditure relatable to exempt income. In view of the provisions of section 14A(2) of the Act*”, which clearly shows this Tribunal categorically found on an examination of assessment order that there was no satisfaction recorded by the AO in respect of the disallowance made by the assessee on its own relating to exempt income. Therefore, in our opinion, the facts and circumstances reflected in the assessment order relating to A.Y. 2011-12 are not identical to the facts on hand, wherein, we find in the present case the AO clearly recorded is non-satisfaction regarding the disallowance made by the assessee on its own relating to exempt income and proceeded to invoke the procedure contemplated under Rule 8D of the Rule. Therefore, the contention of ld. AR that the finding of this Tribunal in assessee’s own case for A.Y. 2011-12 is applicable to the year under consideration is rejected, therefore, we hold the facts in A.Y. 2011-12 in consolidated order of this Tribunal in ITA No. 74/PUN/2016 and ITA No. 299/PUN/2016 are not identical to the fact of the year under consideration. In view of the same, we hold the order of CIT(A) in this regard in holding that the AO did not record any satisfaction relating to the disallowance made by the assessee on its own is not justified. Thus, the order of CIT(A) is set aside in this regard and the order of AO is restored. Accordingly, ground No. 5 raised by the Revenue is allowed.

40. In view of our decision in remanding the issue raised in ground No. 7 by the assessee to the file of AO, the corresponding ground No. 6 of the

Revenue becomes academic requiring no adjudication. Hence, ground No. 6 of the Revenue is dismissed.

41. In the result, the appeal of Revenue is partly allowed.

42. To sum up, the appeal of assessee is allowed for statistical purpose and the appeal of Revenue is partly allowed.

Order pronounced in the open court on 26<sup>th</sup> October, 2021.

Sd/-  
(R.S. Syal)  
VICE PRESIDENT

Sd/-  
(S.S. Viswanethra Ravi)  
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 26<sup>th</sup> October, 2021.

RK

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-13, Pune
4. The Pr. CIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ए” बेंच,  
पुणे / DR, ITAT, “A” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

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