

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.189/Coch/2017 : Asst.Year 2011-2012

The Dy.Commissioner of Income-tax, Circle 1(1) Kochi.	Vs.	M/s.Charter BPO Solutions (P) Limited Door No.14/396, 3 rd Floor IInd Block, Trans Asia Corporate Park, Sea Port Air Port Road, Kakkanad Cochin – 682 037. PAN : AACCC4553B.
(Appellant)		(Respondent)

Appellant by : Smt.A.S.Bindhu, Sr.DR
Respondent by : Sri. Remya S.Menon, CA

Date of Hearing : 14.03.2019	Date of Pronouncement : 19.03.2019
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ORDER

Per George George K., JM

This appeal at the instance of the Department is directed against CIT(A)'s order dated 28.02.2017. The relevant assessment year is 2011-2012.

2. The issue raised in this appeal is regarding eligibility of claim of deduction u/s 10B of the I.T.Act and eligibility of alternative claim u/s 10A of the I.T.Act.

3. The brief facts of the case are as follows:

The assessee is a 100% Export Oriented Unit (EOU) located in Infopark, Kakkanad, Cochin. For the assessment year 2011-2012, the assessee had claimed deduction u/s 10B of the I.T.Act amounting to Rs.91,80,145. In the course of

assessment proceedings, the assessee had filed certificate in Form No.56F to claim deduction u/s 10A of the I.T.Act vide letter dated 04.11.2013. The Assessing Officer completed the assessment u/s 143(3) of the I.T.Act vide order dated 10.01.2014. The assessee's claim of deduction u/s 10B of the I.T.Act was denied by the Assessing Officer. The Assessing Officer held that the assessee was not eligible to the claim on the ground that it is not a 100% EOU as defined in section 10B of the I.T.Act, since approval under the STPI scheme cannot be considered sufficient for granting the benefits of section 10B of the I.T.Act. The Assessing Officer, in taking the above view, relied on the judgment of the Hon'ble Delhi High Court in the case of *CIT v. Regency Creations Limited and CIT v. Valiant Communications Limited [(2013) 353 ITR 326 (Del)]*. The Assessing Officer also rejected the alternative claim of the assessee of deduction u/s 10A of the I.T.Act for the reason that the said claim was not made in the return of income filed by the assessee.

4. Aggrieved by the said order, the assessee preferred an appeal to the first appellate authority. The CIT(A) allowed the claim of deduction u/s 10B of the I.T.Act. The alternative claim of the assessee also was entertained by the CIT(A) and he was of the view that the assessee was also entitled to deduction u/s 10A of the I.T.Act.

5. Aggrieved by the order of the CIT(A), the Department has filed this appeal before the Tribunal, raising the following grounds:-

1. *The orders of the Commissioner of Income Tax (Appeals)-I, Kochi opposed to the facts and circumstances of the case.*

2. *In the facts and circumstances of the case, the learned Commissioner of Income Tax(Appeals)-I, Kochi is not justified to hold that the assessee company is eligible to deduction u/s.10B on the basis of approval from inter Ministerial Standing Committee (IMSC) set up for granting licence under STPI.*

3. *The learned Commissioner of Income Tax (Appeals)-I, Kochi is also not justified to observe that the approval of the Inter Ministerial Committee (IMSC) set up for granting licences under STP1 Scheme appointed by the Central Government in exercise of the powers conferred u/s.14 of the Industries (Development & Regulation) Act, 1951 is sufficient to grant deduction u/s.10B of the Act.*

4. *The decision of the learned Commissioner of Income Tax (Appeals) in this regard is in misapprehension of the Explanation to section 10B of the Act, which clearly laid down the approval by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and the rules made under that Act.*

5. *The learned Commissioner of Income Tax (Appeals) while allowing the assessee's claim u/s.10B failed to appreciate that the functions delegated to IMSC did not include approval of STPI for claim u/s.10B of the Income Tax Act 1961.*

6. *The learned Commissioner of Income Tax (Appeals) further erred in directing to allow the deduction u/s.10A by holding that deduction u/s.10A is part materia to deduction u / s.1 OB and*

when 10B deductions denied, 10A deduction becomes automatic.

7. The learned Commissioner of Income Tax (Appeals) while directing to allow the alternate deduction u/s.10A has not brought on record Form-56G which was required to be furnished by the assessee as per subsection (5) of section 10A of the Act.

8. It is prayed that the orders of the learned Commissioner of Income Tax (Appeals) in this regard be reversed and that of the Assessing Officer restored.

9. For these and other grounds that may be urged at the time of hearing, it is requested that the order of the Commissioner of Income Tax (Appeals) may be set aside and that of the Assessing Officer restored.

6. The learned Departmental Representative strongly relied on the grounds raised. The learned AR, on the other hand, strongly supported the order of the CIT(A).

7. We have heard the rival submissions and perused the material on record. As per Explanation to section 10B of the Income Tax Act, 1961, "*hundred per cent export-oriented undertaking*" means *all undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act*". The Assessee's claim for exemption u/s.10B of the Act was on the basis of approval as 100% EOU under STPI scheme. As per the decision of Hon'ble

Delhi High Court in the cases *CIT v. Regency Creations Ltd.* and *CIT v. Valiant Communications Ltd.* [(2013) 353 ITR 326 (Del)], approval under STPI scheme cannot be equated to approval as hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the Rules made under that Act. The relevant portion of the judgment of the Hon'ble Delhi High Court in the case of *CIT v. Regency Creations Ltd. and CIT v. Valiant Communications Ltd.* (*supra*), reads as follows:-

"Both assesses had received approval to start 100 per cent EOU under STP scheme. The question is whether this approval can be deemed one under Section 10-B of the Act. For that purpose a 100 per cent EOU is only that which is so approved by the Board appointed by Central Government in exercise of powers conferred under Section 14 of IDAR Act, 1951. The pre-conditions that govern units set up under STP scheme are different from those that govern the units set up as 100 per cent EOUs and so approved by the Board. Some conditions may undoubtedly overlap yet, criteria, such as fulfillment of the employment criteria foreign exchange, etc., are not common.

Section 10A extends the exemption to the units set up under STP scheme which start production of goods during the previous year relevant to the assessment year commencing on or after 1st April, 1994. The assessee's plea about eligibility of a 100% EOU STP eligible for exemption would render the amendment brought about by the Finance Act, 1993 (extending the benefit under Section 10A of the Act to the STPs from 1st April, 1994) superfluous. There is no reason for Parliament to amend the law, and extend benefits of Section 10A to units under STP scheme and,

restrict the benefits to those commencing their operations in the year of account relevant to the Assessment year 1994-95, if a STP unit is otherwise eligible for exemption under Section 10B of the Act on the ground of its being 100 per cent EOU.

In the present case, there is no notification or official document suggesting that either the Inter Ministerial Committee, or any other officer or agency was nominated to perform the duties of the Board (constituted under Section 14 of the IDR Act), for purposes of approvals under Section 10-B. Though the considerations which apply for granting approval under Sections 10-A and 10-B may to all extent, overlap, yet the deliberate segregation of these two benefits by the statute reflects Parliamentary intention that to qualify for benefit under either, the specific procedure enacted for that purpose has to be followed. There is nothing in any of the Circulars or instructions relied on by the Tribunal in all the orders, implying that approval for purposes of an STP also entitled the unit to a benefit under Section 10-B."

7.1 In the light of above said judgment, approval as 100 per cent Export Oriented Undertaking under Software Technology Park of India (STPI) scheme cannot be considered sufficient for granting benefit of section 10B of the Income Tax Act.1961. The facts of the case in above decision of the Hon'ble Delhi High Court apply squarely in this case. Accordingly, the assessee, not being approved by the Board appointed by the Central Government in exercise of powers conferred u/s 14 of the Industries (Development and Regulation) Act, 1951, is not eligible for exemption u/s 10B of the I.T.Act. It is ordered accordingly.

8. As regards the alternative claim of deduction u/s 10A of the I.T.Act, the assessee had made a claim by furnishing a certificate in Form No.56F before the assessment order was finalized. To claim deduction u/s 10A of the I.T.Act, the assessee is required to file audit report in Form No.56F. Even if the certificate as required u/s 10A of the I.T.Act was not filed along with the return of income, the provision regarding filing of audit report is only directory and not mandatory and the audit report can be filed during the course of assessment proceedings. In the instant case, the audit report was filed in the course of assessment proceedings and there is no error in granting deduction u/s 10A of the I.T.Act. In the following judicial pronouncements, it has been held that the claim of deduction on similar circumstances should be allowed by the Assessing Officer:-

- (i) In the case of *ITO vs Device Driven (India)(P) Limited* in a case where claim under IOB was denied the Hon. Cochin Bench of the Tribunal restored the matter of deduction u/s IOA of the Act before the AO with the direction to examine the claim for deduction u/s IOA of the Act and take appropriate decision in accordance with the law, after affording necessary opportunity of being heard.

(ii) In the case of *Cronos Consulting India (P) Ltd. vs ACIT [(2014) 49 taxmann.com 432]*, the Cochin Tribunal held that the alternative claim made by the assessee claiming deduction under section IOA should be considered by the tax authorities and hence restored the same to the file of the Assessing Officer with the direction to examine the claim for deduction under section IOA of the Act in the hands of the assessee and take appropriate decision in accordance with the law, after affording necessary opportunity of being heard to the assessee.

(iii) In the case of the *CIT vs. Flytxt Technology (P.) Ltd [(2017) 87 taxmann.com 77 (Kerala)]*, the Kerala High Court relied on the decision of the Hon Delhi High Court in the case of Regency Creations wherein the High Court had directed the Tribunal to examine the claim of the assessee for the benefit of Section IOA.

9. In view of the aforesaid reasoning, we are of the view that the assessee is not entitled to deduction u/s 10B of the I.T.Act, whereas, the alternative claim of deduction u/s 10A of the I.T.Act, the claim should be granted to the assessee provided that necessary pre-condition for satisfaction of the same are qualified in assessee's case. It is ordered accordingly.

10. In the result, the appeal filed by the Department is partly allowed.

Order pronounced on this 19th day of March, 2019.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 19th March, 2019.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The Pr.CIT-I, Kochi
4. The CIT(A)-I, Kochi.
5. The DR, ITAT, Cochin.
6. Guard file.

BY ORDER,

AR-ITAT- Cochin