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

BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI AMARJEET SINGH, JUDICIAL MEMBER
[Through Video Conferencing]

ITA No.4755/Del/2014
Assessment Year: 2009-10

DCIT, Circle-2, Gurgaon	**Vs.**	Sh. Lalit Wadhwa, Prop. Dotsplash, 4th Floor, Vatika Atrium, Tower-B, Golf Course Road, Sec.-53, Gurgaon
		PAN :AALPW4161F
(Appellant)		**(Respondent)**

Appellant by	Sh. Gaurav Pundir, Sr.DR
Respondent by	Sh. Vinod Rawal, CA

Date of hearing	23.08.2021
Date of pronouncement	26.08.2021

ORDER

PER O.P. KANT, AM:

This appeal by the Revenue is directed against order dated 23/06/2014 passed by the learned Commissioner of Income-tax (Appeals)-2, Faridabad [in short 'the Ld. CIT(A)'] for assessment year 2009-10, raising following grounds:

1. *That on the facts and the circumstances of the case the Ld. CIT(A) has erred in deleting the addition arising out of disallowance made by the AO u/s 10B of the I.T. Act, 1961 although the assessee has not been able to substantiate his claim of exemption*

u/s 10B of the I.T Act, 1961 either during assessment or remand proceedings.

2. *That on the facts and the circumstances of the case the Ld. CIT(A) has erred in accepting the contention of the assessee that information regarding eligibility of exemption u/s 10B , was provided to the AO in the form of Compact Disc and thereby deleting the addition u/s 10B of the I.T Act, 1961.*
3. *That on the facts and the circumstances of the case the Ld. CIT(A) has erred in relying upon the information contained in the alleged compact disc, the contents of which he has himself not discussed in the appellate order nor has he discussed the contents of the e-mail trail or other correspondence that has led him to delete the addition.*
4. *That on the facts and the circumstances of the case the Ld. CIT(A) has erred in not appreciating that the principle of Res Judicata does not apply to Income Tax proceedings and allowability of exemption u/s 10B of the I.T. Act, 1961 depends upon the facts and circumstances of the relevant assessment year.*
5. *That on the facts and the circumstances of the case the Ld. CIT(A) has erred in not appreciating the fact that AO has not commented on the documentary evidence in form of a compact disc regarding the output software of the appellant under Rule 46A as no hard copies of compact disc was filed.*
6. *That the appellant craves for the permission to add, delete or amend the grounds of appeal before or at the time of hearing of appeal.*

2. Briefly stated facts of the case are that the assessee, an individual, was carrying business of export of Information Technology (IT) enabled services from Software Technology Park (Noida) through proprietary concern, namely, M/s. Dotsplash. During the year under consideration, the assessee filed return of income on 26/09/2009, declaring total income of ₹ 1,30,09,970/- . In the return of income filed, the assessee claimed deduction under section 10B of Income-tax Act, 1961 (in short 'the Act') amounting to ₹ 3,62,19,000/-. The return of income filed by the assessee was selected for scrutiny assessment. In the assessment completed under section 143(3) of the Act on 28/12/2011, the Assessing Officer disallowed the claim of the deduction under

section 10B of the Act. On further appeal, the Ld. CIT(A) allowed the claim of the assessee vide impugned order dated 23/06/2014. Aggrieved, the Revenue is in appeal before the Tribunal, raising the grounds as reproduced above.

3. Before us, the parties appeared through Video Conferencing facility. The assessee filed a paper-book, containing pages 1 to 284, and other documents physically as well as through email.

4. In the grounds raised, only the issue of disallowance of deduction under section 10B of the Act, is involved. Before us, the Learned DR relied on the order of the Assessing Officer and made arguments in two parts. Firstly, he objected admitting of additional evidence by the Learned CIT(A). Secondly, he argued on merit of deduction claimed by the assessee, which has been allowed by the Learned CIT(A).

5. The Learned DR submitted that despite sufficient opportunity granted by the Assessing Officer, no documentary evidences in support of the claim under section 10B was submitted by the assessee. According to him, there is no reasonable cause for failure on the part of the assessee in submitting documentary evidence and, therefore, Learned CIT(A) is not justified in admitting the additional evidences and allowing relief to the assessee on the basis of those evidences.

6. In support of disallowance of deduction on merit, the Learned DR referred to the deficiencies found by the Assessing Officer in the submission of the assessee. He particularly referred that the assessee could not provide details of input software purchased for rendering IT enabled services as well as output software for IT enabled services rendered by the assessee. He also

emphasized that the assessee could not submit any evidence regarding job work done from third parties. The learned DR also supported the grounds raised and submitted that the Ld. CIT(A) has allowed relief to the assessee without verifying the contains of the 'compact disc' provided by the assessee in the form of additional evidences.

