

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 3231DEL/2013 (A.Y 2007-08)

Nuwave Esolutions Pvt. Ltd. 3 rd Floor, District Centre, DDA Building, Nehru Place New Delhi AABCN5790Q (APPELLANT)	Vs	CIT(A) Delhi-V New Delhi (RESPONDENT)
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Appellant by	Dr. Rakesh Gupta & Sh. Somil Aggarwal, Advs
Respondent by	Ms. Pramita M. Biswas, CIT (DR)

Date of Hearing	20.12.2018
Date of Pronouncement	27.12.2018

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 28/3/2013 passed by CIT(A)- New Delhi for Assessment Year 2007-08.

2. The grounds of appeal are as under:-

"1. That the Ld.CIT(A) is erred under the law while exercising his power u/s 263 of the Act in view of following facts:-

❖ In the original assessment order u/s 143(3) dated 31/12/2010 in the A.O has already denied exemption to the appellant u/s 10A with result, the impugned assessment order is neither erroneous nor prejudicial to the interest of revenue.

❖ The A.O has already initiated reassessment proceeding u/s 148 of the Act

for the year under review to revisit the claim of the appellant u/s 10A of the Act.

❖ The provision contained u/s 263 (1)(c) of the Act does not empower the Ld.CIT(A) to review the deduction u/s 10(A) which is already subject matter of appeal filed by the department against the order dated 15/3/2011 passed by the Ld.CIT(A)-XIII, New Delhi.

2. That any other grounds of appeal may be added/ deleted or amend at the time of hearing.”

3. The assessee company is engaged in the business of development of software and its export. It is a certified 100% Export Oriented Unit as per the certificate of registration issued by the Director, Software Technology Park of India dated 31.03.1999. The assessee filed return declaring income of Rs. 1,45,48,453/- on 30.10.2007 after claiming deduction u/s 10A of the Income Tax Act, 1961 at Rs. 49,33,50,421/-. The said claim of deduction was revised to Rs. 50,52,24,355/- by way of filing revised return on 20.08.2008. The assessee company revised its return as it did not consider the gain on account of currency fluctuation of export proceed amounting to Rs. 1,23,33,934/- in its original I. T. return. The assessee company is a Private Ltd. Company and its entire share capital is held by its two directors Dr. Anil Gupta, an NRI and Mrs. Seema Gupta. The Shareholding pattern of the assessee company is as under:-

Name of the Shareholder	No. of Equity Shares held	Percentage of Holding
Dr. Anil Gupta	19126	99%
Dr. Seema Gupta	207	1%

Mr. Anil Gupta has 99% shareholding in the assessee company and 100% equity in the associate enterprise i.e. CAE Solutions Inc. USA. The assessee company is exporting software wholly and exclusively to its associate

enterprise CAE Solutions USA since 2002. The transactions between the assessee company and its associate enterprise at USA are subject to transfer pricing proceedings u/s 92, chapter X of the I.T. Act on year to year basis. The assessment proceedings for last three previous years have been completed u/s 143(3) after considering report of TPO u/s 92 of the Act, without any adverse finding. The Assessing Officer determined taxable income of the assessee at Rs. 49,74,14,740/- declared in the revised I.T. Return. The Assessing Officer reduced the exemption u/s 10A to the extent of Rs. 43,49,83,092/- and further held that gain on account of currency fluctuation to the extent of Rs.1,23,33,934/- is also not eligible for exemption as the same is due to post export events as result of which the Assessing Officer denied the exemption to the assessee to the extent of Rs. 44,73,17,026/- (Rs.43,49,83,092/- + Rs.1,23,33,934/-), as against Rs. 50,52,24,355/- claimed in the revised return. The Assessing Officer also made disallowance to the extent of Rs.3,55,47,260/- u/s40(a)(ia)/40(a)(i) in the absence of TDS being deducted at the prescribed rate on payment made by the assessee to its shareholder on account of buy-back of shares. The assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal of assessee granting relief and allowed exemption under section 10A of the Act.

4. The Commissioner of Income Tax, Delhi-V issued show cause u/s 263 on 26/3/2013 to the assessee. The assessee filed replies to the said show cause notice. The Commissioner of Income Tax passed order u/ s 263 of the Act on 28/03/2013, thereby holding that the order passed by the Assessing Officer on 31/12/2010 for Assessment Year 2007-08 is erroneous and prejudicial to the interest of the Revenue and set aside/cancelled the said assessment order and directed the Assessing Officer to make a fresh assessment.

5. The Ld. AR submitted that the issue of deduction u/s 10A was considered in assessment including by the TPO in detail while computing the arms length price during the transfer pricing proceedings and by the Assessing

Officer during original assessment proceedings in most extensive manner and it cannot be said that there was error due to lack of application of mind in assessment which is evident from the plain reading of the impugned assessment order. All the aspects were considered as shown below and it may be appreciated that the TPO cannot determine ALP without going into these aspects as raised by the Commissioner of Income Tax in notice as well as order u/s 263. The TPO considered comparable companies which obviously would mean that he has seen the nature of product of the assessee and other comparable companies and functions performed by the assessee and comparable companies. The TPO recorded in the TP order that records have been kept as per rule 10D which means that comprehensive records have been kept and were examined by the TPO. The TPO considered audit report in form no. 3CEB. A copy of Computation of Income and Acknowledgment of Return claiming deduction u/s 10A and the part of balance sheet showing export of Software and software development expense were considered in original assessment by the Assessing Officer. The Assessing Officer also considered the Audit Report u/s 10AA showing various aspects of the deduction u/s 10A and also this fact that the claim u/s 10A was not new in this year but since last 7 years, this deduction was being claimed. The submissions of assessee were also filed before the TPO explaining the nature of business, nature of undertaking and details about ALP. The order of the TPO determining ALP mentioning that records as per rule 10D and other details asked were submitted and taken on record and regarding export of software no adverse inference is drawn by the TPO. The submissions filed before the Assessing Officer by the assessee, explained about the nature of export business of the assessee, nature of undertaking, note on section 10, foreign inward remittance certificate, software export return, EEFC account, foreign exchange gain, reason for high profit and role of Dr. Anil Gupta. The copies of Softex and other details and forms showing the various facets of the impugned transactions were also submitted during the original assessment proceedings. The Ld. AR relied upon the following case laws:

- i. CIT Vs. Malabar Industries 243 ITR 83(S.C)
- ii. Crown Frozen Foods Vs. Addl. CIT 93 TTJ 485 (MUM).
- iii. Ram Kishan Dass Vs. ITO 149 Taxman 55 DEL-(Mag.)
- iv. Infosys Technologies Ltd. Vs. Joint CIT(A) (Assessment)-VOL-287-ITR-211 (Bangalore).
- v. Pawan Kumar Vs. Assessing Officer -VOL.106-TTJ-494 (JD.)
- vi. CIT(A) Vs. Bharat Aluminium Co. Ltd. (2008) 303 ITR 256 (Del.)
- vii. CIT(A) Vs. Design & Automation Engineers (Bombay) (P) Ltd. 13 DTR 145 (Bom)
- viii. Ms. Mayawati Vs. CIT(A) 18 DTR 46 (TRB, 2009)
- ix. Rajiv Agnihotri Vs. CIT(A) 23 DTR 476 (Del) Trib.
- x. Kulbir Singh Vs. Asst. CIT(A) 24 DTR 421 (Agra) Trib.
- xi. CIT(A) Vs. Unique Autofelts (P) Ltd. 30 DTR 231 (P & H).
- xii. CIT(A) Vs. Deepak Mittal 37 DTR 8 (P & H), 2010) 37 DTR (P & H) 8
- xiii. Double Dot Finance Ltd. Vs. Asstt. CIT(A) 38 DTR 220 (Mumbai)
- xiv. CIT(A) vs. Hindustan Marketing and Advertising Co. Ltd. 46 DTR 109 (Del.)
- xv. Raj Shyama Construction (P) Ltd. Vs. Asstt. CIT 135 TTJ 33 (Del.)
- xvi. CIT(A) vs. Hero Auto Ltd. 343 ITR 342 (Del.)
- xvii. 203 ITR 108 (Bom)-
- xviii. 348 ITR 485 (Del) (FB)

The Ld. AR further submitted that when the deduction u/s 10A has been dealt by the Assessing Officer in original assessment u/s 143(3) (PB 30-41) in most extensive manner and ultimately disallowed the claim, then how that order can be said to be prejudicial to the interest of the revenue as the order under revision has to be erroneous and prejudicial both 243 ITR 83(SC). The Ld. AR relied upon the decision of the Tribunal in case of Hukmi HUF vs CIT (Del) (Trib). The Ld. AR submitted that the issue of deduction u/s 10A has been the subject matter of appeal before the CIT(A) and the same is pending for disposal before Income Tax Appellate Tribunal. Hence, it is a case of merger with respect to the issue of deduction u/s 10A and therefore, initiation of

proceedings u/s 263 on the issue of deduction u/s 10A is not possible in law. The Ld. AR relied upon the following judicial decisions wherein it has been held that once the issue becomes subject matter of appeal, the said issue is merged with the appellate order and revisional jurisdiction of the CIT cannot be exercised in respect of the said issue in view of Explanation (c) to Section 263:-

- i. Ranka Jewellers Vs. Addl. CIT(A) 328 ITR 148 (Bom)
- ii. CIT(A) Vs. Nirma Chemicals Works (P) Ltd. 309 ITR 67 (Guj)
- iii. Marical Industries Ltd. Vs. Asstt. CIT(A) (2008) 5 DTR 263.
- iv. Sadhu Ram & Sons Vs. Commissioner of Income Tax & Anr. (2007) 108 TTJ (Asr) 373.
- v. Sonal Garments vs Jt. CIT 95 ITD 363(Mum) (2005)
- vi. Saw Pipes Ltd vs Add. CIT 94 TTJ 1036(Del)
- vii. Hoogly Mills vs ACIT 71 ITD 264 (Cal)
- viii. Sahara India Mutual vs CIT 74 TTJ 67 (All)
- ix. Sahara vs CIT 90 TTJ 878(A11)
- x. Sheena Industries vs CIT (Del)(Trib)

The Ld AR further submitted that the case of CIT is that Assessing Officer ought to have done more detailed enquiry which cannot be the basis for revision as held in case of CIT vs. Hindustan Marketing & Advt. Co. 341 ITR 180(Del). The Ld. AR submitted that once assessment order is passed after TPO order, revision is not possible as held in 55 SOT 1(Mum) and in case of Tata Chemicals Ltd. ITA (TP) 3121, 3122/Mum/2013 dated 20.12.2013. The Ld. AR further submitted that if the CIT felt that the enquiry was inadequate then he must make enquiry and show that assessment order is erroneous. The revising authority has no power to remand and direct the Assessing Officer to conduct enquiry as held in 357 ITR 388 (Del). The Ld. AR finally submitted that Section 148 of the Income Tax Act too was attempted on the same ground and the Hon'ble High Court quashed notice u/s 148 on the ground that the said issue was subject matter of assessment, how can there be then 263 proceeding.

6. The Ld. DR submitted that the order of the CIT(A) is just and proper as the Assessing Officer has not properly discussed the issue u/s 10A.

7. We have heard both the parties and perused the material available on record. From the records, the Assessing Officer has specifically raised query regarding exemption u/s 10A during the original assessment proceedings and all the details were given by the assessee during the assessment proceedings which is later on deleted by the CIT(A). These facts were present before the Commissioner of Income Tax while giving show cause notice u/s 263 of the Act. The order passed by the Commissioner in capacity of Section 263 is merely a second opinion and does not fall in the category of prejudicial to the interest of Revenue. Merely taking a second opinion on the issue which is already concluded by the Revenue Authorities cannot be a ground for invoking Section 263 of the Act. The Assessing Officer should have done this or that is not a prerogative while invoking Section 263 of the Act by the Commissioner of Income Tax. In the present case, the Assessing Officer has taken cognizance of all the material provided by the Assessee during the Assessment Proceedings and after verifying the same has passed just and proper order. Therefore, in light of the above findings, the order of the Commissioner u/s 263 of the Act is set aside.

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

Order pronounced in the Open Court on 27th December, 2018.

**Sd/-
(G. D. AGRAWAL)
VICE PRESIDENT**

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 27/12/2018
R. Naheed

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	20.12.2018
Date on which the typed draft is placed before the dictating Member	20.12.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	27 .12.2018
Date on which the final order is uploaded on the website of ITAT	27 .12.2018
Date on which the file goes to the Bench Clerk	27 .12.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	