IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI

BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI C.N. PRASAD, JUDICIAL MEMBER

ITA NO. 3107/MUM/2016 : A.Y : 2006-07

Larsen & Toubro Infotech Ltd., Taxation Dept., L&T House, 2nd floor, N.M. Marg, Ballard Estate, Mumbai 400 001. **PAN : AAACL1681P** (Appellant)	Vs.	Principal Commissioner of Income-tax -2, Mumbai. (Respondent)

Appellant by : Shri Vijay Mehta
Respondent by : Shri B. Pruseth

Date of Hearing : 22/07/2019
Date of Pronouncement : 24/07/2019

O R D E R

PER G.S. PANNU, VICE PRESIDENT

The captioned appeal by the assessee is directed against the order passed by the Pr. CIT – 2 (in short "the Commissioner"), Mumbai, dated 21.03.2016, holding the assessment order passed by the Assessing Officer u/s.143(3) r.w.s.147 of the Act, dated 31.03.2014, pertaining to Assessment Year 2006-07, as erroneous insofar as it was prejudicial to the interest of the Revenue within the meaning of Section 263 of the Income-tax Act, 1961 (in short "the Act").

2. In its appeal, assessee has raised the following Grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the learned Pr. Commissioner of Income-tax-2 ["Pr. CIT"] erred in holding that the order dated 31 March 2014 passed by the Assessing Officer u/s 143(3) r.w.s. 147 of the Income-tax Act, 1961 ["Act"] is erroneous and prejudicial to the interest of revenue on account of non-setting off of loss of ineligible unit against profit of other units eligible for deduction u/s 10A.

2. Without prejudice to Ground No. 1, on the facts and in the circumstances of the case and in law, the learned Pr. CIT erred in directing to treat all separate units as one single unit and disregarding the eligibility of each unit for the purpose of deduction under section 10A of the Act.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not appreciating the fact that the appellant had filed a declaration u/s 10A(8) for not opting for deduction for 1 (one) unit along with the Return of Income."

3. Briefly put, the relevant facts are that the assessee is a company incorporated under the provisions of the Companies Act, 1956 and it is, inter-alia, engaged in the business of software development and also undertakes export of software. In the return of income filed by the assessee for Assessment Year 2006-07, total income of Rs. 1,87,66,319/- was declared under the normal provisions of the Act and book profit of Rs. 5,41,39,748/- u/s 115JB of the Act was declared wherein, inter-alia, exemption u/s 10A of the Act was claimed at Rs. 80,12,73,491/-. In the assessment finalised u/s 143(3) of the Act dated 18.12.2009, the total income was determined at Rs.6,16,82,070/- under the normal provisions of the Act and book profit at Rs.5,41,39,748/- after scaling down the assessee's claim u/s 10A of the Act to the extent of Rs. 4,88,37,287/-. Subsequently, case of the assessee was reopened u/s 147 of the Act vide notice u/s 148 of the Act dated 31.03.2013 for the reason that assessee was not eligible for exemption u/s 10A of the Act

as it was not developing any software as envisaged in Section 10A of the Act. In the order passed u/s 143(3) r.w.s. 147 of the Act, the Assessing Officer further scaled down the assessee's claim u/s 10A of the Act to the extent of Rs.48,15,41,883/-.

4. Subsequently, the Commissioner invoked Section 263 of the Act on the ground that while passing the order u/s 143(3) r.w.s 147 of the Act, the Assessing Officer erred in not setting-off the loss of ineligible units against the profits of eligible units for the purposes of allowing exemption under Section 10A of the Act. The Commissioner issued a show-cause notice dated 02.03.2016 stating that assessee had a loss of Rs. 1,14,81,554/- pertaining to Hyderabad (non-eligible) unit. This loss was not reduced from the amount of exemption claimed u/s 10A of the Act. As per the Commissioner, Section 10A is now a '*deduction*' provision, therefore, first the income/loss from various sources i.e. eligible and ineligible units under the same head have to be aggregated in accordance with Section 70 of the Act and thereafter, the income from one head has to be aggregated with the income or loss of the other head in accordance with Section 71 of the Act. If after giving effect to the provisions of Section 70 and 71 there is any income (where there is no brought forward loss to be set-off in accordance with the provisions of Section 72 of the Act), and the same is eligible for deduction as per the provisions of Section 10A of the Act, the same shall be allowed in computing the total income of the assessee. According to the Commissioner, the Assessing Officer has not verified the claim u/s 10A of the Act on this aspect and, therefore, the order passed by the Assessing Officer dated 31.03.2014 (supra) is erroneous and prejudicial to the interest of the Revenue.

5. In response to the notice issued u/s 263 of the Act, the assessee raised various pleas resisting the action of the Commissioner. Firstly, assessee canvassed before the Commissioner that the view adopted by the Assessing Officer was one of the possible views and, therefore, the same cannot be said to be erroneous and prejudicial to the interest of Revenue. The second argument put forth by the assessee was that the treatment given by the Assessing Officer was in accordance with the law, and in this regard reliance was placed on various case laws. In fact, in the course of hearing before us, our attention was also drawn to the decision of the Hon'ble Bombay High Court in assessee's own case for earlier years. On this basis, assessee justified its computation of exemption u/s 10A of the Act accepted by the Assessing Officer.

6. However, the submissions put forth by the assessee did not find favour with the Commissioner, who proceeded to hold that the assessment order dated 31.03.2014 (supra) was not only erroneous, but also prejudicial to the interest of Revenue within the meaning of Section 263 of the Act placing reliance on the CBDT Circular dated 16.07.2013 to hold that the Assessing Officer ought to have set-off the loss of ineligible unit against the income of eligible units before allowing exemption u/s 10A of the Act. Accordingly, the Commissioner set-aside the assessment order with direction to the Assessing Officer to set-off the loss of ineligible unit against the eligible unit u/s 70 of the Act before allowing exemption u/s 10A of the Act.

7. Against such a decision of the Commissioner, assessee is in appeal before us. The first and the foremost plea raised by the assessee before us is that the impugned order passed by the Commissioner u/s 263 of the Act was

ultra vires the provisions of Section 263 of the Act inasmuch as the conditions precedent therein were not satisfied. Section 263 of the Act provides that the Commissioner can revise the order passed by the Assessing Officer within two years from the end of the financial year in which the order sought to be revised was passed. The time period of two years is to be computed from the date of the original assessment order passed u/s 143(3) of the Act and not from the date of assessment order passed u/s 143(3) r.w.s. 147 of the Act. The assessment order u/s 143(3) of the Act was passed on 18.02.2009. Two years from the said financial year ended on 31.03.2011. The notice u/s 263 of the Act was issued on 02.03.2016 and thus, the notice u/s 263 of the Act is barred by limitation, *ultra virus* and bad in law. In support of this, the learned representative for the assessee relied on the decision of the Hon'ble Supreme Court in the case of *CIT vs. Alagendran Finance Ltd. [2007] 293 ITR 1 (SC).* The next argument put forth by the learned representative was that the issue of set-off of loss of ineligible unit against the eligible unit has been decided by the Hon'ble Bombay High Court in favour of the assessee for Assessment Years 2002-03 and 2005-06. As such, the view taken by the Assessing Officer was one of the possible views and, therefore, the same cannot be said to be erroneous in law. Further, the learned representative placed reliance on the decision of the Hon'ble Supreme Court in the case of *CIT vs. Yokogawa India Ltd. [2017] 391 ITR 274 (SC)* wherein it has been explained that consequent to the amendment w.e.f. 01.04.2001, the benefit prescribed in Section 10A of the Act is in the nature of a deduction, and not an exemption; so, however, the deduction is to be allowed in computing the gross total income of eligible undertaking under Chapter IV and not at stage of computation of total income under Chapter VI of the Act.

8. On the other hand, the ld. DR appearing for the Revenue has defended the instant action of the Commissioner to revise the assessment u/s 263 of the Act and relied upon the decision of the Hon'ble Supreme Court in the case of *K.P. Varghese vs. ITO [1981] 131 ITR 597* to say that the Circulars issued by the CBDT are binding on the Department and thus, the Commissioner has rightly exercised his jurisdiction to issue direction to revise the assessment order in compliance with the Circular of the CBDT.

9. In the context of the rival stands, we may now examine the manner in which the Commissioner has justified the fulfilment of conditions prescribed in Section 263(1) of the Act in his order. Pertinently, and as has also been explained by the Hon'ble Supreme Court in *Malabar Industrial Co. Ltd. vs. CIT, 243 ITR 83*, invoking of Section 263 of the Act can be justified only on satisfaction of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. It is a trite position of law that even if one of the aforesaid conditions is absent in a given case, then invoking of Section 263 of the Act would be untenable in law. Our discussion in the above paras clearly show that the main contention of the Commissioner is that the order passed by the Assessing Officer was not in accordance with the CBDT Circular dated 16.07.2013 and, therefore, the order passed by the Assessing Officer was erroneous and prejudicial to the interests of the Revenue. Before proceeding further, we may make it clear that there is no dispute with respect to the fact that in the course of assessment proceedings and even in the course of reassessment proceedings, which was reopened on the issue of exemption u/s 10A of the Act, the Assessing Officer had called for details and made inquiries and thereafter varied the assessee's claim of exemption u/s 10A of the Act.

Thus, admittedly Assessing Officer has arrived at a particular conclusion which is now sought to be revised by the Commissioner by exercising his revisionary power u/s 263 of the Act. The Hon'ble Bombay High Court in the case of *CIT vs. Gabriel India Ltd., 203 ITR 108* held that there must be material before the Commissioner to satisfy himself that two requisites provided u/s 263 of the Act are present, otherwise power cannot be exercised at the whims and caprice of the Commissioner. It is not permissible u/s 263(1) of the Act to substitute the judgment of the Commissioner for that of the Assessing Officer unless the conditions stipulated therein are satisfied. The order of the Assessing Officer cannot be termed as erroneous simply because Commissioner does not agree with the conclusion drawn by the Assessing Officer. The Hon'ble Bombay High Court in the case of *CIT vs. Development Credit Bank Limited (2010) 323 ITR 206*, on a somewhat similar situation, wherein assessment order was passed after considering all details called for and furnished by the assessee, the invoking of revisional jurisdiction by the Commissioner on the ground that enquiry was not conducted, was held to be not justified.

10. Be that as it may, we shall now advert to the decision relied upon by the learned representative on merits of the case. In the case of *CIT vs. Yokogawa India Ltd. (supra)*, one of the questions raised was :-

> *"Whether losses of other section 10A units or non-section 10A units could be set off against the profits of section 10A units before deductions under section 10A could be effected?"*

On this, the Hon'ble Supreme Court held as under:

> *"..*
> *16**.** From a reading of the relevant provisions of Section 10A it is more than clear to us that the <u>deductions contemplated therein is qua the eligible undertaking of</u>*

*an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee.The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee***.** *This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that,*
"The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision."

17. *If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No. 794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application.The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income***.** *The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'.*

18. *For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI***.** *All the appeals shall stand disposed of accordingly."*

(underlined for emphasis by us)

The above decision of the Hon'ble Supreme Court, in our view, clearly answers the argument raised by the Commissioner for which he has sought to revise the assessment order passed by the Assessing Officer. The above decision clearly justifies the action of the Assessing Officer in not setting-off the loss of ineligible unit against the profits of eligible unit. Thus, on this ground alone we find that the order passed by the Assessing Officer was very much in accordance with the law and the same cannot be faulted with and Commissioner had no power to exercise his revisionary jurisdiction in such cases. Since the issue involved in appeal has already been decided by the Hon'ble Supreme Court in favour of the assessee, following the said decision, the impugned order passed by the Commissioner u/s 263 of the Act is hereby set-aside. Since we have already decided the issue on merits of the case, we are not inclined to deal with other arguments put-forth by the assessee in appeal.

11. In the result, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 24th July, 2019.

Sd/-	Sd/-
(C.N. PRASAD)	**(G.S. PANNU)**
JUDICIAL MEMBER	**VICE PRESIDENT**

Mumbai, Date : 24th July, 2019

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Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, “D” Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai