

आयकर अपीलिय अधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गराव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.373& 374/Vizag/2016
(निर्धारण वर्ष / Assessment Year: 2008-09 & 2010-11)

M/s. VSR Infotech
Visakhapatnam
[PAN No.AAFFV8176P]
(अपीलार्थी / Appellant)

ITO, Ward-3(2)
Visakhapatnam
(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by : Shri G.V.N. Hari, AR
प्रत्यार्थी की ओर से / Respondent by : Shri Deba Kumar Sonowal,
DR
सुनवाई की तारीख / Date of hearing : 21.02.2018
घोषणा की तारीख / Date of Pronouncement : 28.02.2018

आदेश / O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

These appeals filed by the assessee are directed against order of the Commissioner of Income Tax-1 (CIT), Visakhapatnam vide F.No.CIT-1/VSP/263/11/2014-15 dated 30.3.2016 for the assessment years 2008-09 & 2010-11. Since the facts are identical and the issue involved is

common in these appeals, they are clubbed, heard together, disposed of by this common order for the sake of convenience.

2. The assessee filed appeals with a delay of 453 days. In this case, the order of the CIT(A) was served on the assessee on 31.3.2015, the appeal ought to have been filed on 29.5.2015 against which, the assessee has filed appeal on 22.8.2016 for the A.Y 2008-09. The assessee filed an affidavit explaining reasons for delay. In his petition for condonation of delay, the assessee submitted that he was in Mumbai from July, 2014 and had received the order of the CIT u/s 263 of the Income Tax Act, 1961 (hereinafter called as 'the Act') through his auditor on 31.3.2015 and after signing he had sent the appeal papers to the Accountant of the firm. The accountant of the firm had forgotten to hand over the documents to the Chartered Accountant and meanwhile he left the job of the assessee firm without handing over the appeal papers to the incumbent Accountant. The Managing partner was under the bonafide belief that appeal was filed in time. Meanwhile, the Managing Partner stated to have left to Singapore and thereafter he was busy in travelling in search of new assignments. Subsequently, he got the new assignment based at USA and he had to travel to USA on 29.4.2016 to get acquainted with the requirement of new clients and he returned to India in the first week of July, 2016 and by surprise, he had

received the order passed by the A.O. giving effect to the revision order u/s 263 of the Act on 19.7.2016, then only he came to know that the assessee has not preferred the appeal against order u/s 263 of the Act. After coming to know that the appeal was not filed, the assessee filed the appeal with a request to condonation of delay. The assessee has enclosed a copy of the passport evidencing the travelling dates out of country. The Ld. A.R. argued that there is a reasonable and sufficient cause for not filing of appeal and the assessee was under the bonafide belief that the appeal was filed. There was no willful default from the assessee in filing the appeal. The Ld. A.R. further argued that there was merit in the assessee's case and merely because of the bonafide default condonation of delay should not be rejected. The Ld. A.R. further argued that non condonation of delay would cause financial injury to the assessee and accordingly requested for condonation of delay and admit the appeal of the assessee.

3. On the other hand, the Ld. D.R. argued that there was a delay of 453 days in this case, which is a long delay which required to be explained. The assessee has not explained the delay satisfactorily; hence, opposed the condonation of delay.

4. We have heard both the parties, perused the materials available on record and gone through the evidence placed before us. In this case,

the fact that the assessee was not residing in Visakhapatnam and residing at Mumbai was not disputed by the revenue. Similarly, the Ld. A.R. explained that the assessee was under the bonafide belief that the appeal was filed since the papers were sent to the Accountant after duly signed by the Managing Partner and due to frequent travel to abroad and overstayal, the assessee could not follow up with the authorized representative with regard to the status of filing of appeal. The Ld. A.R. also argued that there is substantial merit in the case of the assessee and non condonation of delay would cause financial injury and injustice to the assessee. Therefore, in the interest of justice, we are of the view that the delay required to be condoned in the assessee's case, accordingly, the delay is condoned and the appeal is admitted.

5. In this case, the assessment was completed u/s 143(3) of the Act originally on 30.8.2010 accepting the income returned. The assessee filed return of income admitting total income of ₹ 2,50,220/- on 29.8.2008. Subsequently, the assessment was reopened u/s 148 of the Act on 29.2.2012 for verification of the assessee's eligibility regarding the deduction claimed by the assessee u/s 10B of the Act. The assessee had claimed exemption of ₹ 53,07,039/- u/s 10B of the Act for the A.Y.2008-09. For the A.Y2010-11 the assessee has claimed the

exemption of ₹ 88,80,362/- u/s 10B and the assessment was completed under section 143(3) of the act dated 17/12/2012.