7. On the other hand, the Learned counsel of the assessee submitted that during the period when the information was sought by the Assessing Officer, the assessee was out of India and therefore could not furnish the information to the Assessing Officer. He submitted that there was a reasonable cause in failure to supply information to the Assessing Officer and, therefore, assessee is covered fully under Rule 46A of Income-Tax Rules, 1962 (in short 'the Rules') for filing additional evidence. The Learned Counsel justified the finding of the learned CIT(A) in admitting additional evidences. On the issue of the merit, the learned Counsel submitted that all evidences for justifying the deduction under section 10B have been filed before the Learned CIT(A), which were forwarded to the Assessing Officer for his comments. The Learned CIT(A) after taking into consideration the report of the Assessing Officer and rejoinder by the assessee, has given detailed finding in respect of the objections of the Assessing Officer. He supported the order of the Ld. CIT(A) and prayed that same may be upheld.

8. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Regarding the grounds related to admissibility of additional evidences, we

may like to refer the detailed finding of Ld. CIT(A), which is reproduced as under:

> *"3.1 I have considered the facts of the case and gone through the remand report of the AO coupled with the rejoinder filed by the learned counsel of the appellant on 10.06.2014. The admissibility of additional evidence is governed by Rule 46A of Income Tax Rules, which gives 4 circumstances in which the additional evidence can be entertained during the course of appellate proceeding:*
>
> *e) Where the Assessing Officer has refused to admit evidence which ought to have been admitted; or*
> *f) Where theappellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or*
> *g) Where theappellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal; or*
> *h) Where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidenced relevant to any ground of appeal.*
>
> *As per the appellant, he was out of the country for the period 30.07.2011 to 17.01.2012. This was the period when most of the details were sought by the AO which culminated in the order of assessment dated 28.12.2011. As per the appellant, he was holding immigration visa for travelling to USA, the dates mentioned on the visa granted by the USAuthorities i.e. 12.07.2011 to 09.11.2011 weremisconstrued as validity of visa, whereas the appellant was granted immigration visa for one year and he was required to get it endorsed by reaching USA within these dates. Accordingly, the appellant travelled to USA on 30.07.2011 and then got his visa endorsed on the same date. As a result of this endorsement, he was on 1-551 status (holder of green card for one year). The appellant, in order to remove any ambiguity on this issue, enclosed a copy of Regulations concerning Form 1-551 (green card) issued by US immigration support. Also, the appellant enclosed a copy of the relevant page of his passport as per which he departed from India on 30.07.2011 and came back on 11.01.2012. A copy of the US visa submitted by the appellant carries the following remarks:*
>
> > *"Upon endorsement serves as temporary 1-551 evidencing permanent residence for one year".*
>
> *3.2 These documents alongwith explanation given by the appellant make it abundantly clear that the appellant was not in India during the period 12.07.2011 to 31.12.2011 when most of the documents*

were sought by the AO. From this it follows that if the appellant was not available during the time most of the documents/submissions were sought by the AO, he had a reasonable cause for not submitting the same during the course of assessment proceedings. The appellant was, thus, prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer and hence his case gets covered by Rule 46A(l)(b) &(c). In view of these facts, the additional evidence filed by the appellant during the course of appellate proceedings is hereby admitted."

8.1 The Ld. CIT(A) pointed out that assessee was not in India during the period from 12/07/2011 to 31/12/2011 when most of the document was sought by the Assessing Officer. Therefore, according to the Ld. CIT(A), the assessee was prevented by sufficient cause from producing the evidences, which were called by the Assessing Officer. Under the Rule 46A(1)(b) of Rules, the additional evidence may be admitted, if the appellant was prevented by sufficient cause from producing the evidences, which was called upon to produce by the Assessing Officer. In the circumstances of absence of assessee in India, the assessee is eligible for filing additional evidence. In our opinion, there is no infirmity in the order of the Ld. CIT(A) in admitting the additional evidence as per the rules. We, accordingly, dismisse the grounds raised in this regard.

8.2 As far as grounds on merit of the issue of deduction under section 10B of the Act is concerned, we find that Ld. CIT(A) has dealt each and every objection of the Assessing Officer raised in assessment order as well as in the remand proceeding. The detailed finding of Ld. CIT(A) is reproduced as under:

"5.7 I have considered the facts of the case and gone through the detailed submissions of the learned counsel of the appellant. I have

also carefully examined the remand report of the AO dated 06.05.2014 together with the rejoinder filed by the appellant and various judicial pronouncements relevant to the facts of the case. The AO, while passing order u/s 143(3) of the Income Tax Act, disallowed deduction u/s 10B of the Income Tax Act on the ground that there were certain deficiencies in the submissions/documents submitted by the appellant. The appellant, during the course of appellate proceedings, gave additional evidence in order to make good the deficiencies pointed out by the AO in her assessment order. Along with these documents, the appellant gave point-wise reply with regard to various deficiencies pointed out by the AO. As regards AO's observation that the appellant could not provide a detailed and documentary evidence of input software licenses purchased by it for rendering IT enabled services and documentary evidence in the form of compact disc regarding the output software,, the appellant filed details of input software licenses in compact disc while filing additional evidences. Along with this, the appellant produced proof of domain ownership to substantiate the genuineness of his claim u/s 10B of the Income Tax Act. However, the AO in his remand report commented that the proof of domain ownership was issued by M/s Moniker Online Services, Inc whereas the appellant did not deal with the said concern during the relevant assessment year. In response to the AO's objection, the appellant submitted that the domains were purchased in previous years since this represents the modus operandi of the appellant's business. As regards output software, the appellant submitted a compact disc to give an overview of the nature of services provided by him. However, the AO has not commented on the documentary evidence in the form of a compact disc regarding the output software of the appellant. From these facts it is evident that the appellant could give authentic evidence with regard to input software licenses purchased and the output software produced by him.*

5.8 As regards AO's requirement for production of I-mail trail of correspondence made by the appellant for procuring the input software, the appellant provided these details in the form of a compact disc alongwith a print out of the same as additional evidence. While submitting the same, the appellant stated that the E-mail trail only reflects the nature of work done by him for various clients.

5.9 Regarding AO's observation that name, PAN, address, educational qualification and contribution made by employees was not provided, the appellant submitted that there are only 4 employees in the organization whose details were attached with the submissions filed during remand proceedings. When queried by the AO that in the Annual Progress Report, there were 16 employees as opposed to only 4 employees mentioned by the appellant, the appellant submitted that the Annual Progress Report includes regular employees as well as persons engaged in the data

processing charges shown in the P & L Account amounting to Rs. 1,68,540/-. Thus, the appellant not only gave full particulars of employees sought by the AO but also reconciled the discrepancy in the number of employees raised by the AO in his remand report.

5.10 Another deficiency pointed out by the AO in the assessment order regarding the valude of computer hardware of only Rs.2,18,346/- shown by the appellant. In response, the appellant submitted that the AO over-looked the fact that the aforesaid amount represents only the written down value and not the value of computer hardware in terms of the actual cost of the asset. Elaborating further, the appellant submitted that he had purchased computer hardware worth Rs.6,56,110/- during assessment years 2003-04 to assessment year 2009-10. The appellant also brought to the notice of the under-signed the case of Techdrive India Pvt. Ltd. 25 SOT 122 as per which it was held that owning of plant and machinery or equipment was not required for producing computer software. Along with this the appellant also relied upon CBDT Circular No. 1/2013 dated 17.01.2013. Thus the appellant was able to effectively rebut the AO's argument concerning the value of computer hardware owned by him.

5.11 Regarding AO's observation that the appellant could not establish with the help of documentary evidence that it was actually rendering IT Enabled Services, the appellant effectively rebutted the same by submitting the annual return filed with the STPI showing export turnover of Rs.490.63 lacs. The appellant also submitted monthly return submitted with the STPI showing exports on a monthly basis. These monthly/annual returns were down loaded from the website www.noidastpi.in. Along with the documents substantiating the export turnover, the appellant also gave a copy of Foreign Inward Remittance Certificate (FIRC) and softtex forms. A copy of renewal letter issued by STPI valid upto 31.03.2011 was also submitted. As regards the agreement entered into by the appellant, copies of service agreement entered in the past and which were continuing during the year under consideration were also submitted, along with proof of domain ownership to substantiate the genuineness of the claim. The appellant submitted voluminous documents in support of his stand on this issue because of the fact that this was the main ground on the basis of which deduction u/s 10B of the Income Tax Act was denied by the AO. By submitting all these documents, the appellant not only produced proof regarding exports but also corroborated the fact that the foreign exchange was received by him within the stipulated time and that the exports made by him were in pursuance of service agreements, valid during the year under consideration. The appellant, by submitting these documents could conclusively establish that it was exporting IT Enabled Services.

5.12 As regards AO's observation that the term of approval granted by the STPI Noida had expired, the appellant filed copy of renewal of green card valid upto 31.03.2011. By submitting the same, the appellant could effectively rebut this argument of the AO. Regarding the final observation of the AO that he was not the original manufacturer/producer of the software, the appellant relied upon Circular No. 1/2013 issued by the CBDT on 17.01.2013 as per which software developed abroad at clients' place would be eligible for benefits under the respective Section because these would amount to deemed exports.

5.13 As regards AO's observation in his report dated 06.05.2014 that no service agreements were valid for the year under consideration, the appellant gave a copy of all the agreements and its validity was specifically mentioned. From the details furnished by the appellant, it is abundantly clear that the agreements made with 8 parties which culminated in total exports of Rs.4,90,63,137/- were all valid during the current year.

5.14 Another observation of the AO in his remand report concerning the discrepancy between total exports shown by him in his return of income amounting to Rs.490.63 Ides and exports as per softtex forms, the appellant in addition to relying upon the certificate issued by the STPI certifying total export of Rs.4,90,63,137/-, gave duplicate copies of softtex forms, on a perusal of which the issue of discrepancy gets resolved.

5.15 Thus, the appellant by filing additional evidence during the course of appellate proceedings along with his submissions effectively rebutted all the deficiencies pointed out by the AO in her assessment order u/s 143(3) of the Income Tax Act as well as the ambiguities pointed out by the AO in his remand report dated 05.05.2014. By effectively rebutting all these observations/arguments, the appellant decisively established that it had rightly claimed deduction u/s 10B of the Income Tax Act. Another very important point relied upon by the appellant is that the appellant had been continuously getting exemption under the said Section from AY 2003-04 to 2008-09 and again in AY 2010-11. Since the facts of the case for the year under consideration are identical to the facts for earlier as well as subsequent years, the appellant averred that the disallowance made by the AO is unjustified and deserves to be deleted.

5.16 Furthermore, there are a number of judicial pronouncements as per which if particular deduction has been allowed in the first assessment year in which the claim was made, the AO cannot withdraw relief for subsequent years if there has been no change in the facts and circumstances of the case. In the case of CIT Vs Excel Industries Ltd. (2013) (358 ITR 295) (Supreme Court), it appeared from the record that in several assessment years, the revenue accepted the order of the Tribunal in favour of the assessee but in respect of some assessment years, the matter was taken up in

appeal before the Hon'ble High Court without any success. It was held by the Hon'ble Apex Court that the revenue could not be allowed to change its stand on the issue and ought to let the matter rest rather than spend the tax payers money in pursuing litigation. In the case of CIT Vs Western Outdoor Interactive (P) Ltd. (2012) TIOL 625 (Mumbai), it was held that unless relief granted for the first assessment year in which the claim was made and accepted is withdrawn or set aside, the Income Tax Officer cannot withdraw the relief for subsequent years. The issue in this case related to grant of exemption u/s 10A of the Income Tax Act. Also, in the case of ITO Pune Vs Cat Labs Pvt. Ltd.(ITA No 131/PN/2013)(2014), the Hon'ble JTAT Pune, on the basis of various judicial pronouncements and CBDT Circular allowed claim u/s 10B of the Income Tax Act on the basis of principle of consistency and held that approval granted by the STPI to..be enough for the fulfillment of condition prescribed in Section 10B.

5.17 Thus, from the above discussion, it is abundantly clear that not only the appellant could conclusively establish the fact that it was entitled to claim u/s 10B of the Income Tax Act by rebutting all the observations/arguments of the AO at the time of assessment as well as remand proceedings but could also furnish prominent judicial pronouncements on the principle of consistency. The aforesaid judicial pronouncements are extremely pertinent to the facts of the case since the Department has all along been allowing deduction u/s 10B of the income Tax Act barring the year under consideration. Since there has been no change in the facts and circumstances of the case during the year compared to preceding and succeeding years, the AO was not justified in making the said disallowance.

5.18 Hence, after a careful consideration of the facts of the case together with all the material placed before the under-signed, I hold that the AO erred in disallowing deduction u/s 10B of the Income Tax Act amounting to Rs.3,62,19,000/-. Consequently, Ground Nos. 1 to 4 of the appeal are hereby allowed."

8.3 We find that Ld. CIT(A) dealt with all the objections of the Assessing Officer of old service agreement, evidence in support of input software as well as output software, No. of employees, quantum of plant and machinery, difference in export figures reported in the return of income and softtex forms. The Learned DR could not rebut any of the factual finding of Ld. CIT(A). Further, we find that assessee has been allowed deduction under section 10B of the Act on the same activity for assessment year

2003-04 to 2008-09. Even in assessment year subsequent to the present assessment year i.e. AY 2010-11 also, the assessee has been allowed the deduction under section 10B of the Act. In such circumstances, we do not find any justified reason for not allowing the deduction only in the year under consideration by the Assessing Officer. In our opinion, there is no infirmity or error in the order of the Learned CIT(A) on the issue in dispute of deduction under section 10B of the Act, and accordingly, we uphold the same. The grounds raised by the Revenue on merit of the deduction under section 10B are also dismissed.

9. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 26th August, 2021.

Sd/-	***Sd/-***
(AMARJEET SINGH)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 26th August, 2021.
RK/-(DTDC)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi