

आयकर अपीलीय अधिकरण “B” न्यायपीठ मुंबई मे ।

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री मनोज कुमार अग्रवाल लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No. 3425/Mum/2017

(निर्धारण वर्ष / Assessment Year 2011-12)

Bristlecone India Limited 2 nd Floor, Techniplex-1, Techniplex Complex, Off Veer Savarkar Flyover, Goregaon West Mumbai 400 062	Vs.	Asst. Commissioner of Income Tax, Circle 2(1)(1) Aayakar Bhvan, M.K. Road, Mumbai-20
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AAACM5186E		

अपीलार्थी की ओर से / Appellant by : Shri Prasad Bapat, AR

प्रत्यर्थी की ओर से / Respondent by : Shri Chaitanya S Anjaria,
DR

सुनवाई की तारीख / Date of hearing:	16.10.2018
घोषणा की तारीख / Date of pronouncement :	29.10.2018

आदेश / ORDER

PER MAHAVIR SINGH, JM:

This appeal by the assessee is arising out of the order of Commissioner of Income Tax (Appeals)-4, Mumbai [in short CIT(A)], in appeal No. CIT(A)-4/IT-72/ACIT-2(1)(1)/2015-16 vide order dated 03.02.2017. The Assessment was framed by the Asst. Commissioner of Income Tax- Circle 2(1)(1), Mumbai (in short 'ACIT/ AO') for the A.Y. 2010-11 vide order dated 25.03.2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').



2. The only issue in this appeal of assessee is against the order of CIT(A) enhancing the assessment and disallowing the claim of deduction under section 10 of the Act. For this assessee has raised the following 6 grounds: -

“1. On the facts and in the circumstances of the case and in Law, whether the learned CIT(A) has jurisdiction of enhancement by holding that appellant had not done any manufacturing activity in software development in the background fact of the issue having been so held and decided by Assessing Officer for seven successive assessment years thereby establishing consistency and, because of which the Assessing Officer himself could not have changed the stand.

2. On the facts and in the circumstances of the case and in Law, whether the learned CIT(A) is competent to give a finding on highly technical field revolving around manufacturing and export of software when an authorized government body. The Software Technology Park of India has already held and certified for last seven years that appellant is engaged in manufacturing and exporting of Software.

3. On the facts and in the circumstances of the case and in Law, whether the learned CIT(A) was justified in directing appellant to discharge onus of being engaged of manufacturing



software when the Assessing Officer had itself held the activity to be manufacturing of software.

4. On the facts and in the circumstances of the case and in Law, whether the learned CIT(A) is justified in making enhancement holding that appellant had not done any manufacturing of software without bringing any fresh evidence on record.

5. On the facts and in the circumstances of the case and in Law, the learned CIT(A) erred in stating that the appellant had failed to demonstrate any evidence of manufacturing of computer software or computer programs or computerized electronic data or project or service of similar nature as notified by CBDT and further erred in concluding that the appellant is not entitled for deduction u/s 10A.

6. Without prejudice to above grounds, on the facts and in the circumstances of the case and in Law, CIT(A) erred in enhancing the income by Rs. 2,40,82,308/- holding that the appellant had not undertaken any manufacturing and export of software.

7. Without prejudice to above grounds, on the facts and in the circumstances of the case and in Law, CIT(A) erred in disallowing depreciation of ₹3,79,298/- holding that the same is claimed by another assessee.



8. The CIT(A) further erred in initiating penalty proceedings u/s271 of the Act when there was neither a case of concealment of income nor of furnishing inaccurate particulars of income and the issue was plainly debatable in nature as is evident from the assessment order. ”

3. Brief facts are that the assessee company is engaged in the business of rendering software services. The assessment was completed under section 143(3) of the Act vide order dated 25.03.2015. The assessee aggrieved by the assessment carried the matter to CIT(A) and CIT(A) issued the enhancement notice by observing that during the course of appellate proceedings it was found that the assessee was not at all entitled for deduction u/s 10A of the Act because in reality assessee was not manufacturing or producing any computer software as prescribed under section 10A of the Act. Explanation 2 of section 10A provides that computer software means any computer programme recorded on any disc, tape, perforate media or other information storage devise or any customized electronic data or any product or service of similar nature which may notified by the CBDT and its transmitted or exported from India to any place outside India by any means. While verifying the paper book containing computation of total income and profit and Loss account, it was noticed by CIT(A) that in this year also assessee has claimed exemption under section 10A of the Act of ₹ 2,40,82,308/- of the profit claimed to be derived from STPI unit at Bangalore. After examining the entire facts and evidence on record, it was found by CIT(A) that there was assessment of lower income because by claiming exemption under section 10A of the Act , the assessee has shown income from business of ₹ 1,70,51,044/-, instead of net income of ₹ 4,11,33,351/-. Therefore, on 06.09.2016 a show cause notice under section 251(1)(a) of for enhancement of assessment was issued and served upon assessee. The learned Counsel



for the assessee stated that the CIT(A) considered the appellant order for AY 2009-10 passed by CIT(A) and he referred in Para 6.3 of his appellate order for making enhancement and the relevant observations reads as under: -

“6.3 I have circumspected the spectrum of facts and circumstances of the case related to claim of deduction u/s 10A of Rs 2,40,82,308/- and have carefully considered the arguments of Ld. Authorized Representative, written representation. evidences on record submitted through paper book and have re-perused various noting of order sheet carefully. I once again find that appellant/Ld. Authorized Representative has simply repeated differently the same clarification and explanation given during the course of appellate proceeding in A.Y. 2009-10. No new evidence or any evidence has been submitted which can refute the finding given in appellate order No. CIT(A)-4/IT-122/DCIT 2(1)/2013-14 dated 02/03/2016. The facts has been elaborately discussed in Para 4 of appellate order. Further, it is pertinent to mention that while imposing penalty u/s. 271(1)(c) in appellant's case for AY 2009-10, a factual clarification was also made and various contrary evidences noticed were also referred to”

4. In view of the above, the learned Counsel for the assessee stated that the Tribunal in AY 2009-10 in ITA No. 4282/Mum/2016 order dated



04.04.2018 has already set aside the issue to the file of the CIT(A) for re-adjudication by observing in Para 5.1 to 5.4 as under: -

“5.1 We have carefully heard the rival contentions and perused relevant material on record. Ground No. 1 has not been contested before us. In Ground Nos. 8 to 11, the assessee is aggrieved by non-adjudication of certain quantum additions / claims by Ld. CIT(A). The remaining Grounds from 2 to 7 are interconnected grounds which are related with deduction u/s 10A and computation thereof. The same are taken up first. 5.2 Upon perusal of orders of lower authorities and documents placed in the paper book, we find that the premises situated at 201-2224, 2nd Floor, Tower-B, Diamond District, Kodihally Village Airport Road, Bangalore was being shared by STP units as well as non-STP units and both units were engaged in providing similar kind of software services. The Ld. AO disputed the computation of profits derived by the assessee whereas Ld. CIT(A) opined that the assessee was not eligible to claim any deduction u/s 10A at all since the nature of services being rendered by the assessee were not covered within the ambit of statutory provisions as contained in Section 10A.

5.3 At the outset, so far as the interpretation of Section 10A read with explanation 2(i) and CBDT Notification No.S.O.890(E), dated 26th



September, 2000 is concerned, we would like to reproduce the scope and ambit of these provisions, as succinctly noted by Hon'ble Delhi High Court in CIT Vs. ML Outsourcing Services Private Limited [228 Taxman 54] in the following manner:-

6. The relevant provisions of Section 10A of the Act read as under:- "(1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of 10 consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be shall be allowed from the total income of the appellant.

XXXXXXXX

XXXXXXXX

(2) This section applies to any undertaking which fulfills all the following conditions, namely:-

(i) It has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year:



(a) commencing on or after the 1st day of April, 1981 in any free trade zone; or

(b) commencing on or after the 1st day of April, 1994 in any electronic hardware technology park, or as the case may be, software technology park

(c) XXXXXXXX"

Explanation 2 to Section 10A "Computer software means-

(a) Any computer programme recorded on any disc, tape, perforated media or other information storage device; or

(b) Any customized electronic data or any product or service of a similar nature, as may be notified by the Board.

7. The said provision applies to an undertaking which begins to manufacture or produce such articles or things or computer software for a period of ten consecutive years beginning from the assessment year in which the undertaking begins to manufacture or produce such articles, things or computer software. 'Articles' or 'things' necessarily refer to tangible goods. 'Computer software' some would regard as intangible, but there is a substantial case law which holds that software recorded on any tape, disc or perforated media are goods. The term "computer software" has been defined, for the purpose of the said



Section, in Explanation 2 to Section 10A. Clause (a) refers to computer programmes recorded in disc, tape or perforated media or other information storage device. Clause (a) refers to the general or common meaning associated with the term, 'computer software'. However, clause (b) expands the meaning of the term 'computer software' and broadens it to include any customized electronic data or any product or service of similar nature, as may be notified by the Board. The expression, 'any customized electronic data' would mean data, which is customized; but it need not be computer software. Processing or customisation, normally would involve assimilation, correction, filtration, etc. of the data. The requirement is that it should be customised. However, clause (b) does not end with 'customized electronic data' and the legislature wanted to further expand the scope of the term, 'computer software' and thus the wide and broad expression, "any product or service of similar nature, as may be notified by the Board". The intention and desire of the Legislature, which is palpable and lucid from the words and expression used, is that the term, 'computer software' specifically includes 'customised electronic data' and also 'any product or service of similar nature' notified by the Board (Central Board of Direct Taxes). In other words, the Parliament has left it to the Board to notify the products or services of similar nature, which



would be covered under clause (b) and treated as 'customized electronic data' for the purposes of clause (b) to Explanation 2 to Section 10A.

8. In exercise of the power conferred under Section 10A, the Board has issued a notification No. S.O. 890 (E), dated 26th September, 2000, and the said notification reads as under:-

S.O.890(E)- In exercise of the powers conferred by clause (B) of item (i) of Explanation 2 of Section 10A, clause (b) of item (i) of Explanation 2 of Section 10A and Clause (b) Explanation to Section 80HHC of the Income Tax Act, 1961 (43 of 1961) the Central Board of Direct Taxes hereby specifies the following Information Technology enabled products or services as the case may be for the purpose of said clauses namely: -

(i) Back-Office Operations; (ii) Call Centres; (iii) Content Development or Animation; (iv) Data Processing; (v) Engineering and Design; (vi) Geographic Information System Services; (vii) Human Resources Services; (viii) Insurance Claim Processing; (ix) Legal Databases; (x) Medical Transcription; (xi) Payroll; (xii) Remote Maintenance; (xiii) Revenue Accounting; (xiv) Support Centres; and (xv) Web-site Services." [Notification No. 11512/F.No. 142/49/2000-TPL]"

9. A perusal of the said notification would indicate that the Board has included several distinct types



of services under the expression, "product or service of similar nature, information technology enabled product or services" in the fifteen clauses. The Board, in the Notification, has used the expression, 'information technology enabled product or services'. Thus, the Board has understood that product or services, to be included within clause (b) of Explanation 2 to Section 10A, need not be computer software as understood in the common parlance or even customized electronic data, as generally understood. Any product or service of similar nature would include in its ambit, product and services which were enabled by, i.e. would rely upon, or are driven by information technology. This becomes clear when we refer to the wide ambit of the divergent and varied services covered in the different clauses like, "(ii) call centres ... (vii) human resources services ... (viii) insurance claim processing ... (xii) remote maintenance" and, "(xiv) support centres". These services would not necessarily and primarily involve customised data processing, but nevertheless, these are information technology enabled services. In case of call centres, queries and questions from a customer of a third company are answered by an employee of the assessee based in India. The said task is performed with the aid and help of information technology but it would not be a case of customised electronic data service or export



thereof. Similar exercise may be undertaken in case of remote maintenance or support centres, which answer queries and gives suggestions by e-mails or through voice and/or video communications. These services would not normally involve processing or sending customised electronic data abroad, yet these are information technology enabled services and specifically covered under the Notification.

10. Leaned senior Standing Counsel for the Revenue submitted that the principle of ejusdem generis should apply. The said doctrine has no application in the present case for the simple reason that there is no enumeration of specific words of a particular class or category preceding the words, 'or any other product or service of similar nature'. In clause (b), prior to the said expression, the word used is, 'any customised electronic data'. Thus, we do not find any genus in the earlier portion of clause (b) of Explanation 2 to Section 10A or the subjects enumerated therein. Principle of noscitur a sociis, though broader in application, again in the facts of the present case would have no application. The said rule of construction, as explained by Lord Macmillan, states that the meaning of a word could be judged by the company it keeps; and, therefore, it is a legitimate rule of construction to make reference to words found in immediate connection with the words to be interpreted.



However, the said rule of construction cannot prevail or be applied in cases when the wider words have been deliberately used and the intention of the legislation is to the contrary. In the present case, the intention of the legislation would be to the contrary as it had specified that the product or service of similar nature could be notified by the Board. It was left to the Board to notify any product or service of similar nature. The Board as per the Act is the highest authority in the pyramid as set out in Section 116 of the Act. The Board, while issuing the notification, which it was empowered and authorised to do by way of delegated legislation, has thought it appropriate to use the expression, 'information technology enabled products and services' without any reference to 'data processing' or 'customised data processing'.

It is, therefore, apparent that the contention of the Revenue is clearly contrary to the notification issued by the Board, and is at cross-purposes with the objective and purpose of and issuance of notification S.O. 890 (E), dated 26th September, 2000. It is obvious that the said notification has been issued to promote outsourcing service industry in India, as it generates employment and helps the country to earn foreign exchange.

11. Appropriate, in this regard, would be to refer to three decisions of the Supreme Court starting



with Rainbow Steels Ltd. Muzaffarnagar & Anr. Vs. C.S.T.; U.P. &Anr. (1981) 2 SCC 141, wherein the court cautioned that the principle of noscitur a sociis, in general should be restricted, but applied the same stating that the word, 'old' occurring in Entry No. 15 should be given a restricted meaning - a sense analogous to that of less general words clubbed with it. It was specified that the said principle would be applicable where there are two or more words, susceptible of analogous meaning, clubbed together and the intention is that they would be understood to be used in their cognate sense, taking colour from each other, thereby meaning that more general being restricted to that of a less general. Reference was made to two decisions in State of Bombay vs. Hospital Mazdoor Sabha AIR 1960 SC 610 and Corporation of the City of Nagpur v. Employees AIR 1960 SC 675 where the said doctrine had not been applied in construing the definition of 'industry' because the Legislature had deliberately used wider words and defined the word correspondingly wider. The principle being that only when the intention of the Legislature in associating wider words with words of narrower significance is in doubt, or otherwise not clear, that the rule of construction, noscitur a sociis can be usefully applied. Therefore, the said doctrine applies when the words used are vague, imprecise, and ambiguous, and there is no



indication that those have been deliberately used for wider meaning. As noticed above, in the present case, the Explanation 2 has been inserted to give wider meaning and that this was deliberately so enacted by the Legislature. The intention, therefore, is to the contrary for the doctrine of noscitur a sociis to apply.

12. In Rohit Pulp and Paper Mills Ltd. vs. Collector of Central Excise, Baroda (1990) 3 SCC 447, the said doctrine was considered and remarks of Diplock, C.J. in Letang vs. Cooper (1964) 2 All ER 929, describing the said doctrine as a treacherous one unless one knows the socetas to which the socii belongs, were referred to. It was nevertheless observed that the said maxim or precedents are not to be mechanically applied and they are of assistance only in so far as they furnish guidance by compendiously summing up principles by common sense and logic. Object and purpose of the notification or the legislation being construed, have to be taken into account and all parts are to be read harmoniously and not in derogation of that purpose. In the said case, the Supreme Court accepted the assessee's submission that 'coated paper' referred only to 'coated paper' used for industrial purposes and not for printing or writing paper, observing that the items mentioned in the group were totally dissimilar and it was impossible to see any thread running through



them. Purpose and object of the Legislation was highlighted.

13. Lastly, in Municipal Corporation of Greater Bombay vs. Bharat Petroleum Corporation Ltd. (2002) 4 SCC 219, it was observed that the principle underlying noscitur a sociis is that, two or more words which are susceptible of analogous meaning when coupled together, are to be understood as used in their cognate sense, taking as they take their colour from each other. In other words, more general words are to be restricted to a sense analogous to the less general. However, the said doctrine along with principles of ejusdem generis is useful in the matter of construction of the statute or its provisions but the intent of the legislature cannot be altogether ignored and the construction which really subserves the purpose of the enactment, must be adopted rather than one which defeats it. No part of the provision should be rendered surplus or otiose.

14. The Board has issued a notification as per the mandate and empowerment under Section 10A and this is not a case of issue of circular under Section 119 which are issued for different purposes and have another purport. Notification is a piece of delegated legislation and to that extent cannot be contrary to the principal enactment nor can it whittle down the effect of



the same. Albeit, clause (b) of Explanation 2 to Section 10A has been worded in a manner which enforces the view and the opinion that Legislature, in their wisdom, has left it to the Board to decide which product or services of similar nature would qualify and should be treated as falling under clause (b), in addition to customised data processing. The intention of the Legislature was not to constrain or restrict but to enable the Board to include several services or products of similar nature in the ambit of the provision. This is what precisely the Board has done when it used the expression, 'information technology enabled products or services' in the notification.

