IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI

BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER
AND SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.6386 and 6387/Del/2012
AY: 2001-02 and 2007-08

Infrasoft Technologies Ltd. C/o Ravinder Gupta, C.A. 20, Vakil Lane, KG Marg New Delhi 110 001	vs.	Dy.CIT, Circle 11(1) New Delhi

PAN: AAACB 2817 R

(Appellant) **(Respondent)**

Appellant by : Sh. Vijay Mehta, C.A.
Respondent by : Sh. T. Vasanthan, Sr.D.R.

ORDER

PER J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

Both these appeals filed by the assessee and are directed against separate orders of the Commissioner of Income Tax (Appeals) – XV, New Delhi. As issues arising in these appeals are common, for the sake of convenience they are heard together and disposed of by way of this common order.

1.1. We first take up the appeal for the Assessment Year 2001-02 in ITA No.6386/Del/2012.

2. Facts in brief:- The Assessee is a company and derives income from the business of the development and sale of software products. The assessee company was incorporated in July,1995 and started a domestic units for sale of different types of

computer software in the local market. During the year under consideration, the assessee claims that it started a "new export unit" after getting the same registered with STPI on 28/03/2000. The assessee has given the chronology of events in support of his contention. This is extracted herein below for ready reference.

(1) 06.07.1995 Assessee company incorporated and started domestic unit engaged in local sale of various computer software.
(2) F.Y. 1999-2000 : Assessee company started export unit for rendering software development services and for that purpose undertook various activities as under:
06.08.1999: Board resolution for registering the export oriented unit with STPI.
23.09.1999: Agreement with M/s Direct Credit Exchange Ltd., UK for manufacturing and export of software.
11.12.1999: Premises of ground floor of the same building taken on lease to shift existing domestic unit.
03.02.2000: Advance received from M/s Direct Credit Exchange Ltd. UK. This was first ever foreign exchange remittance in respect of export received by assessee.
07.02.2000: New EEFC account opened.
14.3.2000: Board resolution permitting authorized people to sign documents in connection with registration of export unit with STPI.
16.3.2000: Application made to STPI Authority for approval.
(3). 28.03.2000: Approval received from STPI Authority.

2.1. The assessee originally filed its return of income on 29/05/2002 declaring total income of Rs.1,79,97,110/- for the A.Y. 2001-02. The original assessment was completed on 27/02/2004 determining the total income at Rs.1,82,58,300/-. The assessing officer disallowed the claim made by the assessee under section 10 A of the Income Tax Act, 1961 (the Act). The assessee had originally claimed deduction under section 80 HHE of the Act in its return of income and subsequently it filed a revised return of income and claimed deduction under section 10A of the Act. The A.O. held that the assessee is not eligible to claim deduction u/s 10A of the Act. The assessee

carried the matter in appeal. The Ld.CIT(A) vide his order dt. 31.01.2005 upheld the orders of the Assessing Officer (A.O.).

2.2. The assessee carried the matter before the ITAT. The ITAT in order dated 17/09/2007, in ITA No.3640/Del/2005, set aside the order of the Ld.CIT(A) and directed the A.O. to re-examine the issue of deduction u/s 10A of the Act and pass fresh orders in accordance with law. In the fresh assessment proceedings the A.O. applied the findings given by the Ld.CIT(A) and in the immediately next A.Y. 2002-03 vide order dt. 29.2.2008 and denied exemption claimed by the assessee u/s 10A of the Act. Aggrieved the assessee carried the matter in appeal before the Ld.CIT(A) without success. The First Appellate Authority in his appellate order noted that the order of the Ld.CIT(A) for the A.Y. 2002-03 has been upheld by the ITAT, Delhi Benches and hence the AO has rightly rejected the claim of the assessee for deduction u/s 10A of the Act. Now the assessee is before us on this issue.

3. We have heard Shri Vijay Mehta, the Ld.Counsel for the assessee and Shri T.Vasanthan, Ld.Sr.D.R. on behalf of the Revenue.

3.1. On a careful consideration of the facts and circumstances of the case, orders of lower authorities and case laws cited, we hold as follows.

4. Mr.Vijay Mehta, the Ld.Counsel for the assessee submitted an application for admission of additional evidence under rule 29 of the Appellate Tribunal Rules 1963 for both the impugned A.Ys that are before us. He pleaded the the assessee has, along with its application made to as STPI filed a number of documents, which were not before the Assessing Officer or the Ld.CIT(A) or before the ITAT in the earlier round of proceedings. He submitted that the assessee was not guided properly by its counsel with regard to filing of evidences, to establish its claim for deduction u/s 10A of the Act. He submitted that the assessee had approached the present Counsel and it came to know that vital evidences that would go to prove the correctness of the claim of the assessee, were not placed before the authorities till date though they were part of

government records. In view of the above advice, the assessee seeks permission under Rule 29 of ITAT Rules to file additional evidences in the form of paper book. Mr.Vijay Mehta pleaded that the documents placed in the paper book are crucial and necessary to decide the issue of eligibility of deduction u/s 10A of the Act. He further submitted that these evidences are contemporary in nature and that these documents were already on the file of the respective statutory authorities and hence are not new documents and that the same are beyond the scope of tampering. He prayed that the same should be admitted and that the issue should be set aside to the file of the A.O. for fresh adjudication in accordance with law. He argued that once these additional evidences are admitted and considered, it would be clear that the facts would be materially different than what was projected and considered by the ITAT in its order for the A.Y. 2002-03. He prayed that the A.O. should be permitted to take an independent view based on these evidences and not be constrained from the view of the ITAT in the next A.Y.

4.1. Without prejudice to the above arguments the learned counsel for the assessee submitted that even if it is held that the assessee has converted its existing domestic unit to STPI unit, it would still be eligible to claim deduction under section 10 A of the Act for the A.Y. 2001-02 as it falls within the period of 10 years starting from A.Y. 1996-97. In order to support this contention he relied on CBDT Circular no.1 of 2005 dt. 6.1.2005. He further submitted that the Ld.CIT(A) has in his order for the A.Y. 2002-03 given a specific finding that the assessee is eligible to claim deduction u/s 10A of the Act for the unexpired period of 10 years, during which period this impugned A.Y. would fall. He pointed out that the revenue has accepted this finding of the Ld.CIT(A) and has not preferred an appeal. Thus he argues that this issue has attained finality and hence for the A.Y. 2001-02 the A.O. should have granted deduction u/s 10A of the Act. He further submitted that the ITAT gave a factual finding that S.10A(9) of the Act would apply to the assessee based on the law that was in the statute on that date. The Ld.Counsel submitted that the provisions of S.10A(9) of the Act underwent amendments and that this sub section was omitted from the statute from the A.Y.

2004-05. He relied on the judgement of the Hon'ble Karnataka High Court in the case of CIT(A) vs. G.E.Thermometrics Ltd. dated 25.11.2014 and submitted that the issue is squarely covered in favour of the assessee. He submitted that this judgement on the effects of omission of a Section or a sub-section from a statute was not available, when the appeal for the A.Y. 2002-03 was adjudicated by the Tribunal.

4.2. Without prejudice to the above argument, it was further submitted that the sub section applies only to units established after 31.3.2000. He argued that, as the unit was established prior to 31.03.2000, the provision of S.10A(9) of the Act will not apply to its case. In support of this contention he relied on the decision of the Hon'ble Bombay High Court in the case of Zycas Infotech P.Ltd. vs. CIT, 331 ITR 72.

4.3. The Ld.D.R. on the other hand strongly objected to the admission of additional evidences. He submitted that the evidences in question were not filed by the assessee, either before the AO or before the Ld.CIT(A), or before the ITAT for the A.Y. 2002-03, or before the AO or Ld.CIT(A) during the course of proceedings for the impugned A.Ys. It was submitted that no valid reason is given by the assessee for non submission of these documents before the authorities on earlier occasion. It was submitted that no reasonable cause whatsoever was given by the Counsel as to justify the non production of documents. Ld.D.R. relied on the order of the ITAT in the assessee's own case for the A.Y. 2002-03 and submitted that deduction u/s 10'A' of the Act cannot be granted to the assessee. He argued that there are no change in facts and circumstances of the case and the assessee is trying to distinguish this order of the ITAT by bringing in fresh documents. On the issue of applicability of S.10A(9) of the Act he relied on the order of the Ld.CIT(A).

5. We first consider the alternative contentions of the assessee for the A.Y. 2001-02. The Ld.CIT(A) in his order for the A.Y. 2002-03 has given a specific finding at page 14, that even if the unit of the assessee is held to have been converted from existing domestic unit to a STPI unit, it would still be eligible to claim deduction u/s 10A of the

Act from the date of conversion, for an unexpired period of 10 years starting from A.Y. 1996-97. This finding of the First Appellate Authority is not challenged by the Revenue. The A.Y. 2001-02 falls within the unexpired period of 10 years, from the year set up of the first domestic unit which was in the A.Y. 1996-97. Hence the assessee is otherwise eligible for deduction u/s 10A for the year under consideration. This is also clear from a plain reading of the Circular of the CBDT, Circular No.1 of 2005 dated 6.1.2005. Hence in our view it is not necessary to go into the other aspects of this issue in this year.

6. The other ground on which deduction u/s 10A was denied, is that the provisions of sub-section 10A(9) of the Act was attracted on the facts of this case. The provisions of S.10A(9) of the Act would apply, if on the last day of the Previous Year the shares of the company carrying not less than 51% of the voting power are not held by the same persons who were holding shares, which carried not less than 51% of the voting power on the last day of the year, in which the undertaking was set up.

6.1. We find that, this provision i.e. S.10A(9) was omitted from the statute book during the A.Y. 2004-05. The Courts have laid down that if a provision is omitted from the statute, and not repealed, it should be treated as if such provision never existed in the statute book. This issue is now no more res integra. It is covered by the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. M/s GE Thermometrics India Pvt.Ltd. in ITA 876/2008 order dt. 25th day of November, 2014 wherein at para 4 to 8 it is held as follows.

"4. The substantial question of taw that arises for consideration in these appeals is as under:

"Whether the Tribunal was correct in holding that in, view of the omission of sub-section 9 to Section 10B of the Act, w.e.f. 01.04.2004, it should be understood that the said section never existed in the statute book and therefore the benefit claimed by the assessee u/s 10B should be allowed?"

5. The learned. Counsel for the revenue assailing the impugned order contends that it is well settled that the Income Tax Act as it stands amended on the first day of April of any financial year must apply to the assessment of that year. Any amendments in the Act which come into force after first day of April of a financial year would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force. In support of his contention, he relies on the judgment of the Apex Court In the case of KARIMTHARUVI TEA ESTATE LTD vs. . STATE OF KERALA reported in [1966J 060 ITR 0262. On the same analogy, though sub-section (9) .of Section 10 B was omitted with effect from 01.04.2004, on the day the beneficial interest was transferred and for subsequent period, till the said omission took place, the said omitted provision 'is' applicable -and he submits that the approach or' of the Tribunal is erroneous and requires to be set aside.

6. Per contra, the learned Counsel for the assessee relying on the judgment of the Constitution Bench of the Apex Court contended that when a provision in a statute is omitted from the statute book, the result is that the said provision did not ever exist in the statute in the absence of any saving provision. Admittedly, there is no saving provision. Therefore, he submits that the approach of the Tribunal is correct and no case for interference is made out.

7. The Apex Court in the case of KOLHAPUR CANESUGAR WORKS LTD., VS. UNION 'OF INDIA reported in AIR 2000 SC 811 dealing with the effect of deletion of a provision in the statute is held at Para 38 as under:

'38. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been. passed, and the statute must be considered as a law that never existed. To this Rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past

largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the Legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision. "

8. Admittedly, in the instant case, there is no saving clause or provision introduced by way of an amendment while omitting sub-section (9) of Section 10B. Therefore, once the aforesaid section is omitted from the statute book, the result is it had never been passed and be considered as a law that never exists and therefore, when the assessment orders were passed in 2006, the Assessing Officer was not justified in taking note of a provision which was not in the statute book and denying benefit to the assessee. The whole object of such omission is to extend the benefit under Section l10B of the Act irrespective of the fact whether during the period to which they are entitled to the benefit, the ownership continues with the original assessee or it is transferred to another person. Benefit is to the undertaking and not to the person who is running the business. We do not see any merit in these appeals. The substantial question of law is answered in favour of the assessee and against the revenue. Accordingly, the appeals are dismissed."

6.2. Respectfully following the same, we uphold the contention of the assessee. This decision was not brought to the notice of the Bench of the ITAT when it was adjudicating the assessee's case for the A.Y. 2002-03 and hence the Bench had no occasion to consider the same.

6.3. Even otherwise the Hon'ble Bombay High Court in the case of Zycus Infotech Pvt.Ltd. reported in 331 ITR 72 (Bom) at paras 14 and 15 held as follows.

"14. So far as second question is concerned, one has to keep in mind the settled principle of interpretation that retrospectivity cannot be lightly inferred unless it is

clearly provided for in the statute. The first proviso to s.10A implies continuity. If the intention was to deprive the existing industries or to impose a condition, which is not capable of being fulfilled in the context of transfer having already occurred prior to the statute, it would have been specifically made clear. Under these circumstances, keeping in mind the general principle that vested right cannot be divested, one cannot assume retrospectivity to a greater extent than what the section intends.

15. At this juncture, it is needless to mention that, where the words used are "has made, has ceased, has failed and has become", they were found to be words which can be understood as happening both prior and after coming into force of the statute, as it was understood from the words "if a person has been convicted" to include anterior conviction. In the explanation 1, present tense is used with an injunction that the shares "are not beneficially held by the persons who hold the shares in company.". The present tense cannot be assumed to describe the status of the shareholder as the owner, but the status of the shares which are beneficially held. On this interpretation the language of the section can only be understood to describe "the date on which the undertaking was set up" as applicable only for those who are setting up the undertaking after the new provision, so that in case of others, the date has to be understood at best, as on 1st April, 2000, the date on which the law was brought in the statute.

6.4. Thus for the A.Y. 2001-02 the assessee would be eligible for claim of deduction u/s 10A of the Act.

6.5. Coming to the application for admission of additional evidence for the A.Y. 2001-02, we reject the same for the reason that, the alternative contentions of the assessee are found to be covered in favour of the assessee as discussed above.

7. Coming to the A.Y. 2007-08 we consider the application of the assessee for admission of additional evidence during this year. The documents that the assessee seeks for admission are as follows:

Page no. of paper book	Nature of document	Relevance of documents
92.	Chart showing bifurcation of income of various years.	i) STPI authorities permit domestic sales only to the extent of 50% of export sale of preceding year and the domestic sale cannot be made from export unit. This chart demonstrates that the assesse has made domestic sales exceeding the said limit from its domestic unit. If department's view about conversion of domestic unit IS correct, the assesse has made domestic sale beyond permissible limit and violated STPI condition. This is not correct. ii) In the STPI application form the assesse has ticked the option of conversion of existing export unit to STP!. There was no export inF.Y. 1999-00. It is submitted that existing domestic unit was not converted to STPI unit.
93.	Covering Letter of application filed with STPI	Covering letter filed along with the application to demonstrate the total documents filed with the STPI application In addition to the application form.
94-99	Project report for setting up STPI unit	It is evident from project report that the assesse wanted to set up a new export unit and is taking all steps to make its mark in the international market. The assesse has also got an export order from Direct Credit Exchange Ltd and had also received advance money from them.
100	Board Resolution dated 14.3.2000	Resolution passed by company authorizing certain people to sign documents In connection with registration of export unit.
101	Power of attorney dated 16.3.2000	Letter to STPI authorizing Mr.Haresh to sign

		application papers in connection with registration of export unit.
102-104	Agreement with Direct Credit Exchange Ltd. dt. 23.9.99	Agreement entered into with assesse for creating new software. This shows steps taken by assesse to establish new export unit.
105-108	Board Resolution dt. 6.8.99	Resolution stating that the existing premises (2nd floor) used by the assessee should be used for the new export unit and the domestic unit of the assesse should be shifted on ground floor of the same building.
109	Ledger A/c of Direct Credit Exchange (London)	Advance was received by the assesse from Direct credit exchange Ltd, UK company.
110-116	Profit and loss account and balance sheet for the year ended 31.3.2000	i) On page 139 of P.B. schedule of fixed assets for the year ended 31.03.00 shows that there is huge addition of computer equipments and furniture and fixtures which also supports the fact that new export unit was started in F.Y. 1999-00. ii) On page 141 of P.B. it can be seen that there IS substantial increase in salaries since a new export unit was started by the assesse.
117-120	FAQ for STPI scheme download from web site of STPI	This shows the condition of 50% of export sale of preceding year and the domestic sale cannot be made from export unit
121-123	Guidelines for sale of goods in Domestic Tariff Area (DTA) issued by STPI	It states that if a STPI unit wants to make domestic sales, an application has to be submitted prior to making such sale. The assesse has not requested for any such permission. This strengthens the argument of the assesse that local sales were being made from a separate domestic unit and the new export unit was set up and approval was obtained from STPI for the export unit.

7.1. We have perused these documents. All these documents are on the record of governmental authorities and are not new. These documents would enable the A.O. to take a just and correct decision on the claim of the assessee. These evidences go to the root of the matter. The assessee claims that the A.O. has erroneously made a double disallowance u/s 10A of the Act. This is ground no.4 of the assessee. It was mutually agreed that this ground against the alleged double disallowance should be set aside to the file of the A.O. for verification. As we are setting aside this claim for verification, we deem it fit and proper to direct the A.O. to consider all these evidences placed before us in the set aside proceedings.

7.2. In any event we are of the considered opinion that the additional evidences filed by the company under Rule 29 of the ITAT Rules should be admitted in the interest of justice. These evidences go to the root of the matter and the assessee has demonstrated that it was because of not being properly guided by a Counsel that it did not file the documents earlier. In this case anyhow the issue of deduction u/s 10'A'is being sent back to the A.O. for verification. Hence we are of the opinion that on these facts the A.O. has to consider the claim in all its aspects afresh, without being constrained by the order of the ITAT for the A.Y. 2002-03. While doing so we rely on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Text Hundred Industries Ltd. (2013) 351 ITR 57 wherein it is held as under.

"13. The aforesaid case law clearly lays down a neat principle of law that discretion lies with the Tribunal to admit additional evidence in the interest of justice once the Tribunal affirms the opinion that doing so would be necessary for proper adjudication of the matter. This can be done even when application is filed by one of the parties to the appeal and it need not to be a suo motto action of the Tribunal. The aforesaid rule is made enabling the Tribunal to admit the additional evidence in its discretion if the Tribunal holds the view that such additional evidence would be necessary to do substantial justice in the matter. It is well settled that the procedure is handmade of

justice and justice should not be allowed to be choked only because of some inadvertent error or omission on the part of one of the parties to lead evidence at the appropriate stage. Once it is found that the party intending to lead evidence before the Tribunal for the first time was prevented by sufficient cause to lead such an evidence and that this evidence would have material bearing on the issue which needs to be decided by the Tribunal and ends of justice demand admission of such an evidence, the Tribunal can pass an order to that effect."

Further the Hon'ble Delhi High Court in the case of CIT vs. Virgin Securities & Credits P.Ltd. 332 ITR 396 at para 8 held as follows.

"8. The aforesaid contention appears to be devoid of any merit. It is a matter of record that before admitting the additional evidence, the CIT (A) had obtained remand report from the AO. While submitting his report, the AO had not objected to the admission of the additional evidence, but had merely reiterated the contentions in the assessment orders. it is only after considering the remand report, the CIT(A) had admitted the additional evidence. It cannot be disputed that this additional evidence was crucial to the disposal of the appeal and had a direct bearing on the quantum of claim made by the assessee. Plea of the assessee which was taken before the AO remains the same. The AO had taken adverse note because or non-production of certain documents to support the plea and it was in these circumstances the additional evidence was submitted before the CIT(A). It cannot be said not is it the case of the Revenue that additional evidence is not permissible at all before the first appellate authority. On the contrary, Rule 46A of the Act permits the (IT (A) to admit additional evidence if he finds that the same is crucial for disposal of the appeal. In the facts of this case, therefore, we are of the opinion that on this aspect, no substantial question of law arises

7.3. In the result we allow the application of the assessee for admission of additional evidence under Rule 29 of the ITAT Rules.

7.4. As we have admitted additional evidence, we deem it fit and proper to set aside the matter to the file of the A.O. for fresh adjudication in accordance with law. The A.O. is directed to consider all the evidences to be produced by the assessee and adjudicate the issue de-novo, independent of the decision taken for the other A.Y.

8. Ground no.3.9 is on the issue of rate of depreciation on computers. The assessee has claimed depreciation at the rate of 60% on thevalue of purchase of UPS, Printers, Batteries etc. The A.O. allowed only 15% depreciation. The Ld.CIT(A) has not adjudicated the issue. As we set aside the matter to the file of A.O., with the direction that the Jurisdictional High Court judgement on the issue be considered and the matter be disposed of in accordance with law.

9. In the result the appeal for the A.Y. 2001-02 is partly allowed and the appeal for the A.Y. 2007-08 is allowed for statistical purposes.

Order pronounced in the Open Court on 03rd May, 2016.

Sd/-	Sd/-
(SUDHANSHU SRIVASTAVA)	**(J. SUDHAKAR REDDY)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: the 03rd May, 2016

- *Manga*

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR