



2. As the Grounds of appeal reveal, the sum and substance of the dispute in this appeal is against the order passed by the Commissioner u/s 263 of the Act treating the assessment order dated 29.12.2015 as erroneous insofar as it is prejudicial to the interests of the Revenue on the issue of the manner of computing deduction under Sections 10A and 10AA of the Act although the stand of the Assessing Officer was compliant with the ruling of the Hon'ble Bombay High Court in assessee's own case for Assessment Years 2005-06 and 2006-07.

3. Briefly put, the relevant facts can be summarised as follows. The appellant is a company incorporated under the provisions of the Companies Act, 1956 and is, *inter-alia*, engaged in the business of software development and export of IT-enabled services. For the assessment year under consideration, it filed a return of income declaring an income of Rs.38,75,66,510/-, which was subject to a scrutiny assessment u/s 143(3) r.w.s. 144C(13) of the Act dated 29.12.2015 wherein the total income was determined at Rs.65,05,53,290/-. Subsequently, the Commissioner issued a notice u/s 263 of the Act dated 9.3.2017 requiring the assessee to show-cause as to why the assessment order dated 29.12.2015 (*supra*) be not be treated as erroneous insofar as it is prejudicial to the interests of the Revenue on account of excess allowance of exemption under Sections 10A and 10AA of the Act. Notably, during the year under consideration, assessee had claimed exemption under Sec. 10A of the Act with regard to the profits derived by its eligible unit at Bangalore and exemption under Sec. 10AA of the Act with respect to the profits of its eligible units located at Mumbai and Pune. The Commissioner noted that the exemption allowed in the assessment order under Sec. 10A as well as under Sec. 10AA of the Act were

computed by excluding the elements of communication charges as well as expenses incurred in foreign currency for travelling from the figure of total turnover of the respective units. As per the Commissioner, the exclusion of the communication charges as well as the travelling expenses incurred in foreign currency from the total turnover was incorrect and, therefore, as per him, excess exemption was allowed in the assessment order. In response, the assessee pointed out that the claim of exemption under Sec. 10A as well as under Sec. 10AA of the Act was computed by excluding the communication charges and expenses incurred in foreign currency for travelling from the figure of total turnover as well as from the figure of export turnover of the respective units. It was also brought to the notice of the Commissioner that in the assessee's own case for Assessment Years 2005-06 and 2006-07, the Hon'ble Bombay High Court had ruled in favour of the assessee; and, that for Assessment Years 2007-08 and 2008-09, the Tribunal had also upheld the stand of the assessee by relying on the judgment of the Hon'ble Bombay High Court in the case of *Gemplus Jewellery India Ltd. (2010-TIOL-456-HC-MUM-IT)*. In terms of the said judgment, the expenditure incurred in foreign exchange had to be excluded while considering the figure of total turnover as well as export turnover for the purpose of computing exemption u/s 10AA of the Act. It is also revealed from a perusal of the order of the Commissioner that assessee had furnished copies of the judgments of the Hon'ble Bombay High Court for Assessment Years 2005-06 and 2006-07, as also the decisions of the Mumbai bench of the Tribunal for Assessment Years 2007-08 and 2008-09 in assessee's own case. The assessee also brought to the notice of the Commissioner that for the Assessment Years 2010-11 & 2012-13, the Dispute Resolution Panel (in short 'the DRP') had also issued directions to the Assessing Officer to

compute the deduction under Sections 10A & 10AA of the Act in terms of the judgment of the Hon'ble Bombay High Court in assessee's own case. In this view of the matter, the assessee resisted the show-cause notice issued by the Commissioner u/s 263 of the Act.

4. However, the Commissioner was not satisfied with the explanation furnished by the assessee. As per the Commissioner, though the Hon'ble Bombay High Court as well as the Tribunal had decided the issue in favour of the assessee in the past years, but according to him, the Assessing Officer had completed the assessment without making any inquiries and verification with regard to the pendency of the SLP filed by the Department in the Hon'ble Supreme Court. According to the Commissioner, there was a failure on the part of the Assessing Officer not to call for the details with regard to the claims made by the assessee under Section 10A & 10AA of the Act. Accordingly, the Commissioner held the assessment order dated 29.12.2015 (supra) to be erroneous and prejudicial to the interests of the Revenue *qua* the aforesaid issue and set-aside the assessment order with directions to examine the issue afresh and make the assessment as per law. Against such a decision, assessee is in appeal before us.

5. Insofar as the merit of the issue is concerned, there is no dispute that the judgments of the Hon'ble Bombay High Court for Assessment Years 2005-06 and 2006-07, which have upheld the stand of the assessee, continue to hold the field and have not been altered by any higher authority. It is also not disputed by the Revenue that such decisions prevailed also when the assessment order was finalised by the Assessing Officer. Remaining on the issue of merit, it is also seen that subsequent to the

assessment order, vide order in Income Tax Appeal No. 28 of 2014 dated 11.7.2016, the Hon'ble Bombay High Court followed its earlier decision in the case of the assessee and affirmed the stand of the assessee for Assessment Year 2007-08 also. Be that as it may, the point to be examined is when the assessment has been finalised by the Assessing Officer based on a subsisting ruling of the jurisdictional High Court in the assessee's own case, can such an assessment be considered by the Commissioner to be erroneous and prejudicial to the interests of the Revenue within the meaning of Sec. 263 of the Act without making out a case that the binding ruling of the jurisdictional High Court does not subsist and/or has been altered by any higher authority or by any retrospective amendment in law. In our considered opinion, the answer is obviously 'No', because the decision of the Assessing Officer under the above circumstances cannot be said to be unsustainable in law. In our view, the aforesaid proposition does not require any elaborate discussion, but we may refer to the judgment of the Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd. vs. CIT*, 243 ITR 83 (SC) wherein various facets of the jurisdictional requirements of Sec. 263 of the Act have been explained. One of the propositions explained by the Hon'ble Supreme Court is to the effect that in cases where the Assessing Officer has taken a view with which the Commissioner does not agree, the assessment cannot be treated as erroneous and prejudicial to the interests of the Revenue unless it can be shown that the view taken by the Assessing Officer is unsustainable in law. Quite clearly, in the present case, it is nobody's case that the view of the Assessing Officer on the manner of determination of deduction u/s 10A as well as u/s 10AA of the Act on the issue of exclusion of communication charges and expenses incurred in foreign currency on travelling from the figure of total turnover and export

turnover is not compliant with the subsisting rulings of the Hon'ble Bombay High Court in assessee's own case. Thus, the stand of the Assessing Officer was not unsustainable in law. Therefore, in our considered opinion, the Commissioner was clearly denuded from invoking his revisionary jurisdiction u/s 263 of the Act.

6. We may also notice that in the impugned order, the Commissioner observes that the Assessing Officer has failed to examine the details of the claim as also the status of the appeals of the Revenue in the past years. At the time of hearing, the learned representative for the assessee referred to queries raised by the Assessing Officer in the course of the original assessment proceedings in a notice u/s 142(1) of the Act dated 10.11.2014, a copy of which has been placed at pages 55 to 56 of the Paper Book. As per item no. 13, the Assessing Officer specifically asked the assessee about the additions made, if any, in the earlier three assessment years and also the outcome of the appeals against such additions. The learned representative also referred to the reply furnished by the assessee in this regard dated 11.02.2015, copy of which has been placed at pages 57 to 59 of the Paper Book alongwith the relevant annexures. In this communication, the assessee explained the manner in which the exemption eligible under Sections 10A and 10AA of the Act have been computed, specifically referring to the exclusion of expenditure incurred on communication charges as well as expenses incurred in foreign currency for travelling from the figures of export turnover as well as total turnover, based on the rulings of the Hon'ble Bombay High Court and that of the Tribunal in assessee's own case in the past years. In this communication, reference has also been made to the judgment of the Hon'ble Bombay High Court in the case of *Gemplus*

*Jewellery India Ltd. (supra)* in this regard. The said communication also brought to the notice of the Assessing Officer the status of the dispute in Assessment Year 2010-11 also, wherein the DRP directions were referred to, which were in compliance with the judgment of the Hon'ble Bombay High Court. The aforesaid material, which is a part of the assessment proceedings, clearly establishes the fallacy in the assertion of the Commissioner that the Assessing Officer did not call for the details of the dispute. In fact, the Assessing Officer was very much aware of the controversy and, in our view, he rightly upheld the manner of computation made by the assessee as it was in tune with the binding rulings of the Hon'ble Bombay High Court in assessee's own case. Therefore, in our view, the Commissioner was wrong in asserting that there was a failure on the part of the Assessing Officer to ascertain the correct position.

7. Before parting, we may also refer to the discussion in para 6.3 of the order of the Commissioner wherein he has referred to Explanation 2 to Sec. 263(1) of the Act. However, apart from referring to Explanation 2 to Sec. 263(1) of the Act, no discussion has been made as to how and in what manner the said Explanation is applicable in the present case. In any case, clauses (a), (b) and (c) are not attracted in the present case. In fact, the stand of the Commissioner is directly in conflict with Clause (d) of Explanation 2 to Sec. 263 of the Act. Notably, clause (d) of the Explanation deems an order to be erroneous insofar as it is prejudicial to the interests of the Revenue if it has not been passed in accordance with any decision rendered by the jurisdictional High Court or Hon'ble Supreme Court. Ostensibly, the instant is a case where the Assessing Officer has passed the assessment order, which is indeed, in accordance with the decision of the

jurisdictional High Court and, therefore, having regard to the spirit of Clause (d) of Explanation 2 to Sec. 263(1) of the Act, the assessment order could not be treated to be erroneous insofar as it is prejudicial to the interests of the Revenue within the meaning of Sec. 263 of the Act.

8. For all the above reasons, we hereby set-aside the order of the Commissioner and restore the assessment order dated 29.12.2015 (supra) *qua* the impugned order relating to computation of exemption available to the assessee under Sections 10A and 10AA of the Act.

9. In the result, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 29<sup>th</sup> November, 2017

Sd/-  
**(RAVISH SOOD)**  
**JUDICIAL MEMBER**

Sd/-  
**(G.S. PANNU)**  
**ACCOUNTANT MEMBER**

Mumbai, Date : 29<sup>th</sup> November, 2017

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "B" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai