आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गा राव,न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER&
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं**./I.T.A.No.79/Viz/2017**
(निर्धारण वर्ष**/Assessment Year:2012-2013)**

M/s ACN Infotech (India) Pvt. Ltd. D.No.9-14-3A, Balaji's Mangalagiri Chambers VIP Road Visakhapatnam	Vs.	ACIT, Circle-1(1) Visakhapatnam

[PAN:AAFCA7810A]

(अपीलार्थी/ Appellant)		**(प्रत्यर्थी/ Respondent)**
अपीलार्थी की ओर से/ Appellant by	:	Shri G.V.N.Hari, AR
प्रत्यार्थी की ओर से/ Respondent by	:	Smt. Suman Malik, DR
सुनवाई की तारीख / Date of Hearing	:	14.11.2018
घोषणा की तारीख/Date of Pronouncement	:	28.11.2018

आदेश /O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

This appeal is filed by the assessee against the order of the Commissioner of Income Tax(Appeals) [CIT(A)]-1, Visakhapatnam vide I.T.A.No.28/2015-16/AC,C-1(1),Vsp/2016-17 dated 23.12.2016 for the assessment year 2012-13.

2. Ground No.1 is general in nature which does not require specific adjudication.

3. Ground No.2 is related to the reasons for non-appearance before the CIT(A) on the dates fixed for hearing. This ground is self-explanatory and having decided the case on merits, it is considered not necessary for separate adjudication.

4. Ground Nos. 3 and 4 are related to the deduction claimed by the assessee u/s 10AA of the Income Tax Act, 1961 (hereinafter called as 'Act'). In this case, the assessee filed return of income on 27.09.2012 declaring Nil income which was processed u/s 143(1) of the Act. The Assessing Officer (AO) found that the assessee had claimed the deduction u/s 10B amounting to Rs.74,28,858/- and the same is not admissible for the impugned assessment year, as per proviso to section 10B(1) of the Act, which reads as under :

> "Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April [2012] and subsequent years."

The AO observed that deduction u/s 10B is not allowable for the assessment year beginning from the 1st day of April 2012 relevant to the

A.Y 2012-13. There was also clarification from the Board vide Circular No.1/2005 towards allowability of deduction u/s 10B(1) of the Act. Hence, the AO issued a letter to the assessee calling for it's explanation as to why the deduction claimed u/s 10B should not be disallowed.

5. In response to the notice, the assessee filed explanation, stating that there was a mistake in claiming the deduction u/s 10B. Instead of claiming the deduction u/s 10AA of the Act, the assessee claimed the deduction u/s 10B of the Act in the Income Tax Return. The assessee further submitted that the assessee is having SEZ unit located in Rushikonda, Visakhapatnam which is operational from the assessment year 2012-13 and eligible for deduction u/s 10AA and the entire business was done during the year from SEZ unit, for which the deduction was claimed. The assessee further clarified that while filing the return of income electronically, deduction was claimed u/s 10B of the Act in a routine manner as claimed in the earlier years. The assessee was operating the unit at Mangalagiri chambers, Siripuram and claimed the deduction u/s 10B earlier, since the unit was eligible for deduction for a period of 10 years from the initial assessment year in a routine manner. The assessee further stated before the AO, that the assessee was under the bonafide

impression that sub section 1 of section 10(B) was applicable to new undertakings commencing export of articles, things or computer software beginning from the 1st day of April 2012. The assessee further submitted that the deduction u/s 10B was claimed in earlier year for business unit located at Mangalagiri Chambers, Siripuram, Visakhapatnam which was in operation till 2010-11.New unit was established in VSEZ at Rushikonda which has commenced export of computer software in the financial year 2011-12 and submitted that the entire business was related to the new unit. The copies of the relevant documents in support of the fact of establishment of the new unit in Visakhapatnam Special Economic Zone(VSEZ) were submitted to the AO on 18.03.2015. The assessee also submitted audit report required u/s 10AA of the Act in Form No.56G before the AO and requested to grant deduction u/s 10AA of the Act alternately. The assessee also submitted that the unit at Siripuram for which the deduction u/s 10B was claimed in the earlier years is no more in operation and it was closed. The AO rejected the claim of the assessee, since the assessee did not file Form No.56F the audit report along with the return of income as required u/s 10AA of the Act and the deduction claimed by the assessee u/s 10B was withdrawn.

