IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)

BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.6320/Del./2012
(ASSESSMENT YEAR : 2008-09)

Ut Starcom Inc. (India Branch), 805, Signature Towers – II, South city – I, Gurgaon (Haryana). **(PAN : AAACU5017A)**	vs.	DDIT, Circle 2 (2), New Delhi.
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Rajan Sachdev, CA
REVENUE BY : Shri T.M. Shiva Kumar, CIT DR

Date of Hearing : 07.12.2016
Date of Order : 23.12.2016

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, UT Starcom Inc. (India Branch) (hereinafter referred to as 'the assessee company') by filing the present appeal sought to set aside the impugned order dated 18.10.2012, passed by the AO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2008-09 in consonance with the orders passed by the ld. DRP/TPO on the concise grounds inter alia that :-

"On the facts and in the circumstances of the case and in law, the learned Deputy Director of Income-tax, Circle 2(2), International Tax, New Delhi ("Ld. AO") under directions issued by the Hon'ble Dispute Resolution Panel - II, New Delhi CORP"), erred in not allowing the claim of exemption under section 10A of the Income-tax Act, 1961 ('the Act') of Rs.2,81,78,490 to the Appellant's total income.

1. Denial of claim under Section 10A of the Act

1.1 That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in denying and the Hon'ble DRP has erred in confirming the action of Ld. AO on the disallowance of Appellant's claim of deduction under section 10A of the Act amounting to Rs.2,81,78,490.

1.2 That on the facts and circumstances of the case and in law, the Ld. AO has erred in holding and the Hon'ble DRP has further erred in confirming the action of Ld. AO, that there is no export of software by the Branch in India to the Head Office.

1.3 That on the facts and circumstances of the case and in law, the Ld. AO has erred in holding and the Hon'ble DRP has further erred in confirming the action of Ld. AO, that the Appellant is not a separate taxable entity and as a consequence a person cannot earn profit from itself.

1.4 That on the facts and circumstances of the case and in law, the Ld. AO is not appreciating and the Hon'ble DRP has further failed to appreciate that if the approach adopted by them is considered to be in accordance with law, no income could be said to result in the hands of the appellant.

1.5 That on the facts and circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have reached to erroneous conclusion of disallowing the deduction under section 10A of the Act by placing their reliance on certain judicial precedents which are not applicable to the Appellant's case.

1.6 That on the facts and circumstances of the case and in law, the Ld. AO has erred in and the Hon'ble DRP has further erred in not following principle of consistency.

2. Interest under section 234B of the Act

That on the facts and circumstances of the case and in law, the Ld. AO has erred in levying interest under section 234B of the Act consequent to the above disallowances.

3. Penalty proceedings under section 271(1)(c) of the Act

That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penal proceedings under section 271 (1)(c) of the Act as per the impugned order consequential to the above disallowances."

2. Assessee company, M/s. UT Starcom Inc. (India Branch), USA (UTS US), being global leader in manufacture, integration and support of IP based, end-to-end networking and telecommunication solutions, set up its branch office in India in December 2001, to enable UTS US to offer its products and services in the Indian market. The assessee provides software development services and marketing support and IT Enables customer support services to UTS US Customers in Asia-Pacific region.

3. Assessee company by filing present appeal has only confined to the corporate grounds by challenging the denial of deduction u/s 10A of the Act to the tune of Rs.2,81,78,490/- and determining the taxable income at Rs.27,13,52,357/-. AO denied the benefit of section 10A to the assessee company on the ground that since the account of the India branch office are consolidated with other branches and the head office, the assessee company cannot be assumed to have earned the profit for itself because in such cases to arrive at the final account of the entity and payment

made to the branch will get squared up when the accounts are consolidated.

4. Assessee carried the matter by raising the objections before the ld. DRP by way of filing the appeal who has affirmed the order passed by AO/TPO. Feeling aggrieved with the order passed by TPO/DRP/AO, assessee company has come up before the Tribunal by way of filing the present appeal.

5. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

CORPORATE GROUNDS

GROUNDS NO.1.1 TO 1.6

6. Ld. AR for the assessee contended that the benefit of section 10A was granted to the assessee company in Assessment Year 2003-04 and continued upto AY 2006-07 and further relied upon the judgment passed by Hon'ble jurisdictional High Court in the case of **DDIT vs. Virage Logic International (ITA No.1108/2007 order dated 09.11.2016) & Ors.** However, on the other hand, ld. DR relied upon the order passed by ld. DRP/AO.

7. Undisputedly, the revenue has been extending the benefit of section 10A to the assessee company since AY 2003-04 upto AY 2006-07 and business model of the assessee company has not been changed qua AYs 2007-08 and 2008-09.

8. More so, the issue in controversy has been answered in favour of the assessee by the Hon'ble jurisdictional High Court in **DDIT vs. Virage Logic International** (supra) in the similar set of facts and circumstances, wherein following questions of law were framed :

> ***"(i) Whether the transfer of computer software by the Indian branch to the head office can be said to be 'sale' to the head office out of India?***
>
> ***(ii) Whether the assessee is entitled to claim benefit of Section 10A of the Income Tax Act, 1961, as the software is developed by the branch as per the requirement of Head Office and not sold to any third party?"***

9. Operative part of the judgment in **DDIT vs. Virage Logic International** (supra) is reproduced for ready perusal as under :-

> *"11. The decision in Moser Baer (supra) specifically dealt with the ITAT's logic and reasoning in the present case. There the Division Bench of this Court noted that transmission of computer software from an Indian entity to its head office on the basis of an arm's length price determined for export entitled the assessee to exemption under Section 10A. The Court is in agreement with the assessee's contention that mere omission of a provision kin to Section 80HHC Explanation (2) or the omission to make a provision of a similar kind of that encompasses Explanation 2(iv) to Section 10A by itself does not rule out the possibility of treatment of transfer/ transmission of software from the branch office to the head office as an export. A plain reading of Section 80-IA(8) shows that transfer of any goods or service "for the purpose of the eligible business" to "any other business carried on by the assessee", are covered. The only condition insisted upon by*

the Parliament was that the face value of such transactions was inconclusive and that the AO could determine the market value: for such transactions or sales. The incorporation in its entirety without any change in this provision [Section 80-IA(8)] to Section 10A through sub-Section (7) is for the purpose of ensuring that inter-branch transfers involving exports are treated as such as long as the other ingredients for a sale are satisfied.

12. In this case the AO carried out the exercise mandated by Section 10A(7) read with Section 80-IA(8). Consequently the particulars of the price or cost reported by the assessee were not binding or conclusive but rather they attained finality in the assessment proceedings, after due addition. It underwent further inquiry/ scrutiny under Chapter X of the Act.

13. It is undoubtedly aphorism that a legal fiction ought to be taken to its logical conclusion and the mind should not be allowed to boggle. This merely implies that a fiction should logically take a direction; the train of thought however cannot divert elsewhere. The absence of a "deemed export" provision in Section 10A similar to the one in Section 80HHC does not logically undercut the amplitude of the expression "transfer of goods" under Section 80-IA(8) – which is of now part of Section 10A. Such an interpretation would defeat Section 10A(7) entirely.

14. For the above reasons, the Court is of the opinion that substantial questions of law framed are to be answered in favour of the assessee and against the Revenue. The ITA Nos. 1108/2007, 1249/2009 and 173/2016 are, accordingly, dismissed. It is clarified, however, that the AO is at liberty to give tax effect as a consequence of the interpretation adopted by this Court."

The ratio of the judgment in Virage Logic International (supra) is that the transfer of computer software, by the Indian branch to the Head Office is not sale, having been developed as per requirement of Head Office, and not being sold to third party and as such entitled for the benefit of section 10A of the Act.

10. So following the ratio laid down by Hon'ble High Court in **DDIT vs. Virage Logic International** (supra), we are of the considered view that since assessee company has exported

computer software from India to its Head Office in US as per its requirement and not sold to any third party, it is entitled to exemption u/s 10A, so AO/DRP have erred in denying the benefit of section 10A to the assessee. So, the matter is restored to the AO to decide afresh in accordance with the law laid down by the Hon'ble jurisdictional High Court and the directions issued herein before. So, Grounds No.1.1 to 1.6 are determined in favour of the assessee.

11. Ground No.2 needs no adjudication as the same is consequential in nature.

12. Ground No.3 is premature, hence needs no adjudication.

13. In view of what has been discussed above, present appeal filed by the assessee is allowed for statistical purposes and matter is restored to the AO to decide afresh in the light of the directions issued herein before.

Order pronounced in open court on this 23rd day of December, 2016.

Sd/-	**sd/-**
(S.V. MEHROTRA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 23rd day of December, 2016
TS

Copy forwarded to:

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

AR, ITAT
NEW DELHI.