IN THE INCOME TAX APPELLATE TRIBUNAL
Delhi Bench"G", New Delhi

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER
I.T.A. No. 1492/Del/2005
Assessment Year: 2001-02

Asstt. Commissioner of Income Tax, Circle 7(1), Room No. 312, CR Building, New Delhi	Vs.	M/s System America India Ltd., FB-02, NSIC-STP Complex, Okhla, New Delhi **PAN-AADCS7828J**
[Appellant]		[Respondent]

I.T.A. No. 905/Del/2005
Assessment Year: 2001-02

M/s System America India Ltd., FB-02, NSIC-STP Complex, Okhla, New Delhi **PAN-AADCS7828J**	Vs.	Asstt. Commissioner of Income Tax, Circle 7(1), Room No. 312, CR Building, New Delhi
[Appellant]		[Respondent]

Department by:	Sh. M. Baranwal, Sr. DR
Respondent by:	Sh. Ved Jain, Adv, Sh. Ashish Jain, Adv & Ms. Divina Sharma, Adv

Date of Hearing:	24	04	2018
Date of Pronouncement:	12	07	2018

O R D E R

PER N.K. SAINI, A.M:

These two cross appeals by the Department and assessee are directed against the order dated 27.1.2005 of the learned CIT(A)-X, New Delhi. The ground raised in the departmental appeal reads as under:-

i. *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in directing the AO to allow deduction u/s 80 HHE overlooking the provisions of sub-section (4) of that section which provides that deduction shall not be admissible unless the assessee furnishes in the prescribed form, along with the return of income, the report of an accountant as specified."*

2. In the assessee's appeal, following grounds have been raised:-

1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in confirming the action of the assessing officer in denying deduction under section 10A of the Income-tax Act ('the Act') in respect of profits derived from the undertaking providing/exporting software services.

1.1 That the Commissioner of Income-tax (Appeals) erred on facts and in law in denying deduction under section 10A of the Act on the ground that the ownership or the beneficial interest in the undertaking had been transferred during the relevant previous year in terms of the provisions of section 10A(9) of the Act.

1.2 That the Commissioner of Income-tax (Appeals) erred on facts and in law in confirming the action of the assessing officer that shares of the company carrying more than 51% of the voting power on the last day of the previous year relevant to the assessment year under appeal were not beneficially held by the same persons who held the shares of the company carrying not less than 51% of the voting power on the last day of the previous year in which the undertaking was set up.

1.3 That the Commissioner of Income-tax (Appeals) erred on facts and in law in not accepting the contention of the appellant that the shares held by Smt. Prem Lata should be treated as transferred before the relevant assessment year and, thus, the provisions of sub-section (9) of section 10A of the Act could not be applied.

2. That the Commissioner of Income-tax (Appeals) erred on facts and in law in the confirming disallowance of 1/5 of Rs.54,09,474, being issue related expenses claimed under section 35D of the Act on the ground that expenses claimed related to public issue which did not take place.

2.1 That the Commissioner of Income Tax (Appeals) erred on facts and in law in not allowing deduction of Rs. 9,67,500 being the loan documentation expenditure under section 37(1) of the Act on the ground that no details have been furnished by the appellant.

3. That the Commissioner of Income Tax (Appeals) erred on facts and in

law in confirming the disallowance of Rs. 26,49,045 made by the assessing officer, being the amount paid for purchase of software on the ground that no tax was deducted from the payment made.

3.1 That the Commissioner of Income Tax(Appeals) erred on facts and in law in not appreciating that the aforesaid sum of Rs. 26,49,045, incurred on purchase of software was not chargeable to tax in India and, therefore, no tax was required to be deducted under section 195 of the Act.

4. That the Commissioner of Income Tax(Appeals) erred on facts and in confirming the levy of interest under section 234B of the Act."

3. The assessee also moved an application for admission of the additional grounds which reads as under:-

"***Application for admission of Additional Grounds of Appeal***

***MAY IT PLEASE YOUR HONOURS*:**

1. *The appellant has filed the above said appeal bearing ITA No. 905/Del/2005 in pursuance of the order dated 27.01.2005 passed by the Learned CIT(A) - X, New Delhi under Section 250 of the Income Tax Act, 1961.*
2. *The brief facts leading to the present appeal are that the assessee claimed deduction u/s 10A of the Act, which was disallowed by the AO vide its order dated 27.02.2004, on the ground that the ownership of the undertaking claiming exemption u/s 10A has changed and as such, it is not eligible for deduction u/s 10A of the Act.*
3. *Aggrieved by the order of the AO, the assessee came in appeal before the Ld. CIT(A). In the said appeal the assessee also took an alternative ground that in case deduction u/s 10A is denied to the assessee, then the deduction u/s 80HHE be allowed to the assessee.*
5. *The Ld. CIT(A), however, vide order dated 27.01.2005 confirmed the order of the AO with regard to the disallowance of exemption u/s 10A claimed by the assessee. On the issue of alternative claim u/s 80HHE of the Act, the Ld. CIT(A) called for a remand report, wherein the AO pointed out that a sum of Rs.3,98,27,529/- out of total export turnover has not been received by the assessee within the period of six months from the end of financial year, and thus, to that extent, the assessee is not eligible for deduction u/s 80HHE of the Act.Aggrieved by the order of the Ld. CIT(A), both the assessee as well as the Revenue are now in appeal before this Hon'ble ITAT.*
6. *That while filing the appeal, the applicant has raised four grounds of appeal, challenging the disallowance of exemption u/s 10A of the Act in ground no. 1 to 1.3 and other additions / disallowances in ground no. 2 to 4.*

7. *In the meanwhile, the AO, in compliance to the directions of the Ld. CIT(A) has passed an order, whereby he has allowed the assessee the deduction u/s 80HHE amounting to Rs.5,08,91,310/-. However, the deduction allowed by the AO u/s 80HHE is not in accordance with the provisions of the Act.*

8. *That accordingly, the applicant is filing the following additional grounds of appeal, which deal with the issue of incorrect computation of deduction u/s 80HHE of the Act allowed by the AO to the assessee.*

9. *That it is submitted that the following additional grounds of appeal may kindly be taken in addition to the grounds originally taken in Form 36.*

"5(i). On the facts and circumstances of the case, the learned AO has erred in computing the amount of deduction allowable to the assessee u/s 80HHE of the Act at Rs.5,08,91,310/- as per the direction of the Ld. CIT(A), as against the amount of Rs. 6,46,36,618/- allowable as per the provisions of the Act.

(ii) That the learned AO, while computing the deduction u/s 80HHE as per the directions of the Ld. CIT(A), has erred in taking the export profit at Rs.7,26,28,213/- by not including the disallowances made, as against Rs.8,13,82,788/- computed by the learned AO in the assessment order.

(iii) That the learned AO, while computing the deduction u/s 80HHE as per the directions of the Ld. CIT(A), has erred in taking the total turnover at Rs.70,41,50,344/-, as against the total turnover of the assessee of Rs. 65,65,82,120/- which is the FOB value of export.

(iv) That the learned AO, while computing the deduction u/s 80HHE as per the directions of the Ld. CIT(A), has erred in considering the export turnover at Rs. 61,67,55,091/-, as against the export turnover of Rs. 65,65,82,120/-.

(v) That the learned AO, while computing the deduction u/s 80HHE as per the directions of the Ld. CIT(A), has erred in excluding the sum of Rs. 3,98,27,529/- as payment not realized within the prescribed period, ignoring the fact that the extension of the same was granted by the bank of the assessee, who is the competent authority as per the directions of the Reserve Bank of India."

4. The assessee in alternative filed an application under Rule 27 of the Income Tax Appellate Tribunal Rules, 1963 which reads as under:-

"SUB: APPLICATION UNDER RULE 27 OF APPELLATE TRIBUNAL RULES, 1963

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1. *Revenue has filed this appeal against the order passed by the Ld. CIT(A) dated 27.01.2005 challenging the direction of the CIT(A) to allow deduction*

under Section 80HHE.

2. *The brief facts leading to the present appeal are that the assessee claimed deduction under Section 10A of the Income Tax Act. The AO vide order dated 27th February, 2004 disallowed the exemption on the ground that ownership of the undertaking claiming exemption under Section 10A has changed and as such it is not eligible for deduction under Section 10A of the Act.*
3. *Aggrieved by the order of the AO, the assessee came in appeal before the CIT(A). In the said appeal the assessee also took an alternative ground that in case deduction under Section 10A is denied then the deduction under Section 80HHE be allowed.*
4. *That the CIT(A) vide order dated 27.01.2005 confirmed the order of the AO with regard to the disallowance of exemption under section 10A claimed by the assessee.*
5. *That on the issue of alternative claim under Section 80HHE, the CIT(A) called for a remand report from the AO. The AO in the remand report pointed out that a sum of Rs. 3,98,27,529/- out of the total export turnover has not been received by the assessee within the period of six months from the end of the financial year and to that extent the assessee is not eligible for deduction under Section 80HHE.*

6. *The CIT(A) after considering the remand report by the AO held that the AO has nowhere objected in the remand report to the eligibility of deduction under Section 80HHE and accordingly directed the AO to allow alternative claim of deduction in accordance with the provisions of the Act.*
7. *That aggrieved by the order of the CIT(A), the Revenue is now in appeal before the Hon'ble ITAT.*
8. *That the assessee has not preferred any appeal on the issue of deduction under Section 80HHE as CIT(A) has directed the AO to allow the deduction.*
9. *That the AO in compliance to the directions of the CIT(A) has passed an order under section 250 of the Act allowing assessee deduction under section 80HHE amounting to Rs. 5,08,91,310/-. That the deduction allowed by the AO under Section 80HHE is not in accordance with the provisions of the Act.*
10. *Accordingly, the assessee intends to support the CIT(A) under Rule 27 on the ground that the resultant deduction under section 80HHE should be computed as per the provisions of the Act and the following errors committed by the AO while granting consequential relief to the assessee may be removed:*

    1. *The Id. AO has erred in computing deduction under Section 80HHE at Rs.5,08,91,310/-, as against Rs.6,46,36,618/- allowable under the provisions of the Act.*
    2. *The Id. AO has erred in taking the export profit at Rs.7,26,28,213/-, as against Rs.8,13,82,788/- computed by him in the*

assessment order itself. The AO has taken the export profit at Rs.7,26,28,213/-. The Id. AO has erred in not including the disallowances while determining the export profit.

3. The Id. AO has erred in taking the total turnover of the assessee at Rs.70,41,50,344/-, as against total turnover of the assessee of Rs.65,65,82,120/-. This error has occurred as the AO has failed to consider the FOB value export.

4. That the Id. AO has erred in considering export turnover at Rs.61,67,55,091/-, as against export turnover of Rs.65,61,24,891/-.

5. The Id. AO has erred in excluding a sum of Rs.3,98,27,529/- as payment not realized within the prescribed period ignoring the fact that the extension of the same was granted by the bank of the assessee who is the competent authority as per the directions of the Reserve Bank of India.

6. Accordingly, it is prayed that the above contention of the assessee may be adjudicated upon by the Hon'ble Bench under Rule 27 of the Income Tax Appellate Tribunal Rules or in the alternative as additional ground in its Appeal No. 905/Del/2005.

5. Since the issue as reiterated by the assessee in the additional grounds and the application under Rule 27 of the IT(AT) Rules, 1963 relates to the issue as agitated by the Department in its appeals and no fresh investigation is required. The facts are already available on the record. The issue raised are legal in nature therefore, the additional ground raised by the assessee are admitted and will be adjudicated alongwith appeal of the department.

6. Vide ground nos. 1 and 1.3, the grievance of the assessee relates to the denial of deduction under section 10A of the Income Tax Act, 1961 (hereinafter referred as the Act).

7. Facts of the case, in brief are that the assessee was engaged in the business of providing / export software services and for the year under consideration filed the return of income on 30.10.2001 declaring an income of Rs. 58,38,510/-, which was processed under section 143(1)(a) of the Act on 17.5.2002. The assessee claimed deduction of Rs. 7,68,68,02/- under section

10A of the Act as per the certificate of Chartered Accountant in Form No. 56F dated 23rd October, 2001, copy of which is placed at page no. 43 of the assessee's compilation annexed to the return of income.

8. During the course of assessment proceedings, the AO observed that the assessee company was incorporated on 1.4.1997 as Systems America (India) Pvt. Ltd. With two shareholders namely Ms. Prem Lata and Mr. Nirdosh Kumar Tyagi holding 1000 and 100 shares respectively as on 31.3.1998. The assessee company is registered with a Software Technology Park India Ltd., as STP Unit (100% EOU) and has been claiming deduction under Section 10A of the Act since its inception. According to the AO entire share capital of the assessee company i.e. 1100 shares were transferred to M/s Systems America Holding LLC Mauritius on 11.5.2000 and subsequently bonus shares in the ratio 1:5454 were issued by the assessee company to its sole shareholder i.e. M/s Systems America Holding LLC Mauritius with the approval of RBI vide letter dated 4.9.2000 resulting in raising the equity share capital of the assessee company from 1100 equity shares to 60,00,500 equity share of Rs. 10/- each aggregating to Rs. 6,00,05,000/-. Subsequently, the assessee company issued 10,00,000 equity shares of 10/- each at a premium of Rs. 147 per share aggregating to Rs. 15.70 Crores of Citicorp International Finance Corporation, USA (City Bank) and thus, the total amount of equity shares capital raised to Rs. 7,00,05,000 as on 31.3.2001 and since the assessee company claimed deduction u/s 10A of the Act and there was substantial change in the share holding pattern of the assessee company during F.Y. 2000-01 relevant to assessment year under consideration, the AO asked the assessee to explain as to why deduction under section 10A of the Act may not be denied in view of the provisions of sub section 9 (read with explanation 1) to section 10A of the Act.

9. In response, the assessee submitted before the AO as under:-

- *The impugned Sec. I0A was amended by the Finance Act w.e.f. April 1. 2001 which means from the Financial Year 2000-01. Section 10A of the I.T Act as amended by the Finance Act was applicable.*
- *Whereas the shares of the company were valued at Rs.1.87 crores on Jan.31, 2000, the certificate issued by the CA is attached. After carrying out due diligence Systems America Holding EEC Mauritious agreed to acquire stake in the assessee company at a price to be determined in accordance with RBI guidelines on transfer of shares form resident to nonresident.*
- *Whereas the prior approval of RBI was required for transfer of shares by a Resident in favour of a non-Resident. So an application was made on March 27, 2000 to the RBI for its approval and RBI granted an in principle approval vide letter dated March 29,2000 to transfer the shares in favour of the non-resident subject to final approval of the RBI.*
- *Whereas pursuant to the RBI approval of the promoter(s) of the company entered into an agreement (dated March 30, 2000 at New Delhi) with M/s System America Holdings LLC. Mauritius selling the shares held bv them, in the assessee company.*
- *In view of the above the appellant pleaded that the title in those shares got transferred on the aforesaid date i.e March 30,2000.*
- *Since transfer of shares had taken place before 31.3.200 i.e. beginning of the relevant previous year, the provisions of amendment in the Section 10A shall not be applicable since these were effective from A.Y. beginning on 1.4.2001. There was no change in shareholding during the previous year. Moreover, change in shareholding had taken placed before the introduction of new law. Hence it would not effect the eligibility to claim benefit of deduction u/s 10A as per pre-amended section.*
- *Without prejudice to the above it was also pleaded that in fact there is no change in the beneficial ownership of shares and it is a matter of record that it was transfer of shares amongst the family member only.*
- *In support of its contention the assessee company also filed a copy of agreement to sell dated 30.3.200 between Mrs. Prem fata and M/s Systems America Holdings LLC Mauritius wherein Smt. Prem Lata i.e. transferor has agreed to sell the 1000 equity shares held by her in M/s Systems America (India) Pvt Ltd to the transferee i.e M/s Systems America Holdings LLC Mauritius and contained, inter alia, the following clauses:*

    1. *The transferor has obtained the necessary approval of RBI (in principle approval dated March 29, 2000 to sell those shares to the transferee.)*

    2. *The transferor has agreed to sell and the transferee has agreed to purchase the aforesaid 1000 equity shares at an agreed price of Rs. 1,70,20,000/- payable in the manner set forth.*

    3. *That the transferor handed over the said certificate to the transferee.*

    4. *The transferee has agreed to pay the aforesaid sum of Rs. 1,70,20,000 in convertible foreign exchange to be remitted from abroad through banking channels or held by the transferee in its NRE/FCNR A/c with the bank authorized to deal in foreign exchange.*

5. *The transferee acknowledges the receipt of the aforesaid shares and upon verification has found them in order.*

6. *The transferor shall execute the share transfer deed on receipt of confirmation that the aforesaid money has been remitted/wired to its account particulars thereof has already been furnished to the transferee.*

7. *That the transferor has agreed to obtain whatever permission/clearances which may be required from RBI and other government departments/agencies in connection with the transfer of aforesaid shares to the transferee.''*

10. However, the AO did not agree with the submission of the assessee and denied the claim of deduction under section 10A of the Act by holding that the ownership and beneficial interest in the undertaking was transferred in the year under consideration and the assessee was not entitled for deduction under section 10A of the Act in view of explanation 1 to sub section 9 of section 10A of the Act. The AO made the following observations in the assessment order:-

> *"I have gone through the reply of the assessee very carefully and observed that the assessee company interpreted the final approval of RBI as "RBI granted the final approval which in fact allows the company to register the transfer the shares in statutory books/register and this get effect to the transaction which quote consumerated on 31.3.2000 itself as the title in those shares passed on to the transferee. The rest of the activities were merely supplementing the original transaction.*
>
> *The assessee company relied on the decision Killick Nixon Ltd Binu Popatlal Kapadia Vs Dhanraj Mills Pvt Ltd & Others (Bombay High Court) in support of its contention that the title in the said shares got transferred from the transferor to the transferee OCB, the moment shares were handed over to the transferee OCB, pursuant to the said agreement between the parties thereto. I have gone through the judgements relied upon by the assessee company and found that it has been observed in the case of Killick Nixon Ltd, Binu Popatlal Kapadia Vs Dhanraj Mills Pvt Ltd & Others (Bombay High Court) that – ……therefore, it is not correct to say that after the instrument of transfer is executed between the transferor and the transferee, a separate application is required to be made either by the transferor or the transferee for registyering the transferee as a member of the company. This is because the prescribed form for the transfer of share itself shows on the face of it that*

the transferees have agreed to become the members of the company. Hence all that is required is to lodge the transfer deeds or the instruments...."

The facts of the case of the assessee company are distinguished from the facts of the above mentioned case. In the said case Share Certificates alongwith duly executed transfer deeds between transferor and transferee were sent to the company for getting the name of the transferee registered in the Register of Members of the company w hereas in the case of the assessee company vide agreement dated 30.3.200, share certificates were handed over by Smt. Frem Lata to M/s Systems America Holdings, LLC Mauritus without any transfer deed duly executed between them. In fact, it has been mentioned in the so called agreement to sell that "the transferor shall execute the share transfer deed on receipt of confirmation that the aforesaid money has been remitted/wired to its accounts, particulars thereof has already been furnished to the transferee."

However, it is pertinent to mention here that in the case of KN Narayanan Vs ITO 1984/145 ITR 373 (Kerala), it has been held that the "transfer of share is completed when the transfer instrument duly stamped is lodged with the company". Mere handing over of share certificate without the transfer deed does not serve any purpose as without transfer deed shares cannot be transferred in the name of the transferee. Further, in its final approval dated 10.5.2000 it has been . mentioned by the RBI that the final approval for the proposed purchase of 1100 shares was granted meaning thereby that the RBI has only granted the approval to the proposal for purchase of shares only by the OCB on 10.5.2000 only as without the said permission the residents could not sell those shares to the non-residents.

It would not be out of place to mention here that vide its reply dated 11.2.2004, it has been submitted that the amount has been duly received bv Smt. Prem Lata on 28.4.2000 as per terms of the agreement (evident from copy of FIRC issued by HDFC Bank).

Further the assessee company was also requested to file computation of income of Smt. Prem Lata for the F.Y. 1999-2000 and F.Y. 2000-01 relevant to the A.Y. 2000-01 and 2001-02 respectively and from the papers filed it has been observed that she has shown long term capital gains on account of sale of her shares of M/s Systems America India Ltd in her return for the F.Y. 2000-01 relevant A.Y. 2001-02. In her calculation of capital gains, she has shown long term capital gain amounting to Rs. 1,71,72,139/- on the sale of 1000 shares of M/s Systems America India Ltd. It has also been observed that she has shown to incur short term capital loss of R s. 1,70,96,112/- on a/c of 172000 equity shares of M/s Suma Finance Ltd. (C ost Price Rs.101.25 per share and selling price Rs. 1.729 per share).

From the above discussion it could be seen that as on 31.3.2000 out of total (1100 shares) share capital of the company, 1000 shares having distinctive numbers from 1 to 1000 were held by Smt. Prem Lata which is more than 51% of the voting power on the last day of the year in which the*

undertaking was set up. Since all the 1000 shares of Smt. Prem Lata were transferred to M/s System America Holding LLC Mauritius on 11.5.2000 on which subsequently bonus shares were issued to City Corp. International Finance Corporation which clearly indicates that the ownership or the beneficial interest in the undertaking as has been transferred by Smt. Prem Lata during the F.Y. 2000-01 relevant to the A.Y. 2001-02 and provisions of Subsection 9 (read with explanation 1) of Section 10A of the IT Act are clearly attracted.

Further vide its letter dated 21.2.2004, the assessee company have filed a copy of the opinion of M/s Price Water House on its eligibility to claim deduction u/s 10A of the I.T. Act which is placed on record, wherein inter alia other things it has been mentioned that –

" Considering the fact that the in-principle approval was received from RBI on 29.3.200 and also considering the agreements dated between the promotes (transferor) and System America Holding LLC, Mauritius (Transferee) and handing over of the shares by the Transferor to the Transferor pursuant to the said agreement, it may be held that the title in those shares (being a movable property) passed on to the transferee on that date.

Since the new-sub-section has been inserted only effective 1st April, 2000 and being prospective and not retrospective, it appears that the tax holiday may not be adversely affected because of any change in the shareholding prior to new sub-sect (9) coming into effect i.e any change in shareholding prior to 1st April 2000 may not have adverse impact on continuation of the tax exemption u/s 10A"

".....Based on the above, the company's view that the majority beneficial ownership of the company as on 31.3.2000 (100%) and 31.3.2001 (85.71%) remains to be held by the family appears to be reasonable.

I have gone through this submission of the assessee company very carefully and appears to be repetition of its earlier reply dated 11.02.2004. Regarding the claim that the ownership of the shares was transferred before 01.4.200, the matter has already been discussed earlier in this order wherein it has clearly been mentioned that ownership in shares were transferred only when the share transfer deed is duly executed between the transfer and the transferee, which is not the case of the assessee company. Further Smt. Prem Lata had herself shown income from the sale of those shares under the head "Income from Capital Cains" in her return of income for the F.Y. relevant to the A.Y. 2001-02.

It would not be out of place to mention here that in the above opinion of PWC, it has been mentioned that M/s System America Holdings LLC, Mauritius, a company owned 100% by Mr. Adesh Kumar Tyagi along with his wife Ms. Archana Tvagi has acquired the outstanding shares of Systems America India Ltd that were previously held by Mr. Tyagi's family members on May 11, 2000 in accordance with the restructuring exercise" which is

contradictory to its own claim that the shares were transferred bv Smt. Prem Lata before 1.4.2000. Thus this claim of the assessee has no weight and deserves to be rejected.

Regarding another view that the majority beneficial ownership of the company as on 31.3.2000 (100%) and 31.3.2001(85.71%) remains to be held by the family appears to be reasonable, it would not be out of place to mention here the provisions of Explanation to Sec. 10A of the I.T Act which states that –

"For the purposes of the section, in the case of the company, where on the last date of any previous year, the shares of the company carrying not less than 51% of the voting power are not beneficially held by persons who held the shares of the company carrying not less than 51% of the voting power on the last day of the year in which the undertaking was set up. The company shall be presumed to have transferred its ownership or the beneficial interest in the undertaking."

The said provision speaks for the persons and as per section 2( ) of the I.T. Act the definition of person does not include "family" as claimed by the assessee company. Therefore this line of defence is also of no help to the assessee and is being rejected.

In the light of above discussion, it could be seen that Smt. Prem Lata transferred her shares in M/s Systems America India Ltd to M/s System America Holdings, LLC Mauritius during the F.Y. 2000-01, the ownership and beneficial interest in the undertaking was transferred and thus the assessee company was not entitled for deduction u/s 10 A of the I.T. Act. Therefore deduction u/s 10A of the I.T Act claimed by the assessee com party is not allowed."

11. Being aggrieved, the assessee carried the matter to the learned CIT(A) and submitted that the relevant provisions i.e. sub section 9 of section 10A would apply only if, the transfer of the ownership takes place in or after assessment year 2001-02. It was further stated that in assessee's case since the ownership and beneficial interest in the shares were transferred in the previous year relevant to assessment year 2000-01 itself thus the provisions of Section 10A (9) of the Act would have no application. It was also stated that 'in principle' the approval of the RBI for the said transfer of the shares was granted to the assessee on 29.2.2000 subject to certain conditions and thereafter the transferors and the transferee entered into an into an

agreement on March 30, 2000 to transfer the shares of the transferors to the transferee subject to RBI's final approval and the share certificates were physically delivered by the transferors to the transferee on the said date i.e. during the previous year ending 31.3.2000. A photocopy of the said agreement to sell has been filed before the learned CIT(A) and it was contended that the transfer of shares took place during the previous year ending 31.3.2000 and not in the relevant previous year ending on 31.3.2001. It was also contended that the final approval of the RBI was received on 1.5.2000 to the said transfer and that the said approval given by the RBI relates back to the date of agreement for transfer of shares and contract for transfer of shares having been concluded between the parties on 31.3.2000 subject to necessary approvals from RBI, stood validated on receipt of the same. The reliance was placed on the following case laws:-

1. *Motilal Vs Nanhelal (reported as AIR 1930 Privy Council 287)*
2. *Mrs. Chandnee Widya Vasti Madden Vs Dr. C.L Katilal (reported as AIR 1963 SC 978)*
3. *K. Raheja Constructions Ltd Vs. Alliance Ministries (reported as AIR 1995 SC 1768)*
4. *Ajit Prashad Jain Vs N.K. Widhani (reported as AIR 1990 Del.42)*
5. *Shah Jitendra Nanalal Vs Patel Lallubhai Ishvarbhai (AIR 1984) Gu. 145*
6. *Smt. Anjali Das Vs. Bidvut Sarkar AIR 1992 Cal. 147*
7. *Indra Prasad Saxena Vs Chaman Lai Malik AIR 1984 All 105*
8. *Raghunath Vs Jogeshwar Prasad Sharma AIR 1989 Delhi 383*
9. *LIC Vs Escorts (reported as 1986 1 SCC 264*

12. The learned CIT(A) after considering the submissions of the assessee observed that the decisions relied by the assessee were not applicable to the facts of the assessee's case. He sustained the action of the AO by observing at page no. 10 of the impugned order as under:-

> *"The learned counsel has not disputed the factum of transfer of beneficial interest/ownership as referred to in the above provisions. What is disputed is the date of transfer. The appellant's contention is that the transfer of the shares and physical delivery of the shares so transferred took place before 31.3.2000 and therefore the above provision has no application as the above provision is applicable w.e.f. 1.4.2000 i.e. A.Y. 2001-02. Whereas the A.O's contention is that the transfer of the beneficial interest was effected during the year under*

consideration i.e. A.Y. 2001-02 f and therefore provisions of Sub-section (9) read with Explanation 1 to Section 10A is clearly attracted in the appellant's case. I had gone through the facts of the case vis-a-viz contention of both the parties and also analysed the documents relied upon by both the parties in support of their respective contentions. No doubt that in case where the change in ownership as referred to in the above provisions has taken place prior to 1.4.2000 (when the provision was not at all on the statute), the said provision should not be applicable in A.Y. 2001-02 or in subsequent years. But the crucial "question to be decided in this case is the date of transfer. In the instant case through there was 'in principle' approval of RBI on 27.3.2000 no share transfer deed was executed on or before 31.3-.2000 so as to establish that the transfer took place before 1.4.2000. The Hon'ble Kerala High Court in the case of KN Narayanan Vs 1TO 1984/145 ITR 373, on which reliance has been placed by the A.O has held that the transfer of shares is completed when the transfer instrument duly stamped is lodged with the company". The RBI has clearly mentioned in its approval dated 27.3.2000 that " this is an approval in principle only and the Indian company should register the transfer in its books only after final permission to that effect is granted for which the applicant should approach this Office together with documents indicated at (a) above" { (a) The purchase consideration as well as transfer expenses should be remitted by the transferee OCB through normal banking channels from abroad or met out of funds held in its NRE/FCNR Account with a bank authorized to deal in foreign exchange in India}. The payment was received by the transferor on 28.4.2000 and the final approval of the RBI was obtained on 10.5.2000 and the shares were registered in the register of members of the appellant on 11.5.2000. All these evidences clearly prove beyond doubt that the transfer of shares in question took place during the previous year relevant to A.Y. 2001-02 and not prior to 1.4.2000 as contended by the learned counsel. Moreover the declaration of capital gain by the transferor on the said transfer of shares during the A.Y. 2001-02 also establishes beyond doubt that the transfer was effected in the previous year relevant to A.Y. 2001-02. As per Section 45(1) any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income-tax under the head "capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. By declaring the capital gains during the A.Y. 2001-02, the transferor clearly admits that the transfer took place during the A.Y. 2001-02.

The learned counsel could not rebut the above findings with any cogent materials. He has merely relied on a photo copy of the "agreement to sell" purported to have been entered on 30/3/2000 between Mrs. Prem Lata (transferor) and M/s Systems America Holdings, LLC Mauritius (Transferee). The A.O has raised serious doubt about the back dating of this agreement. The reason for his doubt is that the in principle approval was granted by the RBI only on 29.3.2000. which has a mention in the so called agreement referred to above, and how the said approval has been obtained by the appellant on the very same day i.e. 20.3.2000 30.3.2000. He has asked the assessee to produce the original agreement in order to verity the veracity of appellant's claim. Hut despite three opportunities afforded, the appellant did not produce the same for the reasons best know to the appellant. The observations made by the A.O in his remand report dated 3.11.2004 in this regard are as under:

" Since great reliance was placed by the assessee company on the said agreement dated 30.3.2000, during the course of remand proceedings, vide order sheet entry dated 20.9.2004, 11.10.2004 and 15.10.2004, the assessee was required to produce the said agreement in original before the undersigned as some serious doubts were raised about the genuineness of the said agreement because RBI gave its approval in

principal only on 29.3.2000 and the said agreement was executed on 30.3.2000 itself mentioning the said approval dated 29.3.2000. It is difficult to understand that how the assessee could get a copy of the said letter when the same was issued by RBI Mumbai on 29.3.2000 only.

However, inspite of the repeated opportunities, the said "agreement to sell" was never produced before the undersigned for its verification. It is pertinent to mention that the said agreement is one of the major argument of the assessee company to defend that the said agreement is one of the major argument of the assessee company to defend its case in the appellate proceedings before your goodself."

Even before me the appellant has not produced the original agreement on which the appellant is heavily placing reliance. No reliance can be placed on this agreement when the assessee could not produce the original for verification either before me or before the A.O, especially as regards the date of entering this agreement to Sell. Moreover, even if it is assumed that this is a genuine document, then also it is a mere agreement to sell on Rs.50 stamp paper and it has not been registered with any authority and has no evidentiary value. The capital asset which is claimed to have been transferred through this agreement worth more than one crore. Some of the clauses mentioned in the said agreement are as under:
Clause 4. That the transferor has handed over the said share certificate to the transferee.
Caluse 9: The transferor shall execute the share Transfer Deed on receipt of confirmation that the aforesaid money has been remitted/wired to its account, narticulars whereof has alreadv been furnished to the Transferee.

Clause.10 Where the transferee commits the breach of this agreement, the transferor shall be entitled to get the aforesaid shares back and the transferor shall be at libertv to sell/disoose off the shares in anv manner whatsoever.

Merely on the strength of the above unregistered agreement, it cannot be held that there was transfer of shares worth Rs. 1,70,20,000/- on the date of the so called agreement. Mere handing over of the share certificate does not tantamount to transfer. It is clearly mentioned in the said agreement that Share I ranster Deed shall be executed only on receipt of confirmation of remittance of money. No share deed was executed before the end of 31.3.2000. The consideration was received onlv on 28.4.2000 and the share transfer deed was executed on 11.5.2000 only. Clause 10 clearly says that this is a revocable agreement. This clause says that in the event of breach of this agreement, the transferor shall be entitled to get the aforesaid shares back and the transferor shall be at liberty to sell/dispose off the share in any manner whatsoever. This also clearly shows that, if at all this is a genuine and legal agreement, even then, it cannot be held be as deed of transfer alienating or relinquishing the right on the said shares on the date of the agreement. Under the circumstance on the strength of the so called photo copy of an agreement, it cannot be held that the transfer took place in the A.Y. 2000-01. On the contrary the various other documents cited by the A.O and discussed by me in the above paras, clearly establish beyond any doubt that the transfer of ownership/beneficial interest took place in the instant year i.e. A.Y. 2001-02 and the A.O has rightly denied deduction u/s 10A to the appellant in view of sub-section 9 tread with Explanation 1) to Section 10A. This action of the A.O is sustained.

13. Now the assessee is in appeal.

14. The learned counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the amendment in Section 10A of the Act took place w.e.f. 1st April, 2001 and an explanation to sub section 9 was introduced, however, the said change in section 10A of the Act did not happen during the previous year relevant to the assessment year under consideration. It was submitted that the provisions of Section 10A of the Act underwent change with effect from the assessment year 2001-02 thus the effective from the assessment year 2001-02, if there is a change by transfer of ownership or the beneficial interest of more than 50% then the benefit of section 10A of the Act is not to be allowed. It was contended that the assessee was required to obtain approval for sale of shares and it received 'in principle' the approval from RBI vide letter dated 29th March, 2000 copy of which is placed at page no. 36 and 37 of the assessee's paper book. Consequent to which the transferors and transferee of shares entered into a sale agreement on March 30th, 2000 and the 'in principle' approval was valid for a period of three months. It was further stated that the final approval from RBI was received vide letter dated 10.5.2000 a reference was made to page no. 41 and 42 of the assessee's paper book. It was contended that the provisions of Section 10A(9) of the Act provides that if during any previous year, the ownership of the beneficial interest in the undertaking is transferred by any means the deduction under explanation 1 to sub section 9 of section 10A of the Act, shall not be allowed to the assessee for the assessment year relevant to such previous year and the subsequent assessment years. It was stated that the assessee entered into agreement on 10th March, 2000 and handed over the share certificates to the transferee, therefore, as per the Board Circular No. 704 dated 28th April, 1995. The assessee was not hit by the amended provisions of explanation 1 of sub section 9 of section 10A of the Act and was

eligible for deduction under section 10A of the Act. The reliance was placed on the following case laws:-

S. No.	Name of Case	Citation	Pronounced By	Relevant Para
Omission of sub section (9) of section 10A by Finance Act 2003 is retrospective				
1.	*CIT v. G.E. Thermometrics Ltd.*	*ITA No. 876/2008 dated 25.11.2014*	*Karnataka High Court*	*Para 8*
2.	*Infrasoft Technologies Ltd. v. DCIT*	*ITA No. 5287/Del/2012 Dated 10.02.2017*	*ITAT Delhi*	*Para 10-13*
3.	*Infrasoft Technologies Ltd. v. DCIT*	*ITA No. 6386 and 6387/Del/2012 dated 3.5.2016*	*ITAT Delhi*	*Para 6-6.4*
4.	*WNS Global Services Pvt. Ltd. v. ITO*	*ITA No. 4520/Mum/2013 dated 17.02.2016*	*ITAT Mumbai*	*Para 3.5.3-3.5.5*
Explanation 1 to section 10A(9) to apply only when exemption is claimed for first time				
5.	*Zycus Infotech Pvt. Ltd. v. CIT*	*[2011]331 ITR 72*	*Bombay High Court*	*Para 10-16*

15. In his rival submissions, the learned Sr. DR reiterated the observations of authorities below in their respective orders and strongly supported the orders of the authorities below.

16. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is an admitted fact that the assessee company was a STP Unit (100% EOU) and claimed the deduction under section 10A of the Act which was allowed by the AO for the earlier assessment year. However, for the year under consideration the deduction was not allowed allegedly for the reason that the assessee company transferred more than 51% on its shareholding during the year under consideration, therefore in view of the explanation 1 of sub section 9 of section 10A of the Act, the assessee was not eligible for the said deduction. In the instant case, the assessee filed the copy of Form No. 56 alongwith relevant annexure and claimed the deduction under section 10A of the Act. The provisions contained in explanation 1 to sub section 9 of section 10A reads as under:-

"Explanation 1.— For the purposes of this section, in the case of a company, where on the last day of any previous year, the shares of the company carrying not less than fifty-one per cent of the voting power are not beneficially held by persons who held the shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year in which the undertaking was set up, the company shall be presumed to have transferred its ownership of the beneficial interest in the undertaking:

***Provided** that nothing contained in this Explanation shall apply to any change in the shareholding of the company as a result of—*

(a) its becoming a company in which the public are substantially interested; or
(b) disinvestment of its equity shares by any venture capital company or venture capital fund."

17. The aforesaid explanation was inserted by the Finance Act, 2001 w.e.f. 1.4.2001, the said explanation was later on omitted by the Finance Act, 2003. However, the said explanation will apply only to those entities which were entitled to claim deduction under section 10A of the Act for the first time from the assessment year 2001-02. In the present case, the ownership of the shares was transferred on 30th March, 2000 and approval in principle was granted by the RBI on 29.3.2000, copy of which is placed at page no. 36 & 37 of the assessee's paper book thereafter the transferors Smt. Prem Lata W/o M.S. Tyagi entered with M/s System America Holding (LLC), Mauritius, the 1000 equity shares vide agreement dated 30th Day, 2000, copy of which is placed at page no. 38 to 40 of the assessee's paper book. It is also noticed that the 'in principle' approval was given by the RBI vide letter dated 29.3.2000 which was finally approved under section 29(1)(b) of the Foreign Exchange Regulation, 1973 vide letter dated 10th May, 2000, copy of which is placed at page no. 41 & 42. As regards to the effective date of approval the CBDT issued a Circular No. 704 dated 28.4.1995, copy of which is placed at page no. 43 & 44 of the assessee's compilation. In the said circular, it has been clarified that where the transaction takes place directly between the parties and not through the stock exchanges, the date of contract of sale as declared by the parties shall be

treated as the date of transfer, provided it is followed up vide actual delivery of shares and the transfer deeds. In the present case, the transferors entered into agreement on 30th March, 2000 and handed over the share certificates to the transferee and followed it up by executing share transfer deed therefore the effective date of transfer was 30th March, 2000 which was prior to insertion of Explanation 1 to sub section 9 of section 10A of the Act.

18. On a similar issue, the Hon'ble Bombay High Court in the case of ***Zycus Infotech P. Ltd. vs. Commission of Income Tax*** (Supra) held as under:-

> ''*Having heard rival parties, before considering the rival submissions, it is necessary to turn to Explanation 1 of section 10A(9), which provides that the promoters of the appellant-company should continue to hold shares of the company carrying not less than 51 per cent of the voting power. The said Explanation reads as under:*
>
> *"Explanation 1.-For the purposes of this section, in the case of a company, where on the last day of any previous year, the shares of the company carrying not less than 51 per cent of the voting power are not beneficially held by persons who held the shares of the company carrying not less than 51 per cent, of the voting power on the last day of the year in which the undertaking was set up, the company shall be presumed to have transferred its ownership or the beneficial interest in the undertaking."*
>
> *At this juncture, it would also be useful to turn to paragraph 15.9 of the Circular of the Central Board of Direct Taxes bearing No. 794, dated August 9, 2000 ([2000] 245 ITR (St.) 21, 36) which explains the insertion of subsection (9) and Explanation 1 thereto by the Finance Act, 2000 which reads as under:*
>
> *"15.9 Sub-section (9) provides that in case there is a transfer of ownership or the beneficial interest in the undertaking by any means, the deduction under sub-section (1) shall not be allowed to the assessee for the assessment year relevant to such previous year in which the transfer takes place and in the subsequent years. Explanation 1 further provides that in the case of a company where on the last date of any previous year the shares of the company carrying not less than 51 per cent, of the voting power are not beneficially held by persons who held the shares of the company carrying not less than 51 per cent, of the voting power on the last day of the year in which the undertaking was set up, the company shall be deemed to have transferred its ownership or the beneficial interest in the under taking?"*

Having examined the aforesaid provisions of the Income-tax Act and the sweep of circular issued by the Central Board of Direct Taxes, it is necessary to take stock of the provisions of the Companies Act, 1956.

Section 86 of the Companies Act has been substituted by the Companies (Amendment) Act, 2000 with effect from December 13, 2000 whereby a company incorporated under the Companies Act, 1956, has been allowed to issue two kinds of shares viz., "equity shares" and "preference shares" and the equity shares can be with voting rights or with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed. Accordingly, the Companies (Issue of Share Capital with Differential Voting Rights) Rules, 2001 have been framed, which permits the issuance of equity shares with differential voting rights. Accordingly, the appellant-company has issued shares without voting rights. In the result, the original promoters, i.e., Shri Aatish Dedhia and Shri Nanji Dedhia continue to hold shares of the appellant-company carrying not less than 51 per cent, of the voting power. It is thus clear that during the previous year relevant to the assessment year 2001-02 the ownership of the appellant-company was not transferred by any means and, therefore, the appellant-company is right in claiming entitlement to deduction under section 10A(1) of the Act.

So far as second question is concerned, one has to keep in mind the settled principle of interpretation that trospectivity cannot be lightly inferred unless it is clearly provided for in the statute. The first proviso to section 10A implies continuity. If the intention was to deprive the existing industries or to impose a condition, which is not capable of being fulfilled in the context of transfer having already occurred prior to the statute, it would have been specifically made clear. Under these circumstances, keeping in mind the general principle that vested right cannot be divested, one cannot assume retrospectivity to a greater extent than what the section intends.

At this juncture, it is needless to mention that, where the words used are "has made, has ceased, has failed and has become", they were found to be words which can be understood as happening both prior and after coming into force of the statute, as it was understood from the words "if a person has been convicted" to include anterior conviction. In Explanation 1, the present tense is used with an injunction that the shares "are not beneficially held by the persons who hold the shares in company". The present tense cannot be assumed to describe the status of the shareholder as the owner, but the status of the shares which are beneficially held. On this interpretation the language of the section can only be understood to describe "the date on which the undertaking was set up" as applicable only for those who are setting up the undertaking after the new provision, so that in case of others, the date has to be understood at best, as on April 1, 2000, the date on which the law was brought in the statute."

19. In the present case, as we have already noted the transfer of the shares took place on 30th March, 2000 and the amendment vide Explanation 1 to sub Section 9 of section 10A of the Act was made w.e.f. 1.4.2000 therefore, the assessee was entitled for deduction under section 10A for the assessment year under consideration. It is also noticed that the said Explanation 1 to sub section 9 of Section 10A of the Act has been omitted by the Finance Act, 2003 and even if the omission of Explanation 1 to sub section 9 of Section 10A would not to be treated as retrospective, the said explanation would apply only to those entities which were entitled to claim deduction under section 10A of the Act for the first time i.e. from A.Y. 2001-02.

20. On a similar issue, the Hon'ble Karnataka High Court by following the judgment of the Hon'ble Apex Court in the case ***Kolhapur Canesugar Works Ltd., vs. Union of India*** **reported in AIR 2000 SC 811** held as under:-

> *"The substantial question of law that arises for consideration in these appeals is as under:-*
>
> > *"Whether the Tribunal was correct in holding that in view of the omission of subsection 9 to Section 10B of the Art, w.e.f. 01.04.2004, it should be understood that the said section never existed in the statute book and therefore :ne benefit claimed by the assessee u/s 10B should be allowed?"*
>
> *The learned Counsel for the revenue assailing the impugned order contends that it is well settled that the Income Tax Act as it stands amended on the first day of April of any financial year must apply to the assessment of that year. Any amendments in the Act which come into force after first day of April of a financial year would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force. In support of his contention, he relies on the judgment of the Apex Court in the case of KARIMTHARUVI TEA ESTATE LTD., VS. STATE OF KERALA reported in [1966] 060 ITR 0262. On the same analogy, though sub-section (9) of Section 10B was omitted with effect from 01.04.2004, on the day the beneficial interest was transferred and for subsequent period, till the said omission took place, the said omitted provision is applicable and he submits that the approach of the Tribunal is erroneous and requires to be set aside.*

Per contra, the learned Counsel for the assessee relying on the judgment of the Constitution Bench of the Apex Court contended that when a provision in a statute is omitted from the statute book, the result is that the said provision did not ever exist in the statute in the absence of any saving provision. Admittedly, there is no saving provision. Therefore, he submits that the approach of the Tribunal is correct and no case for interference is made out.

The Apex Court in the case of KOLHAPUR CANESUGAR WORKS LTD., VS. UNION OF INDIA reported in AIR 2000 SC 811 dealing with the effect of deletion of a provision in the statute is held at Para 38 as under:

> *"38. The position is well-known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this Rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the Legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision."*
>
> *Admittedly, in the instant case, there is no saving clause or provision introduced by way of an amendment while omitting sub-section (9) of Section 10B. Therefore, once the aforesaid section is omitted from the statute book, the result is it had never been passed and be considered as a law that never exists and therefore, when the assessment orders were passed in 2006, the Assessing Officer was not justified in taking note of a provision which was not in the statute book and denying benefit to the assessee. The whole object of such omission is to extend the benefit under Section 10B of the Act irrespective of the fact whether during the period to which they are entitled to the benefit, the ownership continues with the original assessee or it is transferred to another person. Benefit is to the undertaking and not to the person who is running the business. We do not see any merit in these appeals. The substantial question of*

law is answered in favour of the assessee and against the Revenue. Accordingly, the appeals are dismissed."

21. Therefore, by keeping in view the ratio laid down in the aforesaid referred to cases, we are of the view that the assessee for the assessment year under consideration was entitled for deduction under section 10A(9) of the Act.

22. Vide ground no. 2 to 2.1, the grievance of the assessee relates to the disallowance of Rs. 14,15,495/- on account of expenses related to the public issue which did not take place. The facts related to this issue in brief are that the AO during the course of assessment proceedings noticed that the assessee increased its share capital from Rs. 5,00,000/- to Rs. 12,00,00,000/- and furnished the details of expenses amounting to Rs. 70,77,474/- which included Rs. 7,00,500/- paid to ROC for increase in the share capital. It was also noticed that one fifth of the said expenses (Rs. 70,77,474/-) i.e. Rs. 14,15,495/- had been debited during the year under section 35D of the Act. The AO considered the expenses as capital in nature and has held that those expenses could not be amortized under section 35D of the Act. Accordingly addition of Rs. 14,15,495/- was made to the income of the assessee. The reliance was placed on the judgment of Hon'ble Delhi High Court in the case of ***CIT vs. Hindustan Inceticides Limited*** reported at ***250 ITR 338***.

23. Being aggrieved the assessee carried the matter to the learned CIT(A) and furnished the details of expenses incurred which has been incorporated at page no. 12 of the impugned order, for the cost of repetition, the same is not reproduced herein. It was further submitted that a total amount of Rs. 9,67,500/- (Rs. 8,92,500/- plus 75,000/-) was incurred for approval of loan of

Rs. 8,00,00,000/- from IDBI. The said sum was charged by the IDBI as loan documentation charges and other charges, though the loan was not availed by the assessee and one fifth of the expenses incurred were claimed as deduction. It was further stated that these expenses were allowable as business deduction under section 37(1) of the Act though the assessee had by inadvertence claimed only one fifth of the same as deduction. As regards to the balance sum of Rs. 61,09,974/- it was submitted that those were incurred in relation to the public issue expenses which did not materialize. It was contended that the expenses were incurred for coming out with a public issue and in connection thereto so those were not capital in nature since the issue did not finally materialize.

24. The learned CIT(A) after considering the submissions of the assessee observed that the expenses of Rs. 9,67,500/- were claimed to have been charged by the IDBI as loan documentation charges though the loan was not availed by the assessee. According to him, the expenses incurred for the purposes of business were allowable under section 37 of the Act but the assessee had not placed before him any such details on the basis of which it could be concluded that those were admissible expenditure under section 37 of the Act. Accordingly, the contention of the assessee was rejected. As regards to the balance amount of Rs. 7,00,500/- being ROC fee for the increase in the share capital, the ld. CIT(A) held that it was not an allowable deduction under section 35D of the Act. As regards to the remaining expenses, the learned CIT(A) observed that since the expenses were incurred for public issue but no public issue took place, therefore the expenditure could not be amortized under section 35D of the Act. Accordingly the disallowance made by the AO was sustained.

25. Now the assessee is in appeal.

26. The learned counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the assessee incurred Rs. 9,67,500/- on account of approval of loan and since the expenses were incurred wholly and exclusively for the business purpose so those were allowable under section 37(1) of the Act. The reliance was placed on the following case laws:-

i. Commissioner of Income Tax vs. Virat Investment and Merchantile Co. [2017] 392 ITR 202(Delhi)

ii. India Cements Limited vs. Commissioner of Income Tax, Madras [1966] 60 ITR 52, 1966 AIR 1053, 1966(2) SCR 944

27. As regards to the remaining expenses of Rs. 61,09,974/-, it was stated that those expenses were related to public issue therefore, the assessee rightly claimed one fifth of the expenditure to be allowed under the provisions of section 35D of the Act. It was further stated that incurring of expenses was not in dispute and when the expenses were incurred with a view to bring into existence an asset or an advantage for enduring benefit of a trade there was a good reason for treating such expenditure as properly attributable not to Revenue but capital. The reliance was placed on the following case laws:-

i. CIT vs. Ashok Leyland Ltd. 86 ITR 549, (SC)
ii. Alembic Chemical Works Co. Ltd. V. CIT, 177 ITR 377, (SC)
iii. Travancore Sugars & Chemicals Ltd. v. CIT, 62 ITR 566, (SC)
iv. Devidas Vithaldas & Co. vs. CIT, 84 ITR 277, (SC)
v. R. B. Seth Moolchand Suganchand vs. CIT, 86 ITR 647, (SC)
vi. Shree Sita Ram Paper Mills Ltd. vs. DCIT, 6 SOT 585 (Del)
vii. Nimbus Communications Ltd. vs. ACIT 132 TTJ 351 (Bom)

28. In his rival submissions, the learned Sr. DR strongly supported the orders of the authorities below and reiterated the observations made therein.

29. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is noticed that the assessee incurred expenses of Rs. 9,67,500/- on account of approval of loan from IDBI. The assessee incurred Rs. 8,92,500/- for loan approval upfront charges and Rs. 75,000/- for loan documentation charges, the said amount was paid to the IDBI. So, it is not in dispute that the expenses were incurred for availing the loan required in the business of the assessee. As regards to the other expenses amounting to Rs. 61,09,974/- is concerned, those were related to the share capital which the assessee had increased from Rs. 5,00,000/- to Rs. 12,00,00,000/-. The AO had also admitted that those were capital in nature and not the Revenue expenditure. However, it is not clear as to whether the detail incorporated by the learned CIT(A) at para 12 of the impugned order was available to the AO and whether the assessee gave any explanation to the AO to justify its claim that those were directly related to the share capital which was increased by the assessee during the year under consideration. It is true that under Section 35D of the Act, the preliminary expenses incurred can be amortized if those expenses are incurred in connection with the expansion of the business or before the commencement of the business. We, therefore, in the absence of the clear facts on record and considering this vital fact that whether the details were available to the AO relating to those expenses deem it appropriate to remand this limited issue back to the file of the AO for fresh adjudication in accordance with law after by providing a due and reasonable opportunity of being heard to the assessee.

30. The next issue vide ground no. 3 and 3.1 relates to the confirmation of disallowance of Rs. 26,49,095/- made by the AO on account of the purchase of software for which no tax was deducted.

31. The facts related to this issue in brief are that the AO during the course of assessment proceedings noticed that the assessee purchased software named as SAI B2B Server from System America Inc. USA for a sum of Rs. 26,49,045/-, however no TDS was deducted while making payment for the said software, thus there was a default under the provision of Section 40(a) of the Act read with Section 195 of the Act. He, therefore, disallowed Rs. 26,49,045/-.

32. Being aggrieved the assessee carried the matter to the learned CIT(A) and submitted that the purchase of software could not be held as royalty and therefore, it could not be treated that the sum paid to the foreign company for a purchase of software would fall under the ambit of Section 40(a) read with section 195 of the Act.

33. The ld. CIT(A), after considering the submissions of the assessee observed that the assessee had not placed any evidence before him that the sum paid to the foreign company amounting to Rs. 26,49,045/- was towards acquisition of software. He, therefore, sustained the disallowance made by the AO. Reliance was placed on the judgment of Hon'ble Supreme Court in the case of ***Transport Corporation of A.P. Limited vs. CIT*** reported at ***239 ITR 587***.

34. Being aggrieved the assessee is in appeal.

35. The learned counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the AO failed to appreciate that the amount in question incurred on purchase of software was not chargeable to tax in India and therefore no tax was required to be deducted under section 195 of the Act because the said section cast an obligation on a person making the payment to a non resident (including a foreign company) on any sum which is chargeable under the provisions of the Act to deduct tax thereon at the rate in force at the time of payment of said

sum or at the time of credit thereof to the account of payee whichever is earlier. It was further submitted that the software supplied by M/s System America INC under the contract with the assessee was not customized software for the use of the assessee, but was a generic off the shelf software developed and used by the assessee for its business purposes only and that the assessee was prohibited from copying, distributing or modifying the software, therefore the supply of the software by M/s System America Inc to the assessee only resulted in transfer of a copyright article, rather than a copyright and payment made for the same could not be said to be in the nature of royalty. Therefore, the disallowance made by the AO and sustained by the learned CIT(A) was not justified. The reliance was placed on the following case laws:-

i. Mphasis BFL Ltd. vs. Income Tax Officer (Taxation), Ward 19(2), Bangalore (2006) 9 SOT 756 (Bang)
ii. The Principal Commissioner of Income Tax-6 vs. M. Tech India P. Ltd. 381 ITR 31 (Del)
iii. CIT vs. Neyveli Lignite Corporation Ltd. 243 ITR 459 (Mad)
iv. Vertical Software India P. Ltd., [2011] 332 ITR 222 (Del)

36. In his rival submission, the learned Sr. DR strongly supported the orders of the authorities below and relied the judgment of the Hon'ble Karnataka High Court in the case of ***CIT vs. Samsung Electronics Co. Ltd. (2012)*** reported at ***345 ITR 494 (Karn).***

37. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the assessee downloaded a software named SAI B2B Server from the website of System America Inc. USA and made a payment of Rs. 26,49,045/-. The said software was directly downloaded by the assessee and was for its own use only, therefore it was a transaction of sale of software and

was not covered under the provisions of section 195 of the Act and as such there was no obligation on the in assessee company to deduct any tax at source on the same. A similar issue has been decided by the Hon'ble jurisdictional High Court in the case of CIT vs. Dynamic Vertical Software India P. Ltd. [2011] 332 ITR 222 (Supra) wherein it has been held as under:-

> *"That the assessee had purchased a software from M and sold int he Indian market. The assessee acted as a dealer. This could not be termed as royalty. Therefore, section 40(a)(i) of the Income Tax Act, 1961, had no application. The Tribunal had rightly deleted the addition made by the Assessing Officer treating the payment made by the assessee to M as royalty on which tax at source was to be deducted."*

38. Similarly in the case of ***Principal Commissioner of Income Tax vs. M. Tech India P. Ltd.*** reported at ***[2016] 381 ITR 31 (Delhi),*** the Hon'ble Jurisdictional High Court of Delhi held as under:-

> *"That the assessee was appointed for the purposes of reselling the software and payments made were on account of purchases made by the assessee. Payments made by a reseller for the purchase of software for sale in the Indian market could not be considered royalty. It was not disputed that in the preceding year, the Assessing Officer had accepted the transactions to be of purchase of software. The assessee was not liable to deduct tax at source. Deletion of addition was proper."*

39. In the present case also, since the assessee had purchased the software for its own use, so, it was a transaction of sale and purchase of software which cannot be termed as payment of royalty on which tax at source was to be deducted. We, therefore, by following the ratio laid down by the Hon'ble Jurisdictional High Court in the aforesaid referred to cases delete the impugned addition made by the AO and sustained by the learned CIT(A).

60. Since we have directed to allow the deduction under section 10A of the Act in the former part of this order, therefore, the issue raised by the Department in its appeal and the assessee vide additional ground and under

Rule 27 of the Income Tax Appellate Tribunal Rules, 1963 relating to the deduction under section 80HHE now becomes academic in nature therefore, no findings are being given on the said issues.

40. Ground no. 4 agitated by the assessee relates to the charging of interest under section 234B of the Act. As regards to this ground, it was the common contention of both the parties that it is consequential in nature. We, therefore, order accordingly.

41. In the result, appeal of the assessee is partly allowed and that of the Department is dismissed.

(Order pronounced in the open court on 11.07.2018.)

Sd/-	Sd/-
[KULDIP SINGH]	**[N.K. SAINI]**
Judicial Member	**Accountant Member**

DATED: 12. 07.2018
SH
Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Assistant Registrar

Sl. No.	Particulars	Date
1.	Date of dictation	9.07.2018
2.	Date on which the draft is placed before the Dictating Member	11 .07.2018
3.	Draft placed before the other Member	
4.	Approved draft comes to the Sr. PS/PS	
5.	Kept for pronouncement on	
6.	Final order received after pronouncement	
7.	File sent to the Bench Clerk	
8.	Date on which files goes to the Head Clerk	
9.	Date on which file goes to the Assistant Registrar	
10.	Date of dispatch of order	
11.	Date of uploading	12.07.2018