6. Aggrieved by the order of the AO, the assessee filed the appeal before the CIT(A) and the Ld.CIT(A) confirmed the disallowance made by the AO stating that the business activity was carried on from some other unit and not in regard to the unit in respect of section 10B deduction was claimed. For ready reference, we extract para No.4.3 of the Ld.CIT(A)'s order which reads as under :

> *"4.3. I have considered the information available on record. It is seen that the assessee had claimed deduction u/s 10B(1) of the Act, though such deduction was not available from A.Y.2012-13 onwards. When this was pointed out and a show cause notice issued, the assessee had made alternative claim u/s 10AA of the Act. It was contended that its business activity was carried from some other unit and not in regard to the unit in respect of which sec.10B deduction was claimed. It is seen that the assessee had made totally opposite claim which is not permissible. Hence, the disallowance made by the AO is upheld."*

7. Against the order of the Ld.CIT(A), the assessee is in appeal before us. During the appeal hearing, the Ld.AR argued that the assessee filed the return of income and claimed the deduction u/s 10B of the Act till the previous year relevant to the assessment year 2011-12, since, the assessee was carrying on operations of export of software from Mangalagiri Chambers, Siripuram, Visakhapatnam which was eligible for deduction u/s 10B. Accordingly the deduction was claimed deduction u/s 10B for the A.Y. 2012-13 also by mistake in a routine manner. The Ld.AR submitted that during the financial year 2011-12, the assessee has closed the unit located

at Mangalagiri Chambers and relocated the business unit at VSEZ in the following address :

Plot No.21 & 22
APHC SEZ (IT/TES)
HILL No.2, Madhuravada Village
Rushikonda
Visakhapatnam

The said unit is eligible for deduction u/s 10AA. The Ld. counsel submitted that the entire profit declared by the assessee is related to VSEZ unit and there were no operations during the previous year relevant to the assessment year 2012-13 in Mangalagiri Chambers. The Ld.AR further submitted that, in a routine manner, the deduction was claimed u/s 10B instead of 10AA of the Act ignoring the fact that the operations were carried on from SEZ unit. The Ld.AR further submitted that the assessee had submitted the relevant documents supporting the establishment of new unit at VSEZ and carried on the operations from the said unit apart from filing Form No.56F before the AO. The Ld.AR argued that the AO ought to have allowed the deduction u/s 10AA, since the assessee has filed form 56F during the assessment proceedings which was a pure technical mistake. Thus, the Ld.AR argued that the mistake was bonafide and it is also settled issue that the audit report is permitted to be filed during the assessment proceedings also. The Ld.AR relied on the decision of ITAT

Pune in the case of Approva Systems (P.) Ltd., Vs. DCIT, Circle-1, Pune reported (2018) 92 taxmann.com 82. The Ld.AR also clarified that in the subsequent years, the AO has allowed the deduction u/s 10AA for the same unit located at SEZ.

8. On the other hand, the Ld.DR argued that the assessee failed to furnish the audit report in Form No.56F as required u/s 10AA to allow the deduction. The claim made by the assessee is not a genuine claim. The Ld.A.R further submitted that, initially the assessee claimed the deduction u/s 10B for Mangalagiri Chambers, Siripuram and subsequently made the opposite claim, therefore, argued that there is no case for allowing the deduction u/s 10AA of the Act. Ld.DR placed heavy reliance on the order of the Ld.CIT(A).

9. We have heard both the parties and gone through the orders of the lower authorities and perused the material placed on record. In this case, the assessee has claimed the deduction u/s 10B by mistake, instead of claiming the deduction u/s 10AA of the Act. While filing the return of income, the assessee filed audit report in Form 56G for claiming deduction u/s 10B of the Act. Subsequently, when the AO has called for the details,

the assessee realized the mistake and submitted before the AO that the correct claim is deduction u/s 10AA but not u/s 10B of the Act. The assessee also furnished the relevant documents in support of the establishment of new unit in VSEZ and clarified that the entire business was done in the new unit at Rushikonda, the SEZ unit and eligible for deduction u/s 10AA. The assessee also submitted audit report u/s 56F of the Act which required to be furnished along with the return of income. The Ld.AR submitted before the AO as well as before the Ld.CIT(A) that the unit located at Mangalagiri Chambers is not in operation during the financial year 2011-12 relevant to the assessment year 2012-13 and the entire business turnover, profit declaration in the return of income was related to the unit located in the VSEZ at Rushikonda, Visakhapatnam. The AO disallowed the claim of the assessee only on technical reasons for not filing the form No.56F,the audit report along with the return of income. It appears to us that the mistake is a genuine mistake. It is a settled issue that the assessee is permitted to file the audit report during the pendency of assessment proceedings as held by High Court of Madhya Pradesh, Indore Bench, Commissioner of Income-tax v. Panama Chemicals Work,[2007] 165 TAXMAN 135.The decision of the Hon'ble High court in the cited case in connection with deduction u/s 80I is as under:

"7. We are of the view that even if an assessee fails to file information in Form No. 10CCB along with the return, he cannot be divested of the benefit of section 80-I. It is not a case where the form was filed after the assessment, but before it and, therefore, when the authorities assessed the income, the form was before the Assessing Officer. Under these circumstances, we find that the approach of the CIT(A) and the Tribunal was proper.

8. Even in the judgment of Shivanand Electronics' case (supra), Their Lordships of the Bombay High Court have observed that the position may be different when an assessee does a particular act not within the specified time but after the expiry thereof and makes an application for condonation of delay. In such cases, depending on the language of the statute and the objects sought to be achieved by prescribing the time-limit, it would be the duty of the officer to consider the documents, even submitted belatedly. Thus, this decision also supports the view that even if the prescribed form is submitted belatedly, the Assessing Officer has to proceed on the basis of the claim made.

9. We, therefore, hold that in the facts and circumstances of the case, the Tribunal was justified in law in holding that the claim of the assessee under section 80-I is justified even if he had not filed the audit report in Form No. 10CCB along with the return. We, therefore, answer the question against the revenue and in favour of the assessee."

Further Hon'ble Rajasthan High court in CIT, Udaipur.v. Godha Chemicals (P) Ltd, 39 taxman.com 98 in connection with the deduction u/s80HHC took the similar view. Though the AO is not allowed to entertain the fresh claim, otherwise by the revised return of income, the Ld.CIT(A) is not barred from entertaining the fresh claim as held by the Hon'ble Supreme Court in the case of Goetze (India)Ltd., in 284 ITR 323. However, in instant case, the claim made by the assessee is not a fresh claim, it is only an alternate claim and the same is correct claim made by the assessee. The fact that the assessee has carried on the business from the SEZ unit was not

disputed by the AO. The AO also did not dispute the fact that the profit was related to the new unit established in the VSEZ. The assessee has filed audit report which is placed at page No.34 and 35 of the paper book, according to which the entire profit and the turnover was related to the unit located in VSEZ, Rushikonda. Hence, we are of the considered view that merely because of the technical reasons the justice should not suffer. In the subsequent assessment years, on the same facts, the AO has allowed the deduction u/s 10A of the Act. The Ld.CIT(A) also confirmed the addition misdirecting himself that the assessee has made the opposite claim. In fact, there was no opposite claim made by the assessee and it was only an alternate claim. Similar issue of alternate claim u/s 10A has come up before the Coordinate Bench of ITAT Pune in the case of Approva Systems (P) Ltd., (2018) 92 taxmann.com82 (Pune-Trib) and the coordinate bench held that the assessee is entitled to claim deduction u/s 10A on additional income offered on account of suomoto adjustment and transfer pricing provisions. We extract relevant part of the order of the coordinate bench in para No.13 and 14 which reads as under :

> *"13. We have heard the rival contentions and perused the record. The first issue which arises by way of ground of appeal No.3 is whether the assessee is entitled to claim the deduction under section 10B or 10A of the Act. The assessee in the return of income had claimed the deduction under section 10B of the Act. However, during the course of assessment proceedings, the assessee filed an alternate claim that since the unit was registered under STPI,*

the assessee was entitled to claim the deduction under section 10A of the Act. Both the authorities below have denied the deduction under section 10B of the Act. Further, on one reason or the other had also denied the alternate claim of assessee under section 10A of the Act. However, we find that the Tribunal in assessee's own case in ITA No.1788/PN/2013, relating to assessment year 2009-10, order dated 13.01.2015 had held that the assessee was not entitled to the claim of benefit under section 10B of the Act, but the assessee was held to be eligible to claim the deduction under section 10A of the Act, for which the matter was restored back to the file of Assessing Officer. The Tribunal in ITA No.1921/PUN/2014, relating to assessment year 2010-11, vide order dated 25.01.2017, following the earlier order of Tribunal in assessment year 2009-10 had also similarly held and had remitted the issue back to the file of Assessing Officer to verify the claim of assessee vis-ã-vis eligibility of deduction under section 10A of the Act and passed the order accordingly. The assessee during the course of hearing has placed on record the copy of order passed under section 143(3)/254 of the Act by the Assessing Officer giving effect to the order of Tribunal relating to assessment year 2009-10. The Assessing Officer vide order dated 03.03.2017 has allowed the claim of assessee under section 10A of the Act. The issue thus, stands settled in the case of assessee, wherein as against original claim of deduction under section 10B of the Act in the return of income, the alternate plea of claim of deduction under section 10A of the Act raised during the course of assessment proceedings has been allowed in the hands of assessee.

14. The issue arising in the present appeal before us is identical and following the same parity of reasoning, we direct the Assessing Officer to verifythe claim of deduction under section 10A of the Act in the case of assessee and decide the same in line with directions in assessment years 2009-10 and 201011. The Assessing Officer shall afford reasonable opportunity of hearing to the assessee and decide the issue in line with the issue being decided in assessment year 2009-10 in the order giving effect to the order of Tribunal dated 03.03.2017."

Therefore, we do not find any reason to sustain the order of the Ld.CIT(A) and the same is set aside and the addition made by the AO is deleted. The appeal of the assessee on this ground is allowed.

9. Ground No.5 and 6 are related to the disallowance of expenditure u/s 14A of the Act. The AO found that the assessee has made investments towards share capital in various companies i.e. Interpro Global Pte, CosaGmnH and Cosa B V to the extent of Rs.8,25,71,682/-. The assessee also claimed the interest expenses of Rs.89,69,627/- on account of the borrowings, therefore, the AO applied the Rule 8D of IT Rules and disallowed the sum of Rs.30,78,288/- u/s 14 A of the Act.

10. Aggrieved by the order of the AO, the assessee went on appeal before the CIT(A) and argued that there is no exempt income earned during the year, thus question of disallowance u/s 14A does not arise. The Ld.CIT(A) not being convinced with the explanation of the assessee confirmed the addition made by the AO.

11. We have heard both the parties and perused the material placed on record. The assessee has made the investments in the company towards share capital and the AO has disallowed the expenditure relating to the investment made in the shares since the shares yield exempt income u/s 14A. However, the Ld.AR submitted that there was no exempt income earned by the assessee during the impugned assessment year. Thus, there

is no case for disallowance under Rule 8D of IT Rules. The fact that there was no dividend income earned by the assessee is not in dispute. On the similar facts, this Tribunal in the case of Vasanta Traders Vs. ITO, Ward-2(1), Guntur by an order dated 04.05.2018 held that no disallowance is called for in the absence of exempt income. While delivering the ruling, the Tribunal has followed the decision of the coordinate bench of ITAT Hyderabad and the decision of Hon'ble Madras High Court in the case of Redington(India) Ltd. Vs. ACIT reported in (2017) 77 taxman.com 257 (Mds.). For the sake of clarity and convenience, we extract, relevant part of the order of this Tribunal in para No.5 which reads as under :

> *"5. We have heard both the parties and perused the material placed on record. The assessee made the investments of Rs.8,02,00,000/- in M/s Vasantha Industries Ltd. It is undisputed fact that the assessee has not earned any income which does not form part of the total income. During the year under consideration, the assessee has not derived any dividend income. In the assesses own case, the Coordinate Bench of ITAT, Hyderabad cited supra following the decision of Hon'ble Madras High Court held that no disallowance is called for u/s 14A, in the absence of exempt income.*
>
> *We find that the facts of the case before us are similar to the facts before the Hon'ble Madras High Court in the case of Redington (India) Ltd (cited Supra) and respectfully following the said decision, we allow the assessee's appeal and direct the AO to delete the disallowance made u/s 14A. Thus, assessee's grounds of appeal Nos. 2, 3 & 5 are rejected and Ground of Appeal No.4 is allowed."*
>
> *Similar view was taken by this Tribunal in the case of M/s Rashtriya Ispat Nigam Ltd., Visakhapatnam for the assessment year 2004-05 in ITA No.13/Viz/2013 in para No.36 of the cited order. Since the facts are identical, respectfully following the view taken by Coordinate Bench, we hold that no disallowance is called for u/s 14A in the absence of exempt income. Accordingly, we confirm the order of the Ld.CIT(A) and dismiss the appeal of the revenue."*

Since the facts are identical, respectfully following the view taken by the coordinate bench, we hold that in the absence of the exempt income, there is no case for making the disallowance u/s 14A of the Act. Accordingly, we set aside the order of the Ld.CIT(A) and allow the appeal of the assessee.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 28th November, 2018.

Sd/-	Sd/-
(वी.दुर्गा राव)	**(डि.एस. सुन्दर सिंह)**
(V. DURGA RAO)	**(D.S. SUNDER SINGH)**
न्यायिकसदस्य/JUDICIAL MEMBER	**लेखासदस्य/ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam
दिनांक /Dated : 28.11.2018
L.Rama, SPS

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

1. अपीलार्थी / The Appellant – M/s ACN Infotech (India) Pvt. Ltd., D.No.9-14-3A, Balaji's Mangalagiri Chambers, VIP Road, Visakhapatnam
2. प्रत्यार्थी / The Respondent– ACIT, Circle-1(1), Visakhapatnam
3. The Pr.CIT-1, Visakhapatnam
4. The Commissioner of Income Tax (Appeals)-1, Visakhapatnam
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
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