

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'A' PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI C.M. GARG, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1043/PUN/2017

निर्धारण वर्ष / Assessment Year : 2012-13

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.1116/PUN/2017

निर्धारण वर्ष / Assessment Year : 2012-13

DCIT, 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 : Smt. Divya Bajpai

Date of hearing : 08-11-2021
Date of pronouncement : 09-11-2021

आदेश / ORDER

PER R.S.SYAL, VP :

These two cross appeals – one by the assessee and the other by the Revenue - are directed against the order passed by the Id. CIT(A) on 10.02.2017 in relation to the A.Y. 2012-13.

2. The first ground of assessee as well as the Revenue deals with deduction u/s 10AA of the Income-tax Act, 1961 (hereinafter also called 'the Act') *vis-à-vis* telecommunication charges.

3. The facts apropos this issue are that the assessee incurred telecommunication charges and internet user charges, which it did not exclude from the export turnover as well as total turnover in computing deduction u/s 10AA of the Act. The AO reduced such amounts from the amount of export turnover only. The Id. CIT(A) directed to exclude such amounts both from the export turnover and the total turnover. Whereas the Revenue wants exclusion of such charges only from the amount of export turnover, the assessee wants their inclusion in both.

4. We have 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 year. Vide order dated 26.10.2021, the Tribunal in ITA No.2395/PUN/2017 and ITA No.2624/PUN/2017 has upheld the exclusion of telecommunication charges etc. both from the export turnover and total turnover in the computation of deduction u/s 10AA of the Act. The impugned order is, therefore, upheld and consequently the grounds raised by both the assessee as well as the Revenue are dismissed.

5. Ground No. 2 taken both by the assessee and Revenue is against exclusion of Rs.36,04,55,570 on providing technical services abroad from the export as well as total turnover in the computation of deduction u/s 10AA of the Act. The assessee did not exclude this amount both from the export and total turnover. The AO excluded only from the export turnover. The Id. CIT(A) directed its exclusion both from the export and the total turnover. Both the sides have come up in appeal against the impugned order on this score.

6. It is seen that similar issue also came up for consideration before the Tribunal in its order for the immediately preceding A.Y. 2011-12. The Tribunal has upheld the order of Id. CIT(A) in excluding such amount from the export and total turnover. Since the view taken by the Id. CIT(A) accords with that approved by the Tribunal for the immediately preceding assessment year, we approve the same. Both the grounds are dismissed.

7. Ground 3 of the assessee's appeal is against not granting deduction u/s 10AA of the Act on onsite/deputation of technical manpower (DTM) software services.

8. Here, again we find that the Tribunal had an occasion to decide similar issue for the immediately preceding assessment year in favour of the assessee by directing that profit on onsite / DTM services should be considered as part of turnover for the purposes of granting the deduction. Respectfully following the precedent, we overturn the impugned order on this score and direct to include such amount in the profit for the purpose of deduction u/s 10AA of the Act.

9. Ground No.4 of the assessee's appeal is against allocation of common expenses of Rs.2,93,46,896 (including interest on loan of Rs.79,96,855) to the eligible undertakings for the purpose of computing deduction under section 10AA of the Act.

10. Succinctly, the factual matrix of the case is that only two units of assessee, namely, one at Hyderabad SEZ and other at Chennai SEZ were eligible for deduction u/s 10AA during the year and the other units were not eligible. The assessee submitted a working of the computation of income from the two SEZ units. On a perusal of the same, it was observed by the AO that no allocation of common / corporate expenses was made to the eligible units. The AO computed the ratio of operating expenses to revenue at 20.69% of non-eligible units and 17.88% of eligible units. On being show caused, the assessee submitted that the allocation of expenses was properly done. However, on a without prejudice basis, the assessee furnished calculation of corporate expenses at Rs.9,61,12,965 which was not bifurcated to assessee's SEZ units. On the basis of turnover key, the assessee computed the amount of corporate expenses in relation to Hyderabad SEZ at Rs.1,46,98,465 and Chennai SEZ at

Rs.66,51,576. Similarly, in respect of Interest cost also, the assessee initially submitted that there was no specific borrowing for SEZ units. However, on a without prejudice basis, the assessee furnished allocation of such interest cost to Hyderabad SEZ unit at Rs.55,05,446 and Chennai SEZ unit at Rs.24,91,409 on the basis of turnover key. The AO recomputed the amount of eligible deduction from the two SEZ units by reducing the proportionate corporate expenses and interest expenses from the income computed by the assessee in respect of Chennai and Hyderabad SEZ units. The CIT(A) echoed the assessment order on this point.

11. We have heard both the sides and gone through the relevant material on record. On a specific query, the ld. AR could not point out that the amount of corporate expenses of Rs.9,61,12,961 and the amount of interest cost of Rs.3,60,00,000 was allocated to the eligible Hyderabad SEZ and Chennai SEZ units. Since these costs were incurred for and pertained to all the units of assessee including the SEZ units, it was necessary to consider them in computing the profit from the two SEZ units for the purpose of deduction u/s 10AA of the Act. It is found that the AO made allocation to these

two SEZ units on the basis of turnover key, which was, in fact, computed by the assessee itself. Thus, on a totality, the amount of corporate expenses and interest cost allocated by the AO to the Hyderabad SEZ and Chennai SEZ is nothing but the amounts *suo motu* calculated by the assessee which were earlier not included in the cost base for computing profit from them. We, therefore, uphold the same. This ground is not allowed.

12. Ground No.5 of the assessee's appeal is against taxing Rs.64,50,066 towards foreign exchange fluctuation gain on account of overseas branches, which was taken by the assessee directly to the Reserve account. The AO considered this amount as part of total income. The Id. CIT(A) directed the AO to follow his directions given for the A.Y. 2010-11.

13. Having heard the rival contentions and perused the material on record, it is seen that similar issue came to be decided by the Tribunal in the assessee's own case for the A.Y. 2011-12. The Tribunal, following its earlier order, held that the amount of foreign exchange fluctuation gain relatable to the revenue field should be considered as includible in the total income and the part relatable to

the capital field should be excluded. This view has been taken on the basis of similar view taken for the earlier years. As the Id. CIT(A)'s decision matches with the view approved by the Tribunal for the earlier years, respectfully following the precedent, we uphold the same. The ground taken by the assessee is therefore, dismissed.

14. The only other ground which survives in the assessee's Memorandum of appeal is against not allowing set off of brought forward losses and unabsorbed depreciation of erstwhile subsidiary. In this regard, it is found that the Id. CIT(A) restored the matter to the file of the AO giving directions through para 24 that the assessee's claim of set off of brought forward losses be verified and unabsorbed depreciation should be allowed as per law. Since the Id. CIT(A) has already issued necessary directions in this regard, the ground taken by the assessee becomes infructuous and is hence dismissed.

15. The assessee has taken an additional ground reading as under:

“Additional ground:

‘In the facts and circumstances of the case, the learned AO erred in making disallowance of Rs.46,36,714 under section 40(a)(ia) on account of short deduction of tax at source.’”

16. The Hon'ble Supreme Court in *National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC)* has observed that “the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item”. Answering the question posed before it in affirmative, their Lordships held that on the facts found by the authorities below, if a question of law arises (though not raised before the authorities) which has bearing on the tax liability of the assessee, the Tribunal has jurisdiction to examine the same. Having gone through the subject matter of the additional ground taken by the assessee, it is discernible that the additional ground raises a pure question of law. We, therefore, admit the additional ground and espouse it for disposal on merits.

17. The factual matrix apropos this ground is that the assessee *suo motu* disallowed, *inter-alia*, Rs.46,36,714 u/s 40(a)(ia) of the Act at the time of filing the return on the ground of short deduction of tax at source from the payments made to Unique Tourism Private Limited. Later on finding that the deduction of tax at source was correctly done and further that such a claim was not raised in an appeal before the Id. CIT(A), the assessee filed a Revision application u/s 264 of the Act, which came to be dismissed on the ground that the assessee's appeal was already pending before the CIT(A). This is how, the assessee has approached the Tribunal for necessary relief.

18. Having heard the rival contentions and perused the relevant material on record, it is seen that the claim of assessee is that it deducted tax at source @ 0.70% from Rs.46,36,714 paid to Unique Tourism Pvt. Ltd. and made *suo motu* disallowance u/s 40(a)(ia) of the Act on the wrong interpretation that tax should have been deducted at source at 2%. It was later on realized that Unique Tourism Pvt. Ltd. was issued certificate u/s 197 of the Act requiring the deduction of tax at source @ 0.70%. Under such circumstances,

we are of the considered opinion that it would be in the fitness of things, if the AO is directed to examine and verify the assessee's facts in this regard and then decide as per law. We order accordingly. If the amount of deduction of tax at source from the payment of Rs.46,36,714 is found to be made at the correct rate for which necessary certificate was issued by the Department u/s 197 to Unique Tourism Pvt. Ltd., then *suo motu* disallowance made by the assessee u/s 40(a)(ia) of the Act should be deleted. Needless to say, the assessee will be accorded a reasonable opportunity of hearing.

19. The assessee has raised another additional ground reading as under:

“The amount of ‘Education cess on income-tax’ and ‘Secondary and Higher Education cess on Income-tax’ paid during the year ought to be allowed as deduction while computing the taxable income for the year.”

20. This is again a legal ground which goes to the root of the matter not requiring any fresh investigation of facts. We, therefore, admit the same and proceed to dispose it on merits. It can be seen that a similar issue came up for consideration before the Hon'ble Bombay High Court in the case of *Sesa Goa Ltd. vs. JCIT (2020)*

423 ITR 426 (Bom) in which it has been held that Education cess and Higher secondary education cess are not allowable as deduction in the year of payment and hence, the deduction is not linked with actual payment. Similar issue has been considered and decided by the Tribunal in the assessee's own case for the A.Y. 2011-12. Respectfully following the precedent, we set aside the impugned order and remit the matter to the file of the AO for making requisite verification in this regard and thereafter allow necessary deduction.

21. Ground No.3 of the Revenue's appeal is connected with its ground No.5 as both deal with the deletion of disallowance made u/s 14A read with 8D of the Income-tax Rules, 1962 (hereinafter also called 'the Rules').

22. The facts apropos these grounds are that the assessee earned exempt dividend income from mutual funds to the extent of Rs.7,03,29,908. Disallowance was offered only at Rs.3,38,170, being, 25% of salaries of the Investment department officials. The AO, after recording satisfaction, computed the disallowance at net of Rs.4,14,08,008 (after adjusting the *suo motu* disallowance offered by the assessee) while computing income u/s 115JB of the

Act. The Id. CIT(A) accepted the assessee's contention and deleted the disallowance on merits as well as by holding that no disallowance u/s 14A can be made in computing 'book profits' under section 115JB of the Act.

23. We have heard the rival contentions and perused the material on record. In so far as the deletion of disallowance on merits is concerned, the case of the Id. CIT(A) is that the AO did not record proper satisfaction before making the disallowance. Similar course of action was taken by the Id. CIT(A) in his order for the preceding year. When the matter came up for consideration, the Tribunal held that the AO recorded proper satisfaction. The Id. AR fairly admitted that the AO recorded satisfaction in the assessment order for the year under consideration in the same manner as was done for the preceding year. Following the same view, we vacate the order of the Id. CIT(A) on the issue of improper recording of satisfaction by the AO. This ground is allowed.

24. On the question of not making disallowance u/s 14A of the Act in the computation of income u/s 115JB of the Act, we find that the Special Bench of Tribunal in *ACIT vs. Vireet Investment (P) Ltd.*

(2017) 165 ITD 27 (Delhi SB) has held that no disallowance u/s 14A can be made while computing book profit u/s 115JB. In reaching this conclusion, the Special Bench relied on *Pr.CIT & Anr. Vs. Bhushan Steels Ltd. & Anr (2015) 94 CCH 335 (Del)*. In view of the above legal position, we countenance the opinion of Id. CIT(A) on this score. This ground is not allowed.

25. Ground No.4 of the Revenue's appeal is against granting depreciation on goodwill even though the same was acquired in the F.Y. 2003-04 and the assessee did not make any similar claim in earlier years. It is seen that this issue came up for consideration before the Tribunal in the assessee's own case for the A.Y. 2011-12. Although in the preceding year, the Id. CIT(A) decided the issue against the assessee, but for the year under consideration a reverse view has been taken. As can be seen, the Tribunal discussed this issue on page 12 onwards of its order for the preceding year and eventually, accepted the grant of depreciation subject to certain verifications by the AO. Since the facts and circumstances for the instant year are *mutatis mutandis* similar, respectfully following the

precedent, we direct the AO to decide this issue by following the decision of Tribunal for the aforesaid earlier year.

26. In the result, both the appeals of the assessee as well as the Revenue are partly allowed for statistical purposes.

Order pronounced in the Open Court on 9th, November, 2021.

Sd/-
(C.M. GARG)
JUDICIAL MEMBER

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

पुणे Pune; दिनांक Dated : 9th November, 2021
GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A), Pune-1,
4. The Pr.CIT-1, Pune
5. DR, ITAT, 'A' Bench, 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	08-11-2021	Sr.PS
2.	Draft placed before author	09-11-2021	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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