

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM
(through web-based video conferencing platform)**

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.574-577/Viz/2019 and 609/Viz/2019
(निर्धारण वर्ष/Assessment Year:2007-08 to 2010-11 and 2011-12)**

M/s First Tek Private Limited
Bhavanasi Anjaneyulu
Sri Balaji Chemical Industries
Main Road, Piduguralla
Guntur
[PAN : AAACF8840N]
(अपीलार्थी/ Appellant)

Vs. Asst.Commissioner of
Income Tax
Central Circle
Vijayawada

(प्रत्यर्थी/ Respondent)

**आयकर अपील सं./I.T.A.No.607/Viz/2019 and 608/Viz/2019
(निर्धारण वर्ष/Assessment Year:2009-10 and 2011-2012)**

Asst.Commissioner of
Income Tax
Central Circle
Vijayawada

(अपीलार्थी/ Appellant)

Vs. M/s First Tek Private Limited
Bhavanasi Anjaneyulu
Sri Balaji Chemical Industries
Main Road, Piduguralla
Guntur
[PAN : AAACF8840N]
(प्रत्यर्थी/ Respondent)

निर्धारिती की ओर से / Assessee by
राजस्व की ओर से / Revenue by

: Shri G.V.N.Hari, AR
: Shri D.K.Sonowal, CIT, DR

सुनवाई की तारीख / Date of Hearing
घोषणा की तारीख/Date of
Pronouncement

: 23.09.2020
: 24.11.2020

आदेश /ORDER

Per Bench :

These appeals are filed by the assessee against the order of the Commissioner of Income Tax (Appeals) [CIT(A)]-3, Visakhapatnam in Appeal No.87-90/2015-16/CIT(A)-3/VSP/2019-20 dated 30.07.2019 for the Assessment Years (A.Ys) 2007-08 to 2010-11 and by the revenue in Appeal No. 89 & 91/2015-16/CIT(A)-3/VSP/2019-20, dated 30.07.2019 for the A.Y.2009-10 and 2011-12.

Since the issues involved in these appeals are common, these appeals are clubbed, heard together and a common order is being passed for the sake of convenience.

2. During the pendency of appeal proceedings, the assessee has filed the additional grounds for the A.Y. 2007-08, 2008-09 and 2009-10 which reads as under :

A.Y. 2007-08

- 1. The order of the learned Commissioner of Income Tax (Appeals) is contrary to the facts and also the law applicable to the facts of the case.*
- 2. The learned Commissioner of Income Tax (Appeals) ought to have held that the addition of Rs.27,82,846 towards disallowance of exemption is outside the scope of assessment u/s 143(3) r.w.s.153A.*

*I.T.A. No.574-577/Viz/2019 & 609/Viz/2019, A.Y. 2007-08 to 2010-11 & 2011-12
I.T.A. No. 607/Viz/2019 & 608/Viz/2019, A.Y.2009-10 & A.Y.2011-12
M/s First Tek Pvt. Ltd., Guntur*

Without prejudice to the above, the In the learned Commissioner of Income Tax (Appeals) is not justified in sustaining the addition of Rs.27,82,846 made by the assessing officer towards disallowance of Exemption u/s 10A of the Act.

A.Y.2008-09

- 1. The order of the learned Commissioner of Income Tax (Appeals) is contrary to the facts and also the law applicable to the facts of the case.*
- 2. The learned Commissioner of Income Tax(Appeals) ought to have held that the addition of Rs.76,48,516 towards disallowance of exemption is outside the scope of assessment u/s 143(3) r.w.s.153A*
- 3. without prejudice to the above, the learned Commissioner of Income Tax (Appeals) is not justified in sustaining the addition of Rs.76,48,516 made by the assessing officer towards disallowance of exemption u/s 10A of the Act.*

A.Y.. 2009-10

- 1. The order of the learned Commissioner of Income Tax (Appeals) is contrary to the facts and also the law applicable to the facts of the case.*
- 2. The learned Commissioner of Income Tax (Appeals) ought to have held that the addition of Rs.11,71,115 towards disallowance of exemption u/s 10A and addition of Rs1,07,499 u/s 14A are outside the scope of assessment u/s 143(3) rw.s.153A*
- 3. Without prejudice to the above, the learned Commissioner of Income Tax (Appeals) is not justified in sustaining the:*
 - a) addition of Rs.11,71,115 made by the assessing officer towards disallowance of exemption u/s 10A of the Act*
 - b) addition of Rs.1,07,499 made by the assessing officer u/s 14A of the Act.*

2.1. The Ld.AR argued that the additional grounds raised by the assessee are legal grounds and the entire material is available in the records for

adjudication of the additional grounds and no fresh verification is required to adjudicate the issue. Since the issue goes to the root of the assessment , the Ld.AR requested to admit the additional grounds and adjudicate the issue.

2.2. We have heard both the parties and admit the additional grounds raised by the assessee for the Assessment Years (A.Y.) 2007-08 to 2009-10.

3. The first issue which is common for the A.Ys.2007-08 to 2011-12 is denial of exemption claimed by the assessee u/s 10A of the Income Tax Act, 1961 (in short 'Act). The assessee has claimed exemption u/s 10A for the A.Ys 2007-08 to 2011-12 which the Assessing Officer (AO) disallowed as per the details given hereunder :

A.Y.	Exemption (in Rs.)
2007-08	27,82,846
2008-09	76,48,516
2009-10	11,71,115
2010-11	36,70,252
2011-12	1,81,692

4. Brief facts of the case: For the sake of convenience, the facts are extracted from the A.Y.2007-08 which are common to all the impugned A.Ys except change in the amounts. The assessee is a company in which

public are not substantially interested and registered with Software Technology Parks of India (STPI) for providing, development and export of software. For the A.Y.2007-08, the assessee company has claimed the deduction u/s 10A of Rs.27,82,846/-. The Year-wise software exports and deduction u/s 10A claimed by the assessee for the A.Ys 2006-07 to 2010-11 are as under :

S.No.	Assessment Year	Total Software Exports (Rs.)	Deduction u/s 10A	Profit margin
1.	2006-07	88,08,620	-	-
2.	2007-08	2,15,50,525	27,82,846	12.9%
3.	2008-09	2,11,43,740	76,48,516	36.2%
4.	2009-10	91,27,720	11,71,115	12.8%
5.	2010-11	96,92,350	48,60,862	50.2%

4.1. Search u/s 132 was carried out in the assessee's case on 21.01.2011 and during the course of search, certain documents were found and seized as annexure A/FTPL/PO/15 dt.15.02.2011. The Assessing Officer (AO) in para No.6.3 of the order stated that the seized documents are related to the application made by the assessee for registration with STPI. Vide letter dated 11.10.2015 the assessee submitted the Vendors Services Agreement of First Tek Pvt.Ltd. to STPI and the Vendor Services Agreement refers to Temporary Staff Augmentation services but not Development of software products. The DDIT (Inv.), Guntur has also called for information from STPI

and the STPI furnished the copy of agreement entered by the First Tek Pvt. Ltd. with other companies. One of such agreements was the Vendor Services Agreement for providing Staff Augmentation Services dated 09.05.2005. On the day of search, the premises of the company was locked and it was found that no employee was working in the premises of the company. Subsequently a statement was recorded from Sri Bhavanasi Anjaneyulu, Managing Director of the Company, who stated that the computers were sold to M/s Tisyne, Jubilee hills, Hyderabad and the furniture and fixtures were sold to M/s KRB Financial service, Hyderabad and the server was available at his residence in Piduguralla, Guntur District and there were no operations at present. The AO found that the assessee has leased out the company to M/s E2S Corporation for the F.Y.2007-08 and the equipment was sold to M/s KRB Financial Services, thus, viewed that the assessee has not carried out any software development and the entire furniture and fixtures were given on lease to Decoders Info Services in the beginning of F.Y.2007-08, thus held that the claim of export of software by the assessee is bogus with an intention to claim bogus deduction u/s 10A of the Act. The AO collected the information with regard to registration, Softex forms and agreement with

the client and observed that the company got approval for setting up of 100% export oriented unit for manufacture and export of computer software under the head 'Software Development'. The Vendors Services Agreement was entered in to between the First Tek Private Limited, Hyderabad and First Tek Technologies Inc. USA which was signed by Sri Bhavanasi Satyakumar representing First Tek Private Limited, Hyderabad in the capacity of President of the Company and Ashok Shetty, representing First Tek Technologies Inc., USA. Sri Bhavanasi Satyakumar S/o Sri Bhavanasi Anjaneyulu is holding controlling position in First Tek Technologies Ltd., to control, manage and enjoyment of funds was vested with Bhavanasi Anjaneyulu and his family members. The AO observed from the vendor services agreement that the assessee is engaged in supply of manpower services and listed out certain inconsistencies in the agreement and observed that there was no export of software. The assessee was also unable to explain and substantiate the primary fact as to what kind of software was developed, the specific requirements of First Tek Technologies Inc.USA which led to suspicion and genuineness of the software export claimed by the assessee. The AO further observed during the search proceedings that there was no evidence with regard to

software development and the assessee was asked to furnish the documentation for software developed, source code, work orders received from the clients and the time sheets etc, for which the assessee could not furnish any of the said details before the AO. The AO also found certain discrepancies in respect of advances received by the assessee from its client i.e. Sri Satya Kumar made remittances to the assessee's account instead of First Tek Technologies Inc. USA. The above mentioned defects and the discrepancies found during the course of search and subsequent to search made the AO to believe that there was no export of software and the software export claim of the assessee was only with an intention to claim the deduction u/s 10A. Hence, disallowed the deduction claimed by the assessee u/s 10A amounting to Rs.27,82,846/- and added back to the income.

5. Against the order of the AO the assessee went on appeal before the CIT(A) and furnished the additional evidence which was forwarded by the Ld.CIT(A) to the AO and called for the remand report. The AO submitted the remand report. The assessee furnished explanation stating that it has made exports and received inward remittances in foreign exchange. The company is registered with STPI and furnished all the documents that are

required by STPI such as Softex Forms, details of exports etc.. and raised the invoices for software export for the developed products. The payments were received against development of software and the same was submitted to the STPI which was accepted. The assessee further submitted before the CIT(A) that the assessee has paid the salaries, engaged sufficient staff and infrastructure. In support, the assessee furnished the salary payment details along with payment of EPF and ESI. Therefore, argued that the all the evidences that are required for establishment of software development and export was furnished, hence requested the CLd.IT(A) to allow the appeal of the assessee. The Ld.CIT(A) considered the remand report of the AO, reply of the assessee and found that the assessee has not produced any evidence before the AO to substantiate the export of software and the documents furnished by the assessee were only related to various authorities and viewed that the receipt of funds from banking channels does not establish export of software. Payment of PF, ESI also does not lead to any evidence with regard to engagement of staff without furnishing the details of salary payment etc., therefore, held that the AO has rightly denied the exemption claimed u/s 10A of the Act. Accordingly, confirmed the addition and dismissed the appeal of the assessee on this ground.

6. Against which the assessee filed appeal before us. For the A.Y. 2007-08, 2008-09 and 2009-10, the assessee filed additional ground objecting for disallowance of deduction u/s 10A, stating that the assessments for the A.Y.2007-08, 2008-09, 2009-10 are unabated and no positive information was found by the department during the course of search to hold that the assessee was not engaged in the export of software. Therefore, submitted that the disallowance made by the AO without incriminating material is outside the scope of assessment u/s 153A, hence requested to set aside the order of the lower authorities and allow the appeal of the assessee.

6.1. On merits, the Ld.AR submitted that the assessee has furnished the entire information relating to development of software and export, such as registration with STPI, Softex Forms, agreement entered with the clients, receipt of foreign inward remittances, permission given by the STPI for expansion of the unit, central excise bond etc. The invoices were raised for development of software, which was accepted by the STPI and no adverse remark was made by STPI with regard to software export of the assessee company. No information was found during the course of search or collected by the AO subsequent to the search to establish that either there was no export or the claim made by the assessee was bogus. Therefore,

argued that the assessee has rightly claimed the deduction u/s 10A, hence requested to allow the deduction claimed u/s 10A of the Act.

7. On the other hand, the Ld.DR submitted that for the A.Y. 2007-08, 2008-09 and 2009-10, the AO rightly disallowed the deduction claimed u/s 10A and there was enough material that was found and seized during the course of search, marked as annexure A/FTPL/PO/15 dated 15.02.2011 and annexure A/FTPL/PO/12 dated 15.02.2011 indicating the bogus nature of software development and export. The AO made the search assessments taking cue from the material found and seized during the course of search, thus explained that there was no error in search assessments, hence, argued that no interference is called for in the orders of the lower authorities. Therefore, requested to uphold the orders of the lower authorities and dismiss the appeal of the assessee on technical grounds.

7.1. With regard to merits, the Ld.DR argued that the evidence was found during the course of search and enquiries made during the assessment proceedings proves that the assessee had let out the building and receiving the rent from the beginning of the year 2007-08, thus the assessee failed to

establish that it had carried the export activity. The assessee did not furnish any evidence called for by the AO to prove the software development and the export of the software products. The defects brought out by the AO in the assessment order clearly show that the assessee failed to establish that it was in software development or software export. The inward remittances were only to claim the deduction u/s 10A, therefore submitted that the AO rightly disallowed the deduction claimed by the assessee u/s 10A, hence, argued that on merits also, the assessee's case deserves to be dismissed.

8. We have heard rival contentions and gone through the orders of the lower authorities. In this case, the assessee filed the returns of income and declared the exports and claimed the deduction u/s 10A in respect of software development and exports made by the assessee. A search u/s 132 was conducted in this case and during the course of search, no material was found to establish that either exports were bogus or the assessee has not made any exports. With some stray leads, the AO landed in suspicion that there were no genuine exports. The AO during the search or subsequent to the search observed the activity of the assessee as staff augmentation services or vendor services agreement and the defects such

as non furnishing of the details of salary payments and non availability of furniture and fixtures and servers in the premises, the difference in total turnover and the remittances, non submission of copies etc and some deficiencies in inward remittances. The agreement between the assessee and the First Tek Private Limited, dated 09.05.2005 was also not submitted to STPI. Therefore, the AO disbelieved the export activity. However, during the assessment proceedings as well as subsequent to appeal proceedings, the assessee furnished the evidence with regard to inward remittances, Softex forms, payment of PF, ESI etc. The assessee also submitted the evidence with regard to bonds executed by the assessee in favour of Central Excise Department. Apart from the above, the assessee was also permitted to establish the computer software unit under STPI scheme. Permission for expansion letter was issued by STPI vide letter dated 16,07.2010. The Ministry of Commerce, Certificate of Importer Exporter Code dated 11.07.2005 giving permission to the assessee for imports and exports, copy of agreement between the assessee and foreign company to provide IT enable services, the invoices claiming the wages of number of persons engaged in development of software and copies of invoices, receipt of foreign exchange, payment of PF, ESI etc was placed

before the CIT(A). AO in his remand report with regard to additional evidence such as central excise bond, expansion letter, agreement copy for export of software, Ministry of Commerce letter, simply brushed aside stating that the evidence in respect of Central Excise and Ministry of Commerce are only furnishings, but not conclusive proof for export of software. With regard to PF, ESI, vendor service agreement, the AO rejected the contention of the assessee stating that in the absence of complete details, the same cannot be accepted as conclusive evidence. The assessee is in the business of export of software registered under STPI scheme. STPI is single window project, where it provides all services for export in single window scheme. Once the assessee is registered with STPI, the assessee required to submit the information from time to time with regard to software exports, furnish softex forms etc. to the STPI. The Reserve Bank of India also monitors the exports and accord permission for receipt of money in foreign exchange. Though the search was conducted in the instant case, no evidence was gathered by the department to establish that either the exports were bogus or the assessee has not made any exports. As stated by the Ld.AR the company was defunct by the time search was conducted and the entire furniture and fixtures were taken out

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of unit and located at his residence. The AO himself had accepted in the assessment order for the A.Y.2007-08 that the assessee has raised invoices exporting software product to its client, First Tek Technologies Ltd., and submitted softex forms to the STPI, Hyderabad for issuing clearance for foreign inward remittances. The details were also extracted by the AO in the Assessment order. In reply to the remand report, the assessee submitted a rejoinder as under before the CIT(A):

"For the assessment year 2007-08, the issue involved is with regard to exemption u/s.10A of the I.T. Act. According to the Assessing Officer, the appellant is not entitled for exemption u/s 10A of the LT. act as the activity of the appellant is not production or development of computer software. The Assessing Officer mentioned that the work undertaken by the appellant is staff augmentation service. The Assessing officer failed to consider the agreement between the appellant and the foreign company which is meant for software export. This was submitted before the Assessing Officer. The appellant also submitted the details provided by the Central Excise Department which is meant for the development of software.

The Assessing Officer also did not consider the fact that the invoices raised are against supply of software and not for provision of staff. The appellant submitted in the explanation that it is entitled for exemption u/s,10A of the L T. Act in view of the fact that the appellant is developing the software and exporting the same; the invoices were raised the against supply of software and the amount received against supply of software. Therefore, the provisions of Sec..10A are applicable to the facts of the case,

The Assessing Officer is of the view that EPF and salary payments did "not indicate that they were made for development of software. This is not justified. The appellant submits that there are substantial salary payments made by the appellant. The nature of work referred to by the employee would not be indicated either to PF, EFP or to any other authority. In the circumstances, expecting the appellant to state the nature of the work of the employee in the statement by the Assessing Officer is not justified.

The Assessing Officer mentioned that the appellant did not provide any

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evidence about the development of software. This is not correct. The permission was obtained from STPI for development of software, The invoices were raised for development of software. The payments were received against development of software. The Invoices were submitted to the STPI and the STPI also accepted the same. “

8.1. The conjoint reading of the reply of the assessee, the assessment order and the CIT(A) order reveals that the assessee has discharged the burden with regard to software development and export of software services by furnishing necessary information to the STPI and also before the AO. Merely because of some defects, the same cannot be brushed aside and deny the exemption claimed by the assessee u/s 10A of the Act. It is for the department to establish that the assessee has not made software exports or prove that the information furnished by the assessee is false or incorrect. No such exercise was done by the department. No adverse observations were made by the STPI with regard to exports. Though PF, ESI payment does not establish the salary payments, they definitely show that the assessee has engaged the personnel for carrying the work. The AO has not conducted any enquiries either with the clients of the assessee or with the STPI to show that the assessee has neither developed the software nor exported the same to the foreign company. STPI is a Government Agency which monitors the activities of the assessee company and

collecting timely reports for export of software. The very fact that the STPI has permitted expansion of operations shows that the assessee company was engaged in software development which is proposed for expansion of the existing activity at a broader level. All these facts show that the assessee is carrying on software activity in the STPI and made the exports. Once there is evidence for software export made through STPI and clearance received from STPI by softex forms and the receipt of foreign exchange remittances, it is for the department to bring evidence to deny the exemption u/s 10A of the Act. In the instant case, no such evidence was brought on record by the AO. On the similar facts, the ITAT, 'B' Bench, Hyderabad in the case of Annapurna Business Solutions, I.T.A.No.831/H/2015 to 836/H/2015 dt.17.12.2019 held that the assessee is entitled for deduction u/s 10A. For the sake of clarity and convenience, we extract para No.15.2 in page No.57 of the order which reads as under :

"15.2. In the instant case, though the department has alleged that the assessee is not exporting the software, but engaged in the body shopping no conclusive evidence was brought on record to support the department's contention. As per the provisions of section 10A of the Act, the assessee engaged in the export of software is entitled for deduction of 100% profits derived from the export of software. In the instant case, by providing various details, information, the assessee has proved that it was in the activity of software export and received foreign exchange on account of software export. No enquiries were made with the importing country, no evidence was brought on record from the STPI to establish that the assessee's claim is bogus. Therefore, we have no reason to disbelieve the export of software made by the assessee. Thus, we hold that

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the assessee made export of software and entitled for deduction u/s 10A of the Act.”

8.2. Since the facts are similar and the department has not brought any evidence to controvert the submission of the assessee, we are of the considered view that there is no reason to deny the deduction u/s 10A, accordingly, we set aside the orders of the lower authorities and direct the AO to allow the deduction u/s 10A of the Act. **In the result, appeals of the assessee for the A.Y. 2007-08 to 2011-12 on this ground are allowed.**

9. The assessee has raised the additional ground challenging the validity of making assessment u/s 153A for the A.Y.2007-08 to 2009-10 stating that in the absence of any incriminating material, the AO is not permitted to make additions u/s 153A. Since we have decided the issue on merits in favour of the assessee, the issues raised by the assessee through additional grounds have only of academic interest. As discussed earlier in this order, the department did not find any material to hold that there was no export or bogus exports. No incriminating material was found by the AO in the course of search except vendor agreement, softex forms found and seized. Softex forms support the claim of the assessee, vendor agreement shows that the assessee has entered into the agreement for augmentation

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of the staff activities and services also. Vendor agreement does not show any negative evidence to deny the claim of deduction u/s 10A of the Act. Therefore, it is found from the orders of the lower authorities that no evidence was found during the search proceedings to deny the exemption u/s 10A of the Act. The company was closed since the business was defunct. Therefore, closure of the company also does not give any material to the AO to hold adverse inferences. Therefore, it is amply clear from the order of the AO and Ld.CIT(A) that the deduction u/s 10A was denied solely on the material available in the assessment records which was declared by the assessee. It is settled issue that without incriminating material in the search assessments, no additions are permitted to be made by the AO in completed assessments. In the instant case, the assessments years are related to 2007-08, 2008-09, 2009-10. The time limit for issue of notice u/s 143(2) got expired and the assessments became unabated. Hence, incriminating material is required for making the additions. This view is supported by the decision of this Tribunal in the case of Y.V.Anjaneyulu, Guntur in I.T.A. No.513 & 514/Viz/2013 and 534/Viz/2013 dated 09.06.2017. For the sake of clarity and convenience, we extract relevant part of the order of this Tribunal in para No.12 which reads as under :

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"12. In this case, search was taken place on 24.7.2008. As on the date of search, the assessments for the assessment years 2004-05 & 2005-06 are already concluded and there is no pending proceeding for those assessment years. The time limit for issue of notice u/s 143(2) of the Act, for the assessment years 2004-05 & 2005-06 has been expired. The A.O. made additions towards deemed dividend u/s 2(22)(e) of the Act without any incriminating materials and also based on the books of accounts and financial statements, which were already part of regular return of income filed by the assessee u/s 139(1) of the Act, for those assessment years. Therefore, considering the facts and circumstances of the case and also respectfully following the decision of coordinate bench of ITAT, Visakhapatnam in the case of Sri Hari Prasad Bhararia Vs. DCIT (supra), we are of the view that the A.O. has no jurisdiction to make additions in respect of concluded assessments in the absence of any incriminating materials found during the course of search. In this case, undoubtedly the A.O. has made additions towards deemed dividend on the basis of financial statements filed by the assessee along with regular return of income without any material found during the course of search. Therefore, we direct the A.O. to delete additions made towards deemed dividend u/s 2(22)(e) of the Act for the assessment years 2004-05 & 2005-06."

9.1. No other decision was brought on record by the department during the appeal hearing to support the department's contention. Therefore, respectfully following the view taken by this Tribunal in the case of Y.V.Anjaneyulu (supra), we hold that the additions made by the AO in respect of deduction u/s 10A for the A.Y. 2007-08 to 2009-10 cannot be sustained on technical grounds also. Accordingly, the assessee succeeds in respect of the additions made u/s 10A for the A.Y. 2007-08 to 2009-10 on legal grounds also. Accordingly, **appeal of the assessee is allowed for the A.Y. 2007-08 to 2011-12 on the issue of exemption u/s 10A.**

10. The next issue in assessee's appeal for the A.Y. 2009-10 and 2010-11 is with regard to the disallowance made u/s 14A of the Act. For the A.Y.2009-10, the assessee raised the additional ground stating that the addition made by the AO in respect of 14A amounting to Rs.1,07,499/- is outside the scope of assessment u/s 143(3) r.w.s. 153A of the Act. As discussed earlier in this order, while discussing the issue of deduction u/s 10A, we have observed that no incriminating material was found in respect of the claim made u/s 10A of the Act. Similarly, during the course of search, no evidence was found relating to income derived by the assessee u/s 14A of the Act. For the A.Y. 2009-10, the time limit for issue of notice u/s 143(2) got expired and the assessment became completed. Therefore, we hold that the disallowance made by the AO u/s 14A is outside the scope of assessment u/s 153A r.w.s. 143(3). Accordingly, we set aside the orders of the lower authorities and delete the addition made by the AO. Appeal of the assessee for the A.Y. 2009-10 in respect of addition made u/s 14A stands allowed.

11. For the A.Y. 2010-11, the AO made the disallowance of Rs.2,12,222/- @0.5% of the average investment u/s 14A of the Act.

11.1. Against the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) upheld the addition made by the AO. For the sake of clarity and convenience, we extract relevant part of the order of the Ld.CIT(A) which reads as under :

“12.2. I have considered the assessment order and submissions of the appellant. The appellant has made investment in shares on which dividend of Rs.4,35,215/- is received by the appellant. The Assessing Officer computed the disallowance as per Rule 8D at 0.5% of average investment. The action of the Assessing Officer is as per the Rule 8D and the same is confirmed. The ground raised is rejected.”

11.2. In the instant case, there was no dispute that the assessee has earned dividend income and provisions of Rule 8D attracts. Accordingly, the AO made the disallowance applying Rule 8D, hence, we do not find any infirmity in the order of the Ld.CIT(A) and the same is upheld. The appeals of the assessee on this ground is **dismissed**.

12. The next issue for the A.Y.2011-12 is the addition of Rs.8,93,19,016/- representing the opening balance of the advances received by the assessee. For the A.Y.2011-12, opening balance of advances received was stood at Rs.8,93,19,016/-. During the assessment proceedings, the AO asked the assessee to explain the reasons for outstanding advances. The assessee explained that the said advances were received for shifting of the premises

from the existing place to a new bigger place from the assessee's client, First Tek Technologies Inc., USA to create the necessary infrastructure. During the search proceedings or post search proceedings, the assessee did not produce any evidence to show that it has requested the client for advance for shifting. Therefore the AO viewed that the advances received by the assessee was nothing but the income and issued notice u/s 142(1). In response to which the assessee filed the return of income admitting the sum of Rs.4,23,00,000/-, as income in return filed. The AO disbelieved the genuineness of entire advances of Rs.8,93,19,016/-, hence made the addition of balance amount of the opening balance of Rs.4,70,19,016/- as income of the assessee, thus the entire outstanding advances were brought to tax.

12.1. The assessee filed appeal challenging the addition of Rs. 4,70,19,016/- and also raised the additional ground requesting for relief of Rs.4,23,00,000/- also which was admitted as income in the return of income. The assessee submitted before the Ld.CIT(A) that the advance represented the capital receipt, but not revenue receipt. The assessee also submitted that no part of the advance was ceased to exist and the entire advance was payable to the creditors. The assessee further submitted

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before the Ld.CIT(A) that the nature of receipt was a capital receipt and it would get converted as a revenue receipt only when the services are rendered by the assessee to the foreign company. The services were rendered during the financial years 2005-06 to 2009-10 and the foreign company was debited with appropriate amounts. The balance of amount cannot therefore, be considered as a revenue receipt. It still remains as payable to the foreign company. Further, the assessee alone cannot decide whether the amount of Rs.4,23,00,000/- is payable or not It cannot be an unilateral act as the amount was paid because of a business transaction, Such amount cannot be written off by the assessee without the consent of the foreign company. The foreign company is insisting for payments. Therefore, the assessee submitted that even the amount received of Rs.4,23,00,000/- cannot be assessed as the income of the appellant. The same does not accrue as the income of the assessee.

With regard to the addition of Rs. 4,70,19,016/- the submitted before the Ld.CIT(A) that the it was the advances received from the customers and the assessee supplied software to First Tek Technologies Inc. USA. The said advance amount of Rs.4,70,19,016/- was credited to their account. Account copies of the First Tek Technologies Inc. USA for the financial

years-. 2005-06 to 2010-11 were submitted before the CIT(A). The assessee further stated that the assessee is required to spend the said amount for development of software. In case the assessee is not in a position to develop the software and incur any expenditure on such development,, the amount is repayable to the foreign company. The foreign company due to recession ,was not in a position to carry on the software business. The assessee also is not carrying on any further activity. During the year under consideration i.e. financial year 2010-11, the assessee was not supplying any software to the foreign company as it closed its business activity.

12.2. The Ld.CIT(A) sent the submissions made by the assessee to the AO for remand report. The AO submitted the remand report stating that there was inconsistency in the reply submitted by the assessee with regard to the outstanding liability. The AO observed that at one point the assessee was stating that the liability was not ceased and at another point stated that it was repaid. Therefore due to inconsistency the AO suggested for confirming the addition. The Ld.CIT(A) verified the submissions of the assessee and the remand report submitted by the AO and found that there was no evidence to show that the assessee has written off the liability nor

the foreign company has waived the advance and no material was found during the course of search to hold that the outstanding advance was bogus. In the absence of any material to show that the liability ceased beyond the amount admitted by the assessee, the Ld.CIT(A) viewed that the addition made by the AO in respect of the outstanding advances of Rs.4,70,19,016/- was unsustainable, accordingly, deleted the addition.

13. With regard to addition of Rs.4,23,00,000/-, the Ld.CIT(A) observed that the said amount was offered for tax u/s 132(4) and also filed the return of income. The assessee also has not filed retraction, therefore, the Ld.CIT(A) dismissed the additional ground raised by the assessee.

14. Against which the department is in appeal for deleting the addition of Rs.4,70,19,016/- and the assessee is in appeal for relief of Rs.4,23,00,000/-. During the appeal hearing, the Ld.AR submitted that the sum of Rs.4,23,00,000/- was capital receipt which was admitted as income in the return of income filed for the A.Y.2011-12 in response to the notice issued u/s 142(1). The said amount was outstanding and there was no waiver by the creditor and hence requested for relief.

14.1. With regard to addition of Rs.4,70,19,016/-, the Ld.AR submitted that the AO has not invoked any section of the Act for making the addition. The said sum was payable to the creditor and the amount was not written off. No evidence was found during the course of search with regard to Rs.4,70,19,016/-. The Ld.AR further argued that the amount is opening balance, but not the amount received during the year under consideration. Therefore, argued that the Ld.CIT(A) rightly deleted the addition, hence, no interference is called for in the order of the Ld.CIT(A).

15. Per contra, the Ld.DR submitted with regard to sum of Rs.4,23,00,000/-, that the assessee itself admitted the same u/s 132(4) and also filed the return of income. Therefore, there is no case for relief, hence argued that no interference is called for in the order of the Ld.CIT(A).

15.1. The Ld.AR with regard to the addition of Rs.4,70,19,016/- submitted that the assessee has given contradictory statements with regard to existence of liability and has not brought on record any evidence to show that the said sum was repaid subsequently, therefore, argued that the AO rightly made the addition and the Ld.CIT(A) erred in deleting the addition.

Hence, requested to set aside the order of the Ld.CIT(A) and allow the appeal of the revenue.

16. We have heard both the parties and perused the material placed on record. With regard to relief sought by the assessee in assessee's appeal in respect of the sum of Rs.4,23,00,000/-, the assessee had admitted the income, stating that the advances were no more payable to the customers. The assessee had admitted the income u/s 132(4) and subsequently filed the return of income and paid the taxes. No addition was made by the AO to the returned income. Therefore, there is no grievance to the assessee. Having paid the taxes and filed the return of income, if there is mistake in the return of income, the assessee ought to have filed the revised return of income within the time allowed under the Act. Alternatively, the assessee ought to have taken remedial measures by filing the petition u/s 264 before the Ld.CIT(A). In the instant case, the assessee has neither agitated the addition before the AO nor filed the revision petition u/s 264 of the Act or the revised return. It is also observed from the order of the Ld.CIT(A) that the assessee has not retracted the statement given u/s 132(4) before the AO. All the above facts show that the assessee has admitted the income voluntarily having belief that the advances constitute income. Therefore,

we are of the view that filing additional ground before the CIT(A) seeking relief of Rs.4,23,00,000/- was nothing but an afterthought. The assessee has not established the fact that the admission was made erroneously with supporting evidences regarding the existence of the liability. During the appeal hearing, the Ld.AR pressed for relief of Rs.4.23 crores. No evidence was placed by the Ld.AR to support the claim of outstanding advance. For a query from the bench, the Ld.AR admitted that there is no evidence of payment of Rs.4,23,00,000/- to the foreign company subsequently. Therefore, we do not find any reason to interfere with the order of the Ld.CIT(A). Accordingly, we hold that the Ld.CIT(A) rightly confirmed the addition and the same is upheld. The appeal of the assessee on this ground is dismissed.

17. With regard to revenue's appeal in respect of addition made by the AO amounting to Rs. 4,70,19,016/-, we find that the AO has not invoked any of the provisions of the Act. We find from the assessment order that the outstanding advance was opening balance, which was brought forward from the earlier years. Therefore, the AO is not permitted to make addition u/s 68 of the Act, since the credit was not made in the impugned assessment year. Alternatively, outstanding advances required to be

brought u/s 41(1) of the Act in respect of allowance or deduction claimed by the assessee in the earlier assessment year relating to trading liability. In the instant case, the AO neither brought any evidence to disprove the genuineness of outstanding liability nor found any material evidencing that the liability was written off by the assessee or the company has waived the advance. No material was brought on record by the AO to show that the liability was not in existence. The AO also failed to establish that the liability outstanding was related to the deduction or loss claimed by the assessee with regard to trading liability in respect of the earlier years. Therefore, the addition made by the AO is unsustainable, accordingly, we hold that the Ld.CIT(A) has rightly deleted the addition. Hence, we uphold the order of the Ld.CIT(A) and dismiss the appeal of the revenue on this ground.

I.T.A. No.607/Viz/2019, A.Y. 2009-10

18. For the A.Y.2009-10, the first issue is related to the addition of Rs.85,69,584/- representing the difference of turnover in STPI and the turnover declared in the P&L account. During the assessment proceedings, the AO found that the assessee had declared the turnover of Rs. Rs.91,77,720/-, in the return of Income, whereas the turnover admitted to

the STPI was Rs.1,77,47,304/- and there was a difference of Rs.85,69,584/-.The assessee explained before the AO that the value of turnover declared to the STPI was provisional and no way connected to the turnover of the assessee company and the said turnover was not the actual sales. Therefore, argued that no addition required to be made on account of difference of turnover. Not being convinced with the explanation of the assessee, the AO made the addition of Rs.85,69,584/- to the returned income.

19. Against the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) deleted the addition observing that the turnover of Rs.91,77,720/- was reported in P&L account was as per the invoices raised by the assessee company, hence no addition is warranted.

20. Against which the department has filed appeal before this Tribunal. During the appeal hearing, the Ld.DR supported the order of the AO and per contra, the Ld.AR relied on the order of the Ld.CIT(A).

21. Having heard the rival contentions, we find that the assessee admitted the turnover of Rs.91,77,720/- as per the invoices raised by the assessee. The AO did not bring any evidence to show that the assessee has

suppressed the turnover by reconciling the turnover of the assessee with the invoices raised and the turnover declared to the STPI. Unless there is an evidence to show that the assessee has made the sales outside the books of accounts or suppressed the turnover, there is no case for making the addition. In the instant case the books of accounts were audited and the entire sales were export sales and no domestic sales / cash sales by the company. No evidence was brought on record to show that the assessee has received the sums over and above the sales admitted in the return of Income. The turnover is supported by invoices, therefore, there is no reason to suspect the turnover admitted by the assessee in the books of accounts. Hence, we do not find any reason to interfere with the order of the Ld.CIT(A) and the same is upheld. The appeal of the revenue on this ground is dismissed.

22. The next issue in the department's appeal is with regard to the addition made by the AO in respect of notional interest on advances made by the assessee. During the assessment proceedings, the AO found from the bank statement that there were number of third party transactions which are not related to the company. The assessee admitted that the amounts were given as loans to different persons as under :

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S.No.	Date	Name of the person	Amount
1	06/10/2007	Radha Realty Corporation	50,00,000
2	29/02/2008	Sri Magadha Land Developers	30,00,000
3	07/01/2008	Venus Developers	1,00,00,000
4	24/03/2008	M. Durga Reddy	1,00,00,000
5	30/05/2008	M. Durga Reddy	40,00,000
6	13/09/2007	M. Venkata Narayana	40,00,000

The AO was of the view that the assessee was indulging in financial transactions with the above persons and accounted the advances as capital expenditure. During the course of search, a promissory note dated 06.04.2007 was found and seized which was issued by M.Venkata Narayana in favour of Shri Bhavanasi Kasiviswanadham for a sum of Rs.40,00,000/- and the amount was paid from the bank account of the assessee company. The rate of interest mentioned in the promissory note was 2%, hence, the AO viewed that all the amounts advanced to the various parties through the family members were, interest bearing advances, hence, calculated the interest @2% per month and brought to tax the sum of Rs.1,07,08,000/- as under :

A.Y. 2009-10	Date	Loan	Rate of interest	No. of months	Interest
Radha Realty Corp. India P. Ltd.,		0	2%		0
Saimagadha Land Developers	b/f loan	3000000	2%	12	720000
Veenus Developers	b/f loan	6000000	2%	5	600000
	bal	2000000	2%	1	40000
Vijetha Constructions	23/07/2008	10000000	2%	10	2000000

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Vijetha Foundation & Constn P. Ltd.	b/f loan	20000000	2%	12	4800000
M. Durga Reddy	b/f loan	10000000	2%	7	1400000
M. Durga Reddy	30/05/2008	4000000	2%	3	240000
M. Venkatanarayana	b/f loan	4000000	2%	4	320000
M. Venkatanarayana	bal	2000000	2%	9	360000
Kotha Raghu Ramaiah	b/f loan	950000	2%	12	228000
					10708000

23. Against the order of the AO, the assessee went on appeal before the CIT(A) and submitted that the advances were paid for purchase of properties and not the interest bearing loans. The assessee further submitted that the assessee was not in money lending business and it had neither borrowed the funds from bank and nor paid any interest, therefore, there is no case for making the addition of notional interest. The assessee also stated that it has given the advances to Vijetha Constructions, Vijetha Foundation & Construction P. Ltd., M.Durga Reddy for purchase of properties and the properties were also registered subsequently. He further stated that no evidence was found during the search proceedings, indicating the receipt of interest. Therefore, submitted that the AO made the addition on presumptions and on erroneous belief that the assessee has made advances for interest, hence, requested to delete the addition.

24. The Ld.CIT(A) after considering the explanation of the assessee found that there was no material to show that the assessee company has charged the interest on advances given except in the case of Venkatanarayana. Accordingly, the Ld.CIT(A) confirmed the addition of Rs.6,80,000/- on advance given to M.Venkata Narayana and deleted the balance addition made by the AO.

25. Against which the revenue filed appeal before the Tribunal. During the appeal hearing, the Ld.DR submitted that during the course of search, evidence was found in respect of M.Venkata Nayarayana that the assessee has given loans and charged the interest @2%. Therefore, argued that evidence found during the course of search proves that the assessee was giving advances for interest but not admitted the same as income. The assessee has not discharged the onus to establish that the it has not charged the interest on diversion of funds, hence, requested to confirm the addition made by the AO and set aside the order of the Ld.CIT(A).

26. On the other hand, the Ld.AR relied on the orders of the Ld.CIT(A).

27. We have heard both the parties and perused the material placed on record. A search u/s 132 was conducted in this case. During the course of

search, promissory note was found in favour of Bhavanasi Kasiviswanatham for the amounts advanced to M.Venkata Narayana for interest of 2% per month for an amount of Rs.40 lakhs. On the basis of above promissory note, the AO charged the notional interest on the entire outstanding advances and brought to tax the sum of Rs.1,07,08,000/-. We find from the orders of the lower authorities that there was no evidence found during the course of search, evidencing collecting of interest on the amounts advanced to other parties i.e. Vijetha Constructions, Vijetha Foundation & Construction P.Ltd., M.Durga Reddy, Saimagadha Land Developers etc. All the loans are brought forward loans except Vijetha Constructions. The assessee submitted that the amounts were given as advances for purchase of property and subsequently, the lands were also purchased and registered in respect of some properties. It was also explained that in the case of M.Durga Reddy, due to some problem, the sale deed was cancelled and the amount was received back. In the case of Veenus Developers, due to defective construction, the sale agreement was cancelled. The above explanation of the assessee shows that the amounts were advanced for acquiring the properties and the AO misdirected himself because of the promissory note of M.Venkata Narayana found

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bearing interest. No material was found by the department evidencing the charging of interest on amounts advanced by the assessee or indicating the finance business. The AO did not make any cross verifications with the borrowers of money to support the case of department. No evidence was brought on record to show that the assessee was receiving interest. In the absence of any material to show that the assessee was receiving interest, we have no reason to interfere with the order of the Ld.CIT(A) and the same is upheld. The appeal of the revenue is dismissed.

28. In the result, appeal of the revenue for the A.Y. 2009-10 is dismissed.

I.T.A. No.608/Viz/2019, A.Y. 2011-12

29. The first issue in the departments appeal in ground No.2 is related to charging of notional interest on outstanding advances. For the A.Y. 2011-12, the AO has computed notional interest on outstanding advances on the basis of promissory note found in the name of Venkata Narayana and made the addition of Rs.81,48,000/-. On appeal the Ld.CIT(A) deleted the addition. The above issue is identical to the issue discussed in the A.Y.2009-10 with regard to charging of interest in respect of outstanding advances in the case of Radha Realty Corporation and others. In the immediately

preceding assessment year, we have upheld the order of the Ld.CIT(A) and deleted the addition. Therefore following the consistent stand, since the facts are identical, we hold that there is no reason to make addition on account of notional interest. Accordingly, we uphold the order of the Ld.CIT(A) and delete the addition made by the AO. Appeal of the revenue is dismissed.

30. The next issue is with regard to H1B Visa fees. During the course of search, material was found indicating that the assessee has been entrusted with the responsibility of processing H1B Visa applications on behalf of First Tek Technology Inc. USA. Subsequently, candidates were taken to USA with H1B Visa by this organization. The candidates who ought to go to USA on H1B Visa are required to deposit certain amount for visa processing. The AO observed that the amounts collected from various candidates are deposited in the bank account of First Tek Private Ltd and the security deposit collected from unsuccessful candidates was given back. For the F.Y.2010-11, relevant to the A.Y. 2011-12, the outstanding closing balance was of Rs.58,83,698/-. Since the operations of the company were closed, the AO viewed that there was no liability on account of H1B Visa on

unsuccessful candidates, hence, outstanding amount of Rs.58,83,698/- was treated as undisclosed income of the assessee and brought to tax.

31. Against which the assessee went on appeal before the CIT(A) and stated that there was no seizure of liability and the amounts are payable and argued that the company is not entitled to treat the same as income. The details of candidates are available, hence, argued that there is no justification for making the addition. The Ld.CIT(A) after considering the submissions of the assessee deleted the addition.

32. We have heard both the parties and perused the material placed on record. In this case, the amount outstanding as at the end of the year was Rs.58,83,698/-. The AO misdirected himself that since the company has ceased its operations and the advances were received on revenue account, the company has no liability and hence the same was assessed as income. From the order of the lower authorities, it is found that the assessee has to pay back the deposits or the amounts collected from unsuccessful candidates to the respective candidates. Merely because of operations, the company is ceased, the company cannot escape the liability and the AO is also not permitted to treat the same as income. Once receipt is accepted

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and shown as liability, unless, it is established that the amounts need not be refunded to the unsuccessful candidates or the liability is proved to be bogus, the AO is not permitted to tax the same amount. Since the names of the candidates are available, the AO ought to have made enquiries with the candidates and made the addition in respect of the candidates who surrendered the amounts. Since no such evidence was brought on record, the addition made by the AO is unsustainable, hence, we do not find any reason to interfere with the order of the CIT(A) and the same is upheld. The appeal of the revenue on this ground is dismissed. Accordingly, we uphold the order of the Ld.CIT(A) and dismiss the appeal of the revenue.

33. In the result appeals of the revenue for the A.Y.2009-10 and 2011-12 are dismissed. Appeals of the assessee for the A.Y.2007-08 to 2009-10 are allowed and for the A.Y.2010-11 and 2011-12 are partly allowed.

Order pronounced in the open court on 24th November 2020.

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

लेखा सदस्य/ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 24.11.2020

L.Rama, SPS

Sd/-

(वी.दुर्गा राव)

(V. DURGA RAO)

*I.T.A. No.574-577/Viz/2019 & 609/Viz/2019, A.Y. 2007-08 to 2010-11 & 2011-12
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आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee– M/s First Tek Private Limited, Bhavanasi Anjaneyulu, Sri Balaji Chemical Industries, Main Road, Piduguralla, Guntur
2. राजस्व/The Revenue – Asst.Commissioner of Income Tax, Central Circle Vijayawada
3. The Pr.Commissioner of Income Tax (Central), Visakhapatnam
4. The Commissioner of Income Tax (Appeals)-3, Visakhapatnam
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 6.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, Visakhapatnam