IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM & Dr.Arjun Lal Saini, AM]

I.T.A No. 1613/Kol/2016
Assessment Year : 2006-07

A.C.I.T., Circle-2(1) Kolkata (Appellant)	-vs.-	M/s. BNK E Solution Pvt.Ltd. Kolkata [PAN : AABCB 3209 N] (Respondent)

C.O.No.02/Kol/Kol/2017
(A/o I.T.A No. 1613/Kol/2016)
Assessment Year : 2006-07

M/s. BNK E Solution Pvt. Ltd. Now known as Gopi Vallabh Solutions (P) Ltd. Kolkata [PAN : AABCB 3209 N] (Cross Objector)	-vs.-	A.C.I.T., Circle-2(1), Kolkata. (Respondent)

For the Department : Shri Banibrata Dutta, Addl. CIT(DR)
For the Assessee : Shri D.S.Damle, FCA

Date of Hearing : 15.05.2017
Date of Pronouncement : 19.05.2017.

ORDER

Per N.V.Vasudevan, JM

I.T.A.No.1613/Kol/2016 is an appeal by the Revenue against the order dated 07.05.2016 of CIT(A)-23, Kolkata, relating to AY 2006-07. The Assessee has raised Cross Objection against the very same order of CIT(A).

2. In the Cross objection the assessee has challenged the validity of initiation of re-assessment proceedings by the AO u/ 147 of the Act. As far as the appeal of the revenue is concerned the revenue is aggrieved by the action of CIT(A) in allowing

deduction u/s 10A of the Income Tax Act, 1961 (Act) without setting off the brought forward unabsorbed depreciation and brought forward business loss.

3. The facts with regard to the grounds raised by the assessee in the cross objection are that the Assessee is a company engaged in the business of rendering ITES. For A.Y.2006-07 the assessee filed return of income on 28.11.2006 showing nil income. The Assesee had claimed deduction u/s 10A of the Act of Rs.3,28,62,391/-. The said sum was arrived at by the assessee in the following manner :

" **Calculation of Deduction u/s 10A**

Total Turnover	199,962,276
Less : Other Income	3,63,314
Sales Proceeds of the Undertaking	199,598,962
Less : Sales in INR	90,66,866
Total Export Turnover	190,532,096
Less: Foreign Currency not received During prescribed period	70,63,986
Export Turnover	183,468,110

Amount of Deduction u/s 10A

Profit of the Business Under X Turnover
Total Turnover

35816789 X 183468110
199962276
= Rs.32,862,391"

4. The AO completed the assessment u/s 143(3) of the Act by order dated 23.12.2008 and he determined the deduction u/s 10A of the Act by adopting the profits of business of 10A at Rs.3,51,14,628/- as against Rs.3,58,16,789/- considered by the assessee in its computation of deduction u/s 10A of the Act.

5. The AO issued a notice u/s 148 of the Act dated 03.11.2010 for making an assessment u/s 147 of the Act. The reasons for resorting to proceedings u/s 147 of the Act were that after completion of assessment in the case of the Assessee, it was subsequently ascertained that the assessee company had brought forward business loss of Rs.43,91,870/- (assessment year 04-05), unabsorbed depreciation of

Rs.2,47,02,614/- (assessment year 03-04) and depreciation of Rs.2,20,25,827/- (A.Y. 04-05) . As per the original assessment order the assessee company was allowed deduction u/s. 10A of Rs.3,22,18,149/- from total income of Rs.3,51,14,628/· before setting off aforesaid brought forward losses. Brought forward losses should have been first set off against total income of Rs.3,51, 14,628/· and after that deduction u/s 10A of Rs,3,22,18,149/- should have been allowed. As this was not done, the irregularity in set off of losses leads to un-due deduction for an amount of Rs.3,22,18,149/- under section 10A of the Act. Accordingly, assessment in this case is being re-opened under the provisions of section 147 of the Income Tax Act, 1961 after obtaining necessary approval from the Additional Commissioner of Income-tax, Range-2, Kolkata.

6. In the re-assessment proceedings the assessee took a stand that deduction u/s 10A of the Act is an exemption provision and therefore the set off of carry forward of loss as contemplated u/s 70(1) and Sec.72 of the Act are not applicable and therefore the claim as originally allowed in the assessment u/s 143(3) of the Act should be retained. The AO, however, did not agree with the aforesaid contention of the assessee and he held that the provision of section 10A of the Act was deduction provision and he accordingly computed the deduction u/s 10A of the Act as follows :-

> " Since no divisible income is assessed after set off of brought forward business loss, brought forward unabsorbed depreciation and brought forward depreciation, deduction for an amount of Rs.3,22,18,140/- which was erroneously allowed u/s 10A of the Income Tax Act, 1961 as per the original assessment order passed u/s 143(3) on 23.12.2008 is denied. Accordingly total income of the assessee is computed as below :-

Net Profit as per P/L A/c.	Rs.3,25,80,667/-	
Add: Depreciation as per Companies Act	Rs.1,50,27,704/-	Rs.4,76,18,371/-
Less: Depreciation as per Income Tax Act		Rs.1,24,77,301/-
Balance		Rs.3,51,41,070/-
Less: Interest income to be considered separately		Rs. 26,442/-
Balance carried over		Rs.3,51,14,628/-
Add: Disallowance u/s 40(a) as per item 12(f) of the Return of income submitted		Rs. 6,75,719/-
Add: Disallowance as per the original assessment Order On accounts of :-		
(i) u/ s 36(1)(v)(a) for delay in deposits of contributions to PF/ESI	Rs. 5,830/-	

(ii)u/s 40(a)(ia) for non deduction of TDS u/s 194C 194J	Rs.5,45,692/-	
(ii) u/s 37(1) on account of inadmissible donation	Rs. 15,000/-	Rs. 5,66,522/-
Total Income from Business		Rs.3,63,56,869/-
Less: Brought forward business loss set off	Rs.43,91,870/-	
Less: Brought forward unabsorbed depreciation Set off	Rs.2,47,02,614/-	
Less: Brought forward depreciation set off To the tune of remaining income from Business	Rs.72,62,385/-	Rs.3,63,56,869/-
Income from business after set off of Business loss and depreciation		n i l
Income from other sources		Rs. 26,442/-
Total income		Rs. 26,440/-

Less: Depreciation set off out of remaining amount of
(Rs.2,20,25,827/- lessRs.72,62,385/-)
Rs.1,47,63,442/- thus allowed to carry forward."

7. Aggrieved by the aforesaid order of AO the assessee filed an appeal before CIT(A). The assessee challenged the validity of initiation of proceedings u/s 147 of the Act on the ground that the AO while completing the original assessment and formed a particular opinion on the assessee's claim of deduction u/s 10A of the Act and on the basis of the same facts without new material coming to the notice of the AO, he has initiated proceedings u/s 147 of the Act purely on the basis of change of opinion and therefore initiation of re-assessment proceedings are not valid. This plea was rejected by CIT(A) by observing as follows :-

> " 1. I have considered the issue emanating from the reopening of the case of the appellant, and his submission along with the legal precedents, I find that there cannot be a case of change of opinion, as the ld. AO appears to have not explicitly expressed any opinion at all. The AO has passed the order in a mechanical way without any specific opinion.
>
> 2. In the circumstances, I am of the considered view that it cannot be said that there would not be a different or more correct method possible which the AO is precluded from adapting, in a situation where he takes a second look on account of what appears to him a better or legally sound understanding of the applicable law. In the case of Yuvraj vs. Union of India (Bom.) (2009) 315 ITR 84, it has been held by the Hon'ble High Court that the points not decided while passing assessment order under section 143(3), do not lead to a case of change of opinion.

Therefore this additional ground taken by the appellant fails, and is required to be dismissed."

8. As far as the computation of deduction u/s 10A of the Act is concerned the CIT(A) agreed with the contention of the assessee that section 10A provisions are exempt provision.

" Having carefully considered the various issues emanating from the arguments of the Ld AO and the Ld A,R,I find that the point under consideration has been squarely covered by the judgments of the Hon'ble Mumbai High Court in CIT Vs Black & Veatch Consulting (Pvt Ltd) 348 ITR 72 as well as the Hon'ble Karnataka High Court in CIT Vs Yokogawa India Ltd [2112] 204 Taxman 305, alo 341 ITR 385 (2012) . It is quite well laid down that the various High Courts and Hon'ble Tribunals have held that deduction under Sec 10A has to be given effect at the stage of computing the profits and gains of business before applying the provisions of Sec 72. In the case of CIT Vs Yokogawa India Ltd (Karnataka High Court) rules as follows:

"S. 10A/B continue to "exempt" profits & so loss of other units (eligible & non-eligible, including B/f loss) not liable for set-off against s. 10A/B profits
"The High Court had to consider two issues for A Y 2001-02 & onwards: whether (i) the loss incurred by a non-eligible unit & (ii) the brought forward unabsorbed loss &' unabsorbed depreciation of the eligible unit has to be set-off against the profits of the eligible unit before allowing deduction u/s 10A/10B. HELD answering both questions in favour of the assessee:

(a) On issue (i), s. 10A was amended by the FA 2000 w.e.f. 1.4,2001 to convert it from an "exemption" provision to a "deduction" provision. S, 10A allows deduction "from the total income". The phrase "total income" in s. 10A means "the total income of the STP unit" and not "total income of the assessee", Consequently, s. 10A deduction has to be given before computing the "profits & gains of business" under Chapter IV. This proposition is in line with the form of return, Allowing deduction at the earliest stage of business income computation will blur the difference between "commercial profits" and "tax profits". Further, though s, 10A was amended to make it a "deduction" provision, it continues to remain in Chapter III and was not moved to Chapter VI-A. The result is that even now s. 10A is in the nature of an "exemption" provision and the profits of the eligible unit have to be deducted at source level and do not enter into the computation of income, Consequently, the losses suffered by non-eligible units cannot be set-off against the eligible profits;

(b) On issue (ii), s. 10A(6) as amended by the FA 2003 w.r.e.f. 1.4.2001 provides that depreciation and business loss of the eligible unit relating to the

> AY 2001-02 & onwards is eligible for set-off & carry forward for set-off against income post tax holiday. This amendment does not militate against the proposition that the benefit of relief u/s 10A is in the nature of exemption with reference to commercial profits. However, to give effect to the legislative intention of allowing the carry forward of depreciation and loss suffered in respect of any year during the tax holiday for being set off against income post tax holiday, it is necessary that a notional computation of business income and the depreciation should be made for each year of the tax holiday period. Such loss is eligible to be carried forward. But, as the income of the 10A unit has to be excluded at source itself before arriving at the gross total income, the question of setting off the loss of the current year's or the brought forward business loss (and unabsorbed depreciation) against the s. 10A profits does not arise.

In view of the fact of the case and the relevant circumstances, and the judgments applicable in the matter, I am inclined to agree with the view of the appellant / Ld A,R and therefore delete the action of the Ld. AO."

This ground of appeal is adjudicated as allowed in favour of the assessee."

9. Aggrieved by the order of CIT(A) allowing the claim of the assessee the revenue has preferred the present appeal before the Tribunal. Aggrieved by the order of CIT(A) in upholding the validity of initiation of re-assessment proceedings the assessee has preferred the cross objection before the tribunal.

10. As far as the validity of initiation of reassessment proceedings are concerned, we have heard the rival submissions. In the present case, it is noticed that the case of the assesse is that there was no fresh tangible material in the possession of AO at the time of recording of reasons for initiating proceedings u/s.147 of the Act. A perusal of the 'Reasons' recorded by the AO in this case reveals that at the time of recording of these 'Reasons' the AO had examined original assessment records only and no fresh material had come in the possession of the AO. In response to our specific query also, Ld DR could not point out any fresh material available with the AO at the time of reopening of the case of the assessee. Thus, assertion of the assessee that there was no fresh material with AO for reopening of this case, remained uncontroverted.

11. In the light of the above facts with regard to recording of reasons, let us examine settled position of law on this issue. The Hon'ble Supreme Court in the case of CIT vs. Kelvinator India Ltd. 320 ITR 561 (SC), has held that for reopening of the assessment, the AO should have in its possession 'tangible material'. The term 'tangible material' has been understood and explained by various courts subsequently. There has been unanimity of the courts on this issue that in absence of fresh material indicating escaped income, the AO cannot assume jurisdiction to reopen already concluded assessment. The Hon'ble Delhi High Court in the case of Pr. CIT vs Tupperware India Pvt. Ltd., in its order dt 10-8-15 (ITA no 415/2015) has taken the view that that even in the case of original assessment order having been passed u/s 143(1), it is mandatory for the AO to have in its possession, fresh tangible material before reopening of the case. In the case of CIT vs. Orient Craft Ltd. 354 ITR 536, it was held by Hon'ble Delhi High Court that reasons for reassessment disclosed that AO reached belief that there was escapement of income "on going through the return of income" filed by assessee after he accepted return u/s. 143(1) without scrutiny, and nothing more. In these facts, it was held by the Hon'ble High Court that it was nothing but review of earlier proceedings and abuse of power by AO. It was further held that since there was no whisper in reasons recorded, of any tangible material which came to possession of AO subsequent to issue of intimation, therefore, it was an arbitrary exercise of power conferred u/s 147. Thus, reopening was held to be invalid on this ground itself.

12. In the present case, it has already been discussed that admitted facts are that there was no fresh material coming into the possession of the AO, at the time of recording of the 'Reasons'. These facts have not been rebutted by Ld DR also. Thus, in view of decisions referred to above, reopening done by Ld. AO in the absence of fresh tangible material, is invalid and bad in law. Therefore, the initiation of reassessment proceedings was not valid. Thus, re-assessment order framed in pursuance to invalid reopening is illegal; the same is hereby quashed.

13. As far as the appeal of the revenue is concerned, we find the issue was ultimately considered by the Hon'ble Supreme Court in the case of CIT vs Yokogawa India Ltd. (2017) 77 Taxman.,com 41 (SC) by its order dated 16.12.2016 and in the aforesaid decision the Hon'ble Supreme Court took the following view :-

> That from a reading of the relevant provisions of section 10A it is more than clear that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee.
>
> This is also more than clear from the contemporaneous Circular No. 794, dated 9-8-2000.
>
> If the specific provisions of the Act provide [first proviso to sections 10A(1); 10A(1A) and 10A(4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No.794 dated 9-8-2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, "immediately after the stage of determination of its profits and gains.
>
> At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in sections 70, 72 and 74 would be premature for application. The deductions under section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression 'total income of the assessee' in section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in section 10A as 'total income of the undertaking'.
>
> For the aforesaid reasons it is held that though section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV and' not at the stage of computation of the total income under Chapter VI. "

14. In the light of the aforesaid judicial pronouncement, we are of the view that the conclusions of the CIT(A) in the present case cannot be said to be erroneous. We therefore uphold the order of the CIT(A) and dismiss the appeal of the revenue.

15. In the result, the appeal by the Revenue is dismissed and the C.O. by the Assessee is allowed.

Order pronounced in the Court on 19.05.2017.

Sd/-	Sd/-
[Dr.A.L.Saini]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Dated : 19.05.2017.
[RG PS]

Copy of the order forwarded to:

1. M/s. BNK E Solution Pvt. Ltd., Block-GI, Sector-V, Salt lake, Kolkata-700091.
2. A.C.I.T., Circle-2(1), Kolkata.
3. CIT(A)-23, Kolkata. 4. C.I.T.-I, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Sr.Private Secretary
Head of Office/ D.D.O. ITAT Kolkata