Upon perusal of the same, we find that Hon'ble Court while interpreting the language of statutory provisions and cited notification came to conclusion that the principles of ejusdem generis or Principle of noscitur a sociis could not be applied since there was no ambiguity and the intention of the Legislature was not to constrain or restrict the scope of products or services but to enable the Board to include several services or products of similar nature in the ambit of the stated provisions. We completely agree with the said interpretation of statutory provision as noted by the Hon'ble Court. No other contrary judgment is available on record. Although we are conscious of the fact that SLP against the said



judgment of Hon'ble Court has been admitted by Hon'ble Apex Court on 06/03/2017 [2017 79 Taxmann.com 254], however, upon perusal of the same, we find that the operation of said judgment has not been suspended or stayed in any manner by Hon'ble Apex Court and only a Leave has been granted against the same. Therefore, completely agreeing with the aforesaid interpretation, we place reliance on the same.

5.4 In the above back drop, we find that the nature of services being rendered by the assessee during impugned AY has been explained by the assessee while replying to question no. 2 and the same has been extracted on Page Numbers 9 to 11 of the impugned order. The assessee's prime contention is that it was engaged in the business of production of computer software and also engaged in rendering 4 types of notified IT enabled software services viz. Back Office Operations, Engineering & Design, Remote Maintenance and support centers which are duly covered in the aforesaid notification issued by CBDT. On the other hand, the main thrust of Ld. CIT(A) in rejecting the assessee's claim is that the assessee failed to demonstrate any evidence of manufacturing of any computer software / program / customized electronic data / project or services of similar nature and further, the services rendered as



aforesaid do not reveal production of any computer software or related services of similar nature. The other argument of Ld. CIT(A) is that the assessee has only rendered managerial or customer oriented services which were based on software produced / provided by its sister concerns and that too, on sub-contract basis. However, as noted by us as above, manufacture of computer software or program was not an essential condition rather the CBDT notification covered wide spectrum of notified services which were eligible for deduction u/s 10A. We find that Ld. CIT(A) has not appreciated the claim of the assessee vis-à-vis aforesaid CBDT instructions. It is also noted that other years have been reopened by the revenue to deny the said deduction to the assessee. Further, the assessee's claim as raised in Ground Numbers 8 to 11 have not been adjudicated by Ld. CIT(A). Therefore, keeping in view these multiple factors, we deem it fit to restore the matter back to the file of Ld. CIT(A) for re-appreciation of assessee's claim and re-adjudicate the same as per law with a direction to assessee to substance his claim."

5. The learned Counsel stated that the issue can be remitted back to the file of the CIT(A) on similar directions. When this was pointed out to the learned Sr. Departmental Representative, he fairly agreed that the issue can be remitted back to the file of the CIT(A). In view of the above factual position, we set aside this issue to the file of the CIT(A) and direct



him to consider the directions issued in AY 2009-10 by the Tribunal as reproduced above.

6. One more issue in this appeal of assessee is as regards to the disallowance of depreciation of ₹ 3,79,298/- by holding that the same is claimed by another assessee. The AO disallowed the depreciation by observing that there is no clarity in the financial lease agreement with regard to ownership of the asset or who is entitled to claim depreciation under the Act. According to him, there cannot be made by two owners of the same asset and hence, he disallowed the claim of depreciation. The CIT(A) allowed the claim of depreciation relating to computer equipment amounting to ₹ 5,04,345/- but retained the disallowance at ₹ 3,79,298/- in respect to installation charges, Vat and lease instalment. He directed the AO to re-verify the facts and examine whether lease rent / installation and installation charges have been incurred by assessee and not by CISCO System (India) Pvt. Ltd. For this he observed as under: -

“4.2.....

As regards claim that alternatively installation charges of ₹ 40,000/- VAT of ₹ 1,31,143/- and Lease instalment of ₹ 3,33,202/- capitalized should be allowed, is worth consideration. If computer equipment has been taken on lease rent, then Assessing Officer has to allow such expenditure being in revenue in nature. Similarly, the instalment, VAT and installation charges are allowable expenditure. Assessing Officer is therefore directed to re-verify the facts while giving effect to this order, and see whether lease rent/ instalment and installation charges have been incurred by appellant and not by M/s



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CISCO Systems (India) Pvt. Ltd., then it has to be allowed to assessee. If such expenditure has been claimed by CISCO, then it cannot be allowed.”

7. We find no infirmity in the directions of CIT(A) directing AO to re-verify and accordingly, decide the claim. Hence, we confirm the order of CIT(A). This issue of assessee's appeal is dismissed.

8. In the result, the appeal of assessee is partly allowed.

Order pronounced in the open court on 29-10-2018.

आदेश की घोषणा खुले मे दिनांक 29-10-2018 को की गई ।

Sd/-

(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह /MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

Mumbai, Dated: 29-10-2018

Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.
//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI