

**IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH,
MUMBAI
BEFORE SHRI RAJENDRA, AM AND SHRI PAWAN SINGH, JM**

आयकर अपील सं./I.T.A. No.725/Mum/2015
(निर्धारण वर्ष / Assessment Year: 2007-08)

D.C.I.T. -10(1)(1), R. No.209, Aayakar Bhavan, M.K. Road, Mumbai-400 020.	बनाम/ Vs.	M/s. Hexaware Technologies Ltd. 152, Millenium Business Park, Sector-3, TTC Industrial Area, Mahape, Navi Mumbai-400 710.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABCA 3202F		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Arvind Kumar
प्रत्यर्थी की ओर से/Respondent by	:	Shri Vijay Mehta

सुनवाई की तारीख / Date of Hearing	:	10/10/2016
घोषणा की तारीख / Date of Pronouncement	:	14/10/2016

आदेश / ORDER

PER PAWAN SINGH, J. M.:

1. The present Appeal is filed by the Revenue against the order of CIT(A)-17, Mumbai dated 08.11.2014 in respect of Assessment Year 2007-08, the assessee has raised following grounds of appeal:

1. “On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that the reassessment is invalid without appreciating that the reasons were communicated to the assessee vide letter dated 02/07/2012 and the issues raised therein were the reasons for re-opening.”

2."On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in holding that the re-opening of the assessment was based on change of opinion and no new material has been brought on record without appreciating that no opinion on the issues involved was formed at the time of original assessment and the assessment was re-opened within a period of 4 years"

3."On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 10A before computing the brought forward business losses and unabsorbed depreciation without appreciating that after the amendment, S. 10A/1 OB has become "Deduction" and not "Exemption" and the income of the assessee has to be computed as per the Computation of income as defined in S 2(45) of the Act. "

4."On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 10A before computing the brought forward business losses and unabsorbed depreciation ignoring that the Hon 'ble Karnataka High Court in the case of Commissioner of Income-tax Vs. Himatsingka Seide Ltd. reported in 286 ITR 255 (2006) which has clarified that loss of 10-A unit has to be first set off against 10- A profit and only on balance amount deduction is available and ignoring the fact that decision of Karnataka High Court was upheld by Hon'ble Supreme Court in CA 1501 of 2008 holding that appeal is devoid of any merit?"

5."Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 10A before computing the brought forward business losses and unabsorbed depreciation ignoring that the CBDT vide its Circular No.7 of 2013 dated 16.07.2013 has categorically clarified as under:

.... "first the income/loss from various sources i.e. eligible and ineligible units, under the same head are aggregated in accordance with the provisions of section 70 of the Act. Thereafter, the income from one ahead is aggregated with the income or loss of the other head in accordance with the provisions of section 71 of the Act. If after giving effect to the provisions of sections 70 and 71 of the Act there is any income (where there is no brought forward loss to be set off in accordance with the provisions of section 72 of the Act) and the same is eligible for deduction in accordance with the provisions of Chapter VI-A or sections 10A, 10B etc. of the Act, the same shall be allowed in computing the total income of the assessee ... "?

6."Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 10A before computing the brought forward business losses and unabsorbed depreciation by placing reliance upon the decision of Bombay High Court in the case of CIT Vs Black & Veatch Consulting P Ltd 20 Taxmann.com 727 (Born.) ignoring the fact that the department has not accepted the ratio laid down in the said case. ?"

7."On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance of dividend distribution tax while computing the book profits u/s. 115JB without appreciating that the Explanation 2 below section 115JB was already in the statute when the assessee filed its revised return on 05/03/2012."
"

8."On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance of dividend distribution tax while computing the book profits u/s. 115JB without appreciating that the Explanation 2 below section 115JB was inserted by the Finance Act, 2008 with retrospective effect from 01/04/2001 whereas the order u/s 14. Already in the statute when the assessee filed its revised return on 05/03/2012."

2. The brief facts of the case are that the assessee filed return of income for A.Y. 2007-08 on 31.10.2007 declaring total income of Rs. 7,52,80,804/-. The assessment was completed u/s 143(3) of Income Tax Act, 1961 on 30.11.2010 determining its total income at Rs. 7,90,29,077/-. Subsequently the assessment was reopened u/s 147 of the Act. Following reasons were recorded for re-opening of assessment.

"From the perusal of the case records, it is seen that the assessee is engaged in design, development and export of computer software etc. The assessee company is having three 10A units at Mahape, Bangalore and Chennai.

From the scrutiny assessment records, it is observed that during the scrutiny assessment, depreciation as per Income-tax Act was thrust and the profit in respect of Bangalore unit was recomputed and allowed the deduction of profit in respect of Mahape and Chennai units as claimed by the assessee company in its return of income. It was revealed that the Chennai units was having brought forward losses of Rs. 32152293 for AY 2005-06 which was not set off while allowing 10A deduction for the current year. This resulted in excess allowance of deduction under section 10A of Rs. 32152293/- which has escaped assessment with subsequent excess carry forward of losses of the three units, Bangalore unit was transferred and the assessee has offered Short Term Capital Gains of Rs. 51563568 on slump sale its -of return of income which was accepted during scrutiny assessment. From the assessment records, it is revealed that the assessee had considered WDV of depreciable asset as Rs. 48583994 on gross

basis. However, during scrutiny assessment while allowing deduction u/s. 10A in respect of the above unit depreciation of Rs. 26035586 being current year depreciation after elaborate discussion and taking into account various judicial pronouncements. As such while computing Short Term Capital Gains on slump sale WDV of Rs. 22548408 net of current year depreciation should have been taken, which has resulted in under assessment of Rs. 2,60,35,586 which in turn resulted in excess carry forward of losses of Rs. 2,60,35,586.

In the computation of income, assessee had claimed deduction of Rs. 665811431 under section 10A. The assessee was allowed to set off brought forward unabsorbed depreciation and business loss of Rs. 11,84,74,976 pertaining to 10A units from the balance remaining after allowance of deduction under section 10A. No set off of brought forward losses/ unabsorbed depreciation was made while computing eligible profits for the purpose of section 10A. The Hon'ble Karnataka High Court in the case of CIT vs Himatsingeke Siede Ltd [2006 TIOL -448-HC-KAR-IT] held that brought forward unabsorbed business losses and depreciation should be set off first while computing eligible profit under section 10B. In a recent judgment of ITAT Bangalore Bench in the case of M/s. Intellinet Technologies India Pvt. Ltd. [2010-TIOL-167-ITAT-BANG], it was held that the total income of a particular assessment year has to be computed after aggregation of the profits/losses of the concerned assessment year under different heads of income and after the set off of brought forward business losses/unabsorbed depreciation relating to assessment years and the deduction u/ s. 10A has to be worked out after setting off of brought forward losses/unabsorbed depreciation. Similar view was expressed by the Delhi Bench in the case of Global Vantedge Pvt. Ltd. vs. DCIT 2010-TIOL-24-ITAT-DEL where the tribunal has held that unabsorbed business losses in respect of eligible 10A unit has to be set off against the profits for determining the amount of deduction available u/ s. 10A . The Delhi Bench had considered the decision of the Karnataka High Court in the case of Commissioner of Income-tax vs. Himatsingeke Siede Ltd. while giving its judgement.

In view of the decisions cited above, the brought forward losses of units eligible for deduction under section 10A should have been adjusted before allowing full deduction under section 10A. This had resulted in excess allowance of deduction of Rs. 118474976.

It was noticed from the computation sheet that assessee was allowed relief under section 90(1) to the extent of Rs. 8962633 in respect of taxes paid overseas. This amount included Rs. 7604853 being credit for withholding tax paid in foreign branches as per the DTA. Since the entire profit earned from export activities were claimed exempt from tax in India, assessee was not eligible to get DTA relief in respect of such income.

While computing book profit under section 115JB, assessee had reduced dividend distribution tax of Rs. 34686771 from the book profit. As per explanation 2 below section 115JB, tax on distributed profit should be treated as income tax and therefore cannot be allowed as deduction from book profit for the purpose of section 115JB. Since the assessee had claimed deduction of MAT credit u/ s. 115JB from the normal income of current year, correct computation of tax liability u/ s. 115JB is relevant in this case. Accordingly, the excess allowance of dividend distribution tax of Rs. 34686771 from the book profit has resulted in escapement of assessment."

The notice u/s 148 issued on 01.03.2012 was served on the assessee. The assessee filed its vide reply dated 05.03.2012 contending that return filed on 31.10.2007 may be treated as return in response to the notice u/s 148. After hearing the representative of assessee, the AO passed the reassessment order u/s 143(3) r.w.s. 147 of the Act. While passing the order of reassessment the AO made disallowance of set off of brought forward loss of Chennai STP unit, disallowed brought forward loss and unobserved depreciation of non eligible units against the income of STP units, not granted relief in respect of tax paid outside India and made additions on account of dividend distribution. Aggrieved by the order of AO, the assessee filed appeal before the CIT(A) challenging the validity of reopening and the various additions made in quantum reassessment. The Ld. CIT(A) while deciding the appeal declared the re-opening of assessment as invalid. The Ld. CIT(A) further deleted the various

addition made in quantum assessment. Thus, being aggrieved by the order of Id. CIT(A) the Revenue has filed present appeal before us.

3. We have heard the Id. DR for revenue and the Id. AR for assessee and perused the material placed on record. The Ld. DR for the revenue would argue that Id CIT(A) wrongly held the order of reopening as invalid. The addition was also deleted without valid reasons. On the other hand the Id. AR of the assessee would argue that reasons of reopening was not supplied to assessee despite requesting in writing to AO. The Ld. AR for assessee argued that due to non supply of reasons of reopening the reassessment order passed u/s 143(3) r.w.s. 147 is invalid and thus consequential addition made in such reassessment proceeding are illegal. The Ld. AR of the assessee further argued that Ground against the reopening is squarely covered in his favour by the judgment of Hon'ble Jurisdictional High Court in CIT vs. Trend Electronics in ITA No.1867 of 2013 dated 16.09.2015 reported vide [2015] 379 ITR 456 (Mum).
4. We have considered the rival contentions of the Id AR for the parties and perused the material placed on record. The notice u/s 148 dated 01.03.2012 was duly served upon the assessee. In reply to the notice u/s 148 the assessee submitted that return already filed on 31.10.2007 may be treated as return filed in response to the notice u/s 148 of the Act. The assessee requested reasons recorded for reopening. The AO did not passed any order about the reasons demanded by assessee. We have further perused the order of reassessment u/s 143(3) r.w.s. 147 dated 18.03.2013, the AO has not recorded that the reasons of reopening was supplied. Though para no.3 of the assessment order

contained the reference of reply of assessee dated 05.03.2012. The Ld. CIT(A) while considering this ground of appeal on the allegation of assessee that assessee was not supplied reasons of reopening despite requesting time and again, forwarded the objections raised by assessee to the AO and directed to submit his report. The AO filed his report dated 22.09.2014, wherein it was contended that the AR of the assessee was provided copy of reasons recorded during the hearing dated 12.09.2014(during remand proceedings). The Ld. CIT(A) observed that reasons recorded were never communicated to the assessee during the course of assessment proceeding despite being repeatedly asked by assessee. No separate order for disposing the objection raised by assessee was passed by AO. On the merit of the case, it was observed by the Ld CIT(A) that AO tried to rectify the previous order wherein he had already allowed relief to the assessee on the same facts and record. Nothing new material came to the notice of AO, the AO also admitted that the relief was granted to assessee on the basis of information provided to him. The reasons recorded by AO are also patently incorrect as the reasons were not pertaining to the year under consideration and the same was related to earlier year. The Ld. CIT(A) concluded that if the reasons are not supplied during the assessment proceeding, then furnishing the reasons at subsequent stage to the assessment proceeding would serve no purpose. The non supply of reasons amounts to denial of opportunity to the assessee. The Ld. CIT(A) held that reassessment was completed without furnishing the reasons actually recorded by AO and the reopening of assessment is not sustainable in law. The AO is duty bound to supply his reasons for

recorded within reasonable time as per the directions of Hon'be Apex court. Subsequent supply of reasons would not make good the illegality suffered by reopening of assessment.

The Hon'ble Jurisdictional High Court in the case of CIT vs. Trend Electronics (supra) held:

“That an order passed in reassessment proceedings was bad in law in the absence of reason recorded for issuing a reopening notice under section 148 of the Income-tax Act, 1961, being furnished to the assessee when sought for. It is axiomatic that the power to reopen a completed assessment under the Act is an exceptional power and whenever the Revenue seeks to exercise such power, it must strictly comply with the pre-requisite conditions, viz., recording of reasons to indicate that the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment which would warrant the re-opening of an assessment. These recorded reasons must be furnished to the, assessee when sought for so as to enable the assessee to object to the reasons before the Assessing Officer. Thus, in the absence of reasons being furnished when sought for would make an order of reassessment bad in law. The recording of reasons and-furnishing, of the reasons has to be-strictly complied with t as it is a jurisdictional issue. I This requirement is salutary as it not only ensures reopening notices are not lightly issued but also where notices have been issued on some misunderstanding misconception, the assessee is given an opportunity to point' out that the reasons to believe as recorded in the reasons do not warrant 'reopening before the reassessment proceedings are commenced. The Assessing Officer disposes of these objections and if satisfied with the objections, then the reopening notice under section 148 is dropped or withdrawn otherwise it is proceeded with further. In issues such as this, i.e., where the jurisdictional issue is involved this must be strictly complied with by the authority concerned and no question of knowledge being attributed on the basis of implication can arise. The stand of the' Revenue could not be appreciated, that the assessee had asked for reasons' recorded only

once and, therefore, seeking to justify non-furnishing of reasons. The State is expected to act more responsibly."

5. In view of the above discussion we find that the ratio determined by Hon'ble Jurisdictional High Court in the case of CIT vs. Trend Electronics (supra) is squarely applicable on the facts of the present case. Thus, following the decision of Jurisdictional High Court we sustain the order of Id. CIT(A) that reopening of assessment proceeding is invalid. As we have sustained that reopening of assessment proceeding is invalid, thus the decision of other ground of appeal raised by the assessee become academic.

In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 14th October, 2016

Sd/-

(RAJENDRA)

Sd/-

(PAWAN SINGH)

लेखा सदस्य / Accountant Member

न्यायिक सदस्य/ Judicial Member

मुंबई Mumbai; दिनांक Dated : 14.10.2016

Ps. Ashwini

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai.