

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD**

**BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER**

ITA No.	A.Y.	Appellant	Respondent
705/Hyd/15	2009-10	GVK Biosciences Pvt. Ltd., HYDERABAD [PAN: AABCG3208J]	Deputy Commissioner of Income Tax, Circle-2(2), HYDERABAD
706/Hyd/15	2010-11		Asst. Commissioner of Income Tax, Circle-2(2), HYDERABAD
707/Hyd/15	2011-12		Deputy Commissioner of Income Tax, Circle-2(2), HYDERABAD
738/Hyd/15	2009-10	Asst. Commissioner of Income Tax, Circle-2(2), HYDERABAD [PAN: AABCG3208J]	GVK Biosciences Pvt. Ltd., HYDERABAD [PAN: AABCG3208J]
739/Hyd/15	2010-11		
740/Hyd/15	2011-12		

For Assessee : Shri V. Siva Kumar, AR
For Revenue : Shri K. Ashok Kumar, DR

Date of Hearing : 02-01-2018
Date of Pronouncement : 10-01-2018

ORDER

PER BENCH:

These are cross-appeals by Assessee and Revenue for the AYs. 2009-10, 2010-11 & 2011-12 against the orders of the

Commissioner of Income Tax (Appeals)-2, Hyderabad, dated 23-03-2015. Since common issues are involved in all these appeals, these are heard together and decided by this common order.

2. Briefly stated, assessee is a company engaged in the business of Bio-Informatics, Contract Research Services etc. In the years under consideration, assessee has claimed deduction u/s. 10A of the Income Tax Act [Act] and also u/s. 80IB on some of the units, but offered income u/s. 115JB of the Act as well. In the scrutiny assessments completed, the Assessing Officer (AO) invoked the provisions of Section 14A for AY. 2009-10, denied deduction u/s. 80IB(8A) in the AYs. 2009-10, 2010-11 & 2011-12. In addition, AO also restricted the disallowance u/s. 10A by excluding certain communication charges from the Export Turnover alone and made adjustment in AY. 2009-10, whereas in AY. 2010-11 and 2011-12, AO denied the entire claim u/s. 10A on the reason that certain FIRC's issued by Kotak Mahindra Bank mentioned the purpose of remittance as 'research services' and not as 'software exports' and accordingly, assessee was not eligible u/s. 10A of the Act. There was also disallowance of ESOP expenditure in AY 2010-11 and 2011-12.

3. Before the Ld.CIT(A), assessee has made detailed submissions. While deduction u/s. 14A, deduction u/s. 80IB and claim of ESOP expenditure was allowed by the CIT(A), the claim u/s. 10A has been rejected by the CIT(A). Hence the cross appeals. We have heard Ld. Counsel for Assessee and Ld. DR in detail.

Disallowance u/s. 14A:

4. This issue arises in AY. 2009-10 in the departmental appeal. Assessee earned dividend of Rs. 88,09,181/- and claimed the same as 'exempt'. AO disallowed the sum of Rs. 7,08,664/- u/s. 14A r.w. Rule 8D(2)(iii). In appeal, the Ld.CIT(A) allowed the assessee's contention, considering assessee's statement that company utilised the services of one employee for looking after the investment and cost of such employee was only Rs. 2,30,000/- and the said expenditures are sufficient to be considered and not 0.5% of the value of the average investment. Ld.CIT(A) did not give any reason but accepted assessee's contention and hence Revenue is aggrieved.

4.1. After considering the rival contentions, we are of the opinion that the calculation u/s. 14A requires re-examination by the AO. In fact, as seen from the order, AO did not verify whether there is any direct expenditure or not. Assessee states that there is direct expenditure by way of cost of one employee at Rs.2,30,000/-. Ld.CIT(A) without examining the issue has accepted the contention. Moreover, it is also noticed that the average of investments as stated by the AO seems to be not correct. The average of opening investment at Rs. 44,49,44,803/- and closing balance at Rs. 16,14,79,458/- results in average value of Rs. 30,32,12,130/- as against Rs. 17,17,32,670/- stated by the AO in the order. 0.5% thereon at Rs. 7,08,664/- was not correctly worked out. Therefore, without going into merits of the addition, we accept the Revenue's ground and restore the issue of entire disallowance u/s. 14A to the file of AO to be considered afresh, after giving due

opportunity to assessee. The grounds are considered allowed for statistical purposes.

Deduction claimed u/s. 80IB(8A):

5. Assessee has claimed deduction u/s. 80IB in various years and AO denied the deduction claimed by assessee. AO was of the view that the work carried out by assessee was in the nature of job work/service and it cannot be termed as 'Scientific Research and Development'. AO was of the view that assessee did not fulfil the conditions laid down in Rule 18DA of IT Rules. Accordingly, AO disallowed the deduction claimed in all the impugned three assessment years. In appeal, Ld.CIT(A) allowed assessee's claim following the decision of ITAT in assessee's own case vide order in ITA No. 1276/Hyd/2010 dt. 02-08-2013 for AY. 2006-07 and also order in ITA No. 1053/Hyd/2013 dt. 06-02-2014 for the AY. 2008-09. Revenue is aggrieved.

6. It was submitted that the approval granted to assessee while allowing deduction u/s. 80IB in AYs. 2006-07 and 2008-09 by the department has been renewed for the AYs. 2009-10, 2010-11 and 2011-12 vide letter No.TU/IV-R&D/Com/GVK/81/2006 dated 11-04-2008 issued by the prescribed authority viz., Secretary to Government of India in the Dept. of Scientific and Industrial Research. It was also submitted that the assessee has also been granted further renewal u/s. 80IB(8A) for the Asst. Years 2012-13, 2013-14 and 2014-15 by the said prescribed authority vide letter No. TU/IV /R&D.com/GVK/81/2005 dated 29-07-2011.

7. Ld.DR, however, submitted that CIT(A) is not correct in granting relief as the ITAT order indicate that the facts are to be examined in each of the years.

8. We have considered the rival contentions and perused the orders placed on record. In the light of the decision of the ITAT in assessee's own case for earlier years, which the Ld.CIT(A) has followed, we do not see any reason to differ from the order of the CIT(A). It is true that ITAT has stated that the claim has to be examined in each of the years and left a note of caution that the view taken therein may not apply to subsequent years, if there are change of facts. However, as seen from the approval granted, there are no change of facts and assessee is found to be eligible for deduction u/s. 80IB. In view of that, as the issue is squarely covered by the earlier decision, we uphold the order of CIT(A) and dismiss the Revenue grounds on this in all the years.

Deduction towards ESOP:

9. This issue arises in Revenue appeals for AYs. 2010-11 and 2011-12. Assessee debited an amount of Rs. 63,53,501/- in the P&L A/c in the financial year relevant to the AY. 2010-11 and an amount of Rs. 32,00,042/- in financial year relevant for AY. 2011-12 in the P&L A/c towards stock based compensation. AO following the decision of the ITAT in the case of Ranbaxy Laboratories Ltd., [124 TTJ 77] (Delhi) disallowed the deduction. In appeal, Ld.CIT(A) allowed the claim following the decision of the Special Bench of the Hon'ble ITAT, Bangalore in the case of Biocon Ltd., Vs. DCIT [144 ITD 21] [35 taxmann.com 335] (Bangalore-

Trib.) (SB). The department is aggrieved and preferred grounds in these two years.

10. After considering the rival contentions, we do not see any reason to interfere with the order of the CIT(A) as he has followed the Special Bench decision in the case of Biocon Ltd., Vs. DCIT (supra) which is binding on the authorities. The grounds of Revenue are accordingly dismissed.

Disallowance of communication charges while computing deduction u/s. 10A:

11. This issue arises in AY. 2009-10 in assessee's appeal. Assessee furnished Form 56F and claimed deduction u/s. 10A on two of the units. AO noticing that there may be internet charges attributable to delivery of article/thing outside India, disallowed the claim of communication charges. (Bio-informatics Division, Balanagar, Hyderabad at Rs. 1,18,877/- & an amount of Rs. 11,082/- in Informatics Division, Chennai.) Aggrieved by the disallowance made u/s. 10A, assessee preferred an appeal before the Ld.CIT(A) and relied on various case law including the definition of 'Export Turnover' and 'Total Turnover' based on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Lakshmi Machine Works Ltd., [290 ITR 667] (SC). Ld.CIT(A), however, Ld. CIT(A) did not agree stating that the claim does not hold water.

12. After considering the rival contentions, we are of the opinion that this issue is covered by the decision of ITAT in the case of Patni Telecom Solutions (P) Ltd., Vs. ITO [35 Taxmann.com 87]

(HYD) wherein the ITAT has held that internet expenses could not be treated as 'communication charges' under Clause-4 of Explanation-2 to Section 10A. However, assessee failed to furnish the amount of internet charges or any expenditure under this head. When this was pointed out, assessee's Counsel accepted for alternate contention that whatever is excluded from the export turnover should also be excluded from the total turnover on the principles laid down by the Hon'ble Bombay High Court in the case of CIT Vs. Gem Plus Jewellery India Ltd., [194 Taxman 192] (Bombay) [330 ITR 175] (Bom). This alternate contention is squarely covered by the above decision and also Special Bench decision of the ITAT, Chennai in the case of ITO Vs. Sak Soft Ltd. [313 ITR (AT) 353], wherein it has been held that communication charges etc., attributable to the delivery of the computer software outside India which are to be reduced from the export turnover should be reduced from the total turnover as well, while computing the deduction u/s. 10A. Therefore, following the ratio laid down in the aforesaid cases, we direct the AO to exclude the same amount from Total Turnover as well and re-workout the disallowance u/s. 10A. Grounds are partly allowed.

Disallowance of entire claim u/s. 10A:

13. In A.Ys. 2010-11 and 2011-12, AO disallowed the entire claim on Section 10A on the reason that some of the FIRC's issued by Kotak Mahindra Bank mentioned the purpose as 'research services'. Since assessee has claimed the deduction for software exports, AO was of the opinion that research services provided by assessee are not eligible for deduction u/s. 10A. Ld.CIT(A) confirmed the disallowance, even though assessee explained that

they were into software exports and gave detailed explanation and also furnished necessary invoices in support of the claim.

14. Ld. Counsel referred to the submissions made before the CIT(A) and submitted that the reference to research services is because assessee is mainly involved in providing medical research services. Therefore, there may be mistake in issuing the certificate but that does not prove that assessee has not exported software on which the claims are made. Referring to the order of assessment in AY. 2009-10 [which is also in appeal before us], the Ld. Counsel pointed out that from the same units, assessee has claimed deductions u/s. 10A which was allowed in earlier years but in these two years, AO took a different stand.

15. Ld.DR, however, relied on the orders of the AO and CIT(A) on this issue.

16. We have considered the rival contentions and perused the submissions on this issue. The claim u/s. 10A on the similar facts was allowed by the AO in the assessments made u/s. 143(3) for AYs. 2005-06, 2006-07 and 2008-09. Similar computation of income and copies of report in Form 56F were filed by assessee. Even in AY. 2009-10, which is also in appeal before us, the claim was allowed. Therefore *prima-facie* the claim of deduction u/s. 10A is allowable. However, the AO made out a new case that the remittances were for 'research services'. The FIRC issued by the bank cannot be taken as a conclusive evidence, unless supported by actual research for which remittances are made. This aspect has not been examined by the AO at all. Moreover, the detailed

explanation made before the CIT(A) has not been examined by the CIT(A). He has summarily rejected assessee's contentions stating that 'it does not hold water'. We are of the opinion that this issue requires re-examination by the AO based on the invoices raised and corresponding amounts remitted, so that whether assessee has indeed exported software services or the amounts remitted were indeed for research services as stated in the certificate. Since the invoices are required to be examined, the issue of deduction u/s. 10A is restored to the file of AO to examine afresh and allow the claim, if assessee satisfies the provisions of Section 10A. The issue in AYs. 2010-11 and 2011-12 are accordingly restored to the file of AO for fresh examination. Grounds are considered allowed for statistical purposes.

17. In the result, Revenue appeals in AY 2010-11,2011-12 are dismissed and all the other appeals are considered partly allowed for statistical purposes.

Order pronounced in the open court on 10th January, 2018

Sd/-
(D. MANMOHAN)
VICE PRESIDENT

Sd/-
(B. RAMAKOTAIAH)
ACCOUNTANT MEMBER

Hyderabad, Dated 10th January, 2018

TNMM

Copy to :

- 1. GVK Biosciences Pvt. Ltd., Plot No. 28A, Road No. 15, IDA Nacharam, Hyderabad.*
- 2. Deputy Commissioner of Income Tax, Circle-2(2), Hyderabad.*
- 3. Asst. Commissioner of Income Tax, Circle-2(2), Hyderabad.*
- 4. CIT (Appeals)-2, Hyderabad.*
- 5. Pr.CIT-2, Hyderabad.*
- 6. D.R. ITAT, Hyderabad.*
- 7. Guard File.*