6. The assessee is engaged in the business of computer software and registered with the Software Technology Park of India (STPI), Duvvada, Visakhapatnam. The A.O. has called for the explanation of the assessee as to why the exemption claimed by the assessee u/s 10B of the Act should not be disallowed and requested the assessee to produce information with regard to the satisfaction of the conditions laid down for granting deduction u/s 10B of the Act as well as the approval from the board for allowing the exemption u/s 10B. The assessee had replied to the A.O., and the same is extracted as under:

"On verification of Profit and loss account and computation it is noticed that the assessee has claimed exemption U/s 10B of Rs. 53,07,039, According to the provisions of section 10B, for claiming exemption under this section the assessee should obtain statutory approval from Board of Approval" appointed by Government of India. In this case no proof for approval obtained from "Board of Approval" placed on record. Further, the deduction U/s 10B is available to undertaking which manufactures or produces any article or thing or computer software. But, the assessee is providing certain consulting services to the "CHEMTURA" company relating to EAS marketing, Sales and services. Further, the consulting agreement with "CHEMTURA" was expired on 1-3-2007 and no agreement for the F.Y.2007-08 relevant to A.Y.2008-09. The assessee is also required to enter a legal agreement with the Director, STPI, Hyderabad in the prescribed form Appendix-14F. In the absence of the above approvals and agreements the assessee firm is not entitled for exemption U/s 10B. Therefore, the assessee is asked to produce the information and also called upon as to why the exemption claimed U/s 10B should not be withdrawn. In response thereto the assessee furnished a detailed reply as under:

"a) Approval from Board: it was mentioned in your letter that the assessee should obtain statutory approval from the Board appointed by

Government of India. You have also mentioned the case of MIs Infotech enterprises LTD Vs CIT. But however the Income tax Appellate Tribunal, Hyderabad, in the case Secunderabad Software Vs. CIT, has held that, having been registered with STPI, is entitled for deduction under Section 10B of the Income Tax Act. It has specifically mentioned that STPI registration is sufficient to claim deduction under Section 108 of the IT Act. We herewith enclosed the copy of the said case for your reference. We also herewith enclosed another Tribunal case Smt, K.Sudha Rani Vs. Department of Income tax (ITA No. 412\HYD\2012).

b) Computer Software: it was mentioned in your letter that deduction U/s. IOB is available only to an undertaking which fulfils "Manufacture, or produces any article or thing or computer software. We invite your kind attention to the Notification issued by Central Board of Direct Taxes vide Notification No. 11521 dated 26-9-2000. As per the said notification, the following information Technology enabled products or services are covered under Section IOB.

- (i) Back-office Operations;*
- (ii) Call Centres;*
- (iii) Content Development or Animation; .jiv) Data Processing;*
- (v) Engineering and Design;*
- (vi) Geographic Information System Services;*
- (vii) Human Resource Services;*
- (viii) Insurance Claim Processing;*
- (ix) Legal Databases;*
- (x) Medical Transcription;*
- (xi) Payroll;*
- (xii) Remote Maintenance;*
- (xiii) Revenue Accounting;*
- (xiv) Support Centres*
- (xv) Website Services-*

Our services to the company Chemtura would squarely cover under Computer software as per the above circular.

c) It was also mentioned that the agreement with Chemtura was expired on 1st March, 2007. We herewith enclosed the renewed agreement with Chemtura.

d) We also herewith enclosed the legal agreement with the Director STPI, in the prescribed form of Appendix- 14F.

Hence, we request your goodselves to drop the re-opening of assessment under Section 148 of the Income Tax Act."

The assessee has entered into legal agreement with the Director,

STPI, Hyderabad on 7-7-2006 in the prescribed form 14-IF within one month from the date of letter of approval (LOP) dated 29-06-2006 and furnished copy of the same. The assessee also furnished the Revival and extension of consulting agreement with "CHEMTURA" from 1-3-2007 to 31-3-2006. The assessee furnished copy of the Notification No. 11521 dated 26-9-2000 issued by the CBDT and as per which all the Information technology enabled services are covered under clause (b) of explanation 2 of the section 10B were covered. The assessee submitted that the services rendered to "Chemtura" involves

- (a) *Support and Configuring SAP Business Processes,*
- (b) *Lead Business Blue Print/GAP Analysis Sessions*
- (c) *Provide weekly Projects updates or as required*
- (d) *Development of solutions to issue*
- (e) *Training of users functionality, as required*
- (f) *Demonstration of SAP Processes*
- (g) *Other SAP related services as required*
- (h) *Investigation of SAP Best Practices*
- (i) *Data Migration as required.*

He explained that some of the above services cover under Data Processing and some of the services cover under Remote maintenance of CBDT Notification No. 11521 dated 26-9-2000.

A letter was addressed to the Director, Software Technology Parks of India, VSEZ, Duvvada, Visakhapatnam to provide copy of approval or ratification of LOP by 'Board of Approval' on 16-11-2012. The Software Technology Parks of India vide its letter dated 5-12-2012 furnished a copy of letter No.1(1)/06-IPHW dated 7-9-2006 by the Additional Director, Department of IT to the Director, Ministry of Finance, Department of Revenue, CBDT, North Block, New Delhi stating that no further ratification of approvals issued by the Directors of Software Technology Parks of India is required from the Inter Ministerial Standing Committee(IMSC). It is clarified that tax benefits shall not be denied by Incometax Department to STP units only on the ground that the approval to units have been granted by the Directors of Software Technology Parks of India.

7. After verification of the information furnished by the assessee and after considering the clarification received from the Director, the A.O. accepted the claim of the assessee and completed the reassessment allowing the exemption claimed u/s 10B of the Act.

8. In the assessment year 2010-11, the assessment was completed u/s 143(3) of the Act allowing the exemption u/s 10B of the Act. The A.O. completed the assessment in the assessment year 2010-11 also after verification of the eligibility of the assessee with regard to the engagement of assessee in the computer software services and also with regard to the requirement of approval from the Board appointed by the Government of India. Subsequently, the Ld. CIT has taken up the cases for revision for both the assessment years and held that the assessments made by the A.O. were erroneous and prejudicial to the interest of the revenue due to the following reasons:

The assessee is engaged only in consultancy work which will not come within the purview of section 10B of the Act. The A.O. has not followed the ratio of the Delhi High Court in the case of M/s. Regency Creations Limited as mentioned above.

9. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The Ld. CIT has taken up the case for revision u/s 263 of the Act since the assessee is not in the activity of manufacturing the computer software and the assessee did not obtain the approval from the Board to be constituted by Central Government which issues notification. However,

on verification of the assessment order, it is observed that the assessing officer has examined the issue whether the assessee is carrying on consultancy work or engaged in the manufacturing of computer software. In the reply submitted by the assessee before the A.O. which was reproduced above, the assessee submitted that the it is engaged in the Data processing and Remote Maintenance which is information technology enabled products or services covered u/s 10B of the Act as per the notification issued by the vide CBDT vide Notification No.11521 dated 26.9.2000. Since the issue has been considered by the assessing officer and taken a conscious decision that the assessee is engaged in the computer software after conducting necessary enquiry and analyzing the information filed by the assessee, the Ld. CIT is not permitted to revisit the same issue which was already examined by the assessing officer and allowed the deduction. Similarly, the issue with regard to the approval from the Board constituted by Central Government was also examined by the assessing officer. The A.O. has conducted enquiries with the Director, Software Technology Parks of India, VSEZ, Duvvada, Visakhapatnam who has clarified vide letter dated 5.12.2012 that once the Director, STPI approves the unit, no further ratification of approval from the inter-ministerial standing committee is required and the income tax benefits should not be denied on the ground that the approval of

units have been granted by the Director of STPI. Hence, it is evident from the assessment order passed u/s 143(3) r.w.s. 147/143(3) of the Act that the A.O. has examined the issue of requirement of approval from the Board also.

10. Hon'ble ITAT, Hyderabad 'A' Bench in ITA No.412/Hyd/2010 dated 17.9.2010 in the case of K. Sudharani has examined the issue with regard to the requirement of approval by the Board appointed by the Central Government in exercise of powers u/s 14 of the Industries (Development & Regularisation Act, 1951) and the Rules made thereunder, which prescribed under the Income Tax Act for the purpose of claiming deduction u/s 10B of the Act and gave a Ruling that the approval of 100% EOU by the Board and STPI is one and the same and the assessee is eligible for deduction u/s 10B of the Act. For ready reference, we extract relevant para No.3 of the cited order which reads as under:

3. After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's own case in ITA No.1750/Hyd/2008 vide order dated 30.10.2009 wherein it was held as follows:

7. We have considered the rival submissions and perused the materials available on record. One of the conditions prescribed by the statute for claiming exemption u/s 10B of the Act is that the unit begins to manufacture or produce computer software/IT enabled services in any Software Technology Park (STP). As per Explanation 2 (vii) to section 10A, STP or STPI (software technology part of India) means any park set up in

accordance with the software technology park scheme notified by the government in the Ministry of Commerce and Industry. The deduction u/s 10B as claimed has been denied in the case under consideration by the department only on the ground that software technology park scheme as notified stipulates that the entity STP must be approved by the Board and mere approval by the Inter Ministerial Standing Committee (IMSC) is not enough. As per Gazette Notification GSR No.526(E) published in Part II Sec. III of the Gazette of India Extra ordinary, dated 13th August, 1991, the IMSC was invested with the function of approval of setting up of 100% EOUs for the units under the STP scheme. It may be noted that STP while registering a unit executes an agreement between such unit and President of India (referred to as the Govt.) and accordingly grants the status of 100% export oriented unit as defined in Ministry of Commerce, Notification No.33 (RE) 92-97 dated 22nd March 1994 on software technology parks. Hence, it is not relevant as to how the software technology parks. Hence, It is not relevant as to how the statutory obligation or authority is delegated to STP since it is an internal matter of the govt. Therefore, once STP approves the unit as a 100% export oriented undertaking, it should be allowed deduction u/s IOB provided it complies with other conditions as specified in that section. S.10B is a special incentive provision Introduced by the legislature in order to promote exports of computer software/IT enabled services and therefore the same ought to be construed liberally. The Supreme Court In the case of Bajaj Tempo Ltd. Vs. CIT (196 ITR 188) had held as under:

A provision In taxing statute granting incentives for promoting growth and development should be construed liberally, the restriction on it too has to be construed so as to advance objective of the provision and not to frustrate it'.

There is no dispute that the assessee in the instant case has obtained approval from STP Hyderabad as 100% EOU. The first appellate authority held that the assessee as not eligible for relief u/s IOB only on the ground that the 100% EOU under STP scheme cannot be equated with the 100% EOU approved by the Board. Since in our considered opinion the approval of 100% EOU by the Board and STP Is one and the same, assessee is eligible for exemption u/s 10B of the Act. We accordingly, set aside the impugned order of the CIT(A), and direct the assessing officer to allow the assessee's claim for exemption u/s 10B of the Act, allowing the grounds of the assessee in this behalf.

11. The revenue went on appeal before the Hon'ble jurisdictional High Court against the order of the Hon'ble ITAT in the case cited (supra) and the Hon'ble jurisdictional High Court dismissed the appeal of the revenue. Therefore, issue is put at rest by the Hon'ble jurisdictional High Court in the case of K. Sudharani in ITTA No.87 of 2013 dated 25.6.2013 with regard to the requirement of Board approval. Similar views are taken by the Hon'ble ITAT 'B' Bench in following cases:

- (i) ITA Nos.836, 815, 816, 817/Hyd/2016 & 916/Hyd/2017 in the case of DCIT, Circle-8(1), Hyderabad Vs. M/s. Value Labs, Hyderabad dated 15.12.2017.
- (ii) ITA No.1501/Hyd/2011 in the case of ITO Ward-3(1), Hyderabad Vs. M/s. Secunderabad Software Services, Secunderabad dated 10.4.2012.

12. Therefore, it is evident from the order of the A.O. that the A.O. has taken one of the possible views. Therefore, once the A.O. has taken one of the possible views after conducting the enquiries, the Ld. CIT is not permitted to take up the case for revision u/s 263 because the Ld. CIT has another independent view. This view is supported by the Hon'ble Supreme Court decision in the case of CIT Vs. Max India Limited 166 Taxman.com 0188 and similar view was expressed by the Hon'ble Supreme Court in the case of CIT Gujarat II Vs. Quality Steel Supply Complex 84 Taxmann.com 234 (SC). Hon'ble apex court held that

where two views are possible and the ITO has taken one of the views which the CIT does not agree, it cannot be treated as erroneous order prejudicial to the interest of the revenue. Therefore, we hold that there is no case for assuming jurisdiction by the Ld. CIT u/s 263 of the Act, accordingly we set aside the order of the Ld. CIT and allow the appeal of the assessee.

13. In the result, the appeals filed by the assessee are allowed.

The above order was pronounced in the open court on 28th Feb'18.

Sd/-

(वी. दुर्गराव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 28.02.2018

VG/SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – M/s. VSR Infotech, D.No.9-42-9/31, Flat No.504, Mahalakshmi Towers, Balaji Nagar, Siripuram, Visakhapatnam
2. प्रत्यार्थी / The Respondent – The ITO, Ward-3(2), Visakhapatnam
3. आयकर आयुक्त / The CIT-1, Visakhapatnam
4. आयकर आयुक्त (अपील) / The CIT (A), Visakhapatnam
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम / DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

// True Copy //

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, VISAKHAPATNAM

Sl. No.	Description	Date	Initials
1.	Date of dictation by the Author	22.02.2018	Sr.PS
2.	Draft placed before the Dictating Member	23.02.2018	Sr.PS
3.	Draft placed before the Second Member		Sr. PS
4.	Draft approved by the Second Member		Sr. PS
5.	Date of approved order comes to the Sr. PS		Sr. PS
6.	Date of pronouncement of order		Sr. PS
7.	Date of file sent to the Bench Clerk		Sr. PS
8.	Date on which file goes to the Head Clerk		Hd. Clk
9.	Date of dispatch of order		Sr. PS