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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No. 3143/Mum/2019
(A.Y.2007-08)

MWH India Private Ltd. 168, Udyog Bhavan, Sonawala Road, Goregaon (East) Mumbai-400 063	Vs.	Income Tax Officer, Circle-9(2)(3), Room No. 147B, Aaykar Bhavan, M.K. Road, Churchgate, Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACA4613L		
Appellant	..	Respondent

Appellant by :	Niraj Sheth
Respondent by :	Mahita Nair

Date of Hearing	31.10.2022
Date of Pronouncement	29.12.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-21, Mumbai, dated 04.01.2019 for A.Y. 2007-08. The assessee has raised the following grounds before us:

1:0 Re: Denial of deduction u/s, 10A of the Income-tax Act, 1961 amounting to Rs.6,65,18,513:-

1:1 The Commissioner of Income-tax(Appeals) has erred in confirming the action of the Assessing Officer in not allowing the deduction u/s 10A of the Income-tax Act, 1961.

1:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the Appellant is entitled to

the deduction u/s. 10A with respect to its profits from Pune Unit and the stand taken by the Assessing Officer in this regard is incorrect and erroneous and the Commissioner of Income-tax(Appeals) ought to have held as such.

1:4 The Appellant submits that the Assessing Officer be directed to grant deduction u/s. 10A of the Income-tax Act, 1961 in accordance with law and to re-compute its total income and tax thereon accordingly.

2:0 Re: Excessive levy of Interest u/s. 2348 amounting to Rs.95,77,946/-:

2:1 The Commissioner of Income-tax(Appeals) has erred in confirming the action of the Assessing Officer in levying excessive interest u/s. 2348 of the Income-tax Act, 1961.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the stand taken by the Assessing Officer in this regard is incorrect and erroneous and the Commissioner of Income-tax(Appeals) ought to have held as such.

2:3 The Appellant submits that the Assessing Officer be directed to re-compute the interest u/s 234B levied on it in accordance with law and to re-compute its tax liability accordingly.

***3:0 Re: General**:*

3:1 The Appellant craves leave to add, alter, amend and/or substitute all or any of the foregoing grounds of appeal at or before the hearing of the appeal."

2. Fact in brief is that return of income declaring nil income was filed on 14.11.2007. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 06.08.2008. The assessee has also claimed deduction in form no. 56F u/s 10A of the Act. However, while filing the return of income the assesse inadvertently filled in the detail under schedule 10B. During the course of assessment the A.O noticed that assessee has claimed deduction of Rs.6,65,18,513/- u/s 10B of the Act in respect of Pune unit. However, the Assessing officer has restricted the claim of deduction u/s 10B to the amount of Rs.2,02,03,742/-. The assesse filed the appeal before the ld. CIT(A), the ld. CIT(A) agreed with the submission of the assesse and directed the assessing officer to grant the deduction u/s 10A at the amount of

Rs.6,65,18,613/- claimed by the assesse. Thereafter, the revenue filed appeal before the ITAT. The ITAT vide order dated 12.10.2012 set aside the order of the CIT(A) to the file of the A.O to determine the quantum of deduction factually available to the assesse. Thereafter, the A.O vide order u/s 143(3) r.w.s 254 dated 20.03.2014 stated that assessee was earlier claiming deduction u/s 10B from assessment year 2003-04 to assessment year 2006-07 and it has started claiming deduction u/s 10A of the Act from assessment year 2007-08 on the same Pune unit. The A.O further stated that assesse has not fulfilled the condition that undertaking should not be formed by splitting or reconstruction of business since assesse has claimed deduction u/s 10A on the same unit on which it has claimed deduction u/s 10B from 2002-03 onwards. The assessing officer further stated that if the deduction under one section was claimed i.e Section 10B then the assesse was not entitled to claim the deduction under any other section for that particular unit. Therefore, the A.O held that assesse was not entitled for deduction u/s 10A of the Act and the whole amount of claim of deduction of Rs.6,65,18,513/- u/s10A was disallowed.

3. Aggrieved, the assesse filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assesse reiterating the facts mentioned by the A.O and held that there was no provision u/s 10A of the Act to allow claim for deduction in respect of unit which had already claimed deduction/exemption u/s 10B of the Act and which was allowed subject to certain modification by the A.O for the earlier assessment years. The ld. CIT(A) also held that even otherwise the second condition of Sec. 10A(2)(iii) of I.T. Act 1961 that it is not formed by the transfer to the new business of machinery previously used for any purposes is also not satisfied.

4. During the course of appellate proceedings before us the ld. Counsel contended that assesse had claimed a deduction u/s 10B of the I.T. Act,1961 from assessment year 2003-04 to assessment year 2006-07 under a bonafide belief that since its Pune undertaking was a 100% in respect of export unit (EOU) and it was eligible for deduction u/s 10B of the I.T Act, 1961. However, during the course of finalization of accounts for the assessment year 2007-08 it was first time realized that Pune Unit was only 100% export oriented undertaking registered with the Software Technology Park (STP), therefore, Pune Unit was eligible for deduction u/s 10A of the Income Tax Act, and not u/s 10B of the Income Tax Act. The ld. Counsel further pointed out that during the year the assesse has also filed form no. 56F to make a claim for deduction u/s 10A of the Act, however, inadvertently it has filled the detailed in the wrong schedule 10B. The ld. Counsel also referred that the CIT(A) vide order dated 30.08.2021 had agreed with the submission of the assesse and correctly allowed the claim of deduction u/s10A of the Act. The ld. Counsel also referred the various copies of document and detail filed by the assesse before the A.O and CIT(A) explaining in detail the reason for change in deduction claimed from the provision of Sec. 10B to Sec. 10A and how the assesse was eligible to claim the deduction u/s 10A of the Act. The ld. Counsel also contended that claim of deduction otherwise allowable cannot be denied on account of technical defect by claiming u/s 10B instead of claiming under correct Sec. 10A of the Income Tax Act. The ld. Counsel also placed reliance on various judicial pronouncements i.e Clarion Technologies (P) Ltd. Vs. DCIT (2015) 57 taxman.com 351 (Pune Trib); ITAT, Mumbai in the case of ITO Vs. M/s Accentia Technologies Ltd. Vide ITA No. 1871/Mum/2011; ITAT, Hyderabad in the case of DCIT Vs. M/s Varsum Technologies P. Ltd vide ITA No. 688/Hyd/2013.

On the other hand, the ld. D.R submitted that once claim is made u/s 10B of the I.T. Act, 1961 then it cannot be claimed u/s 10A of the Act. The ld. D.R has also supported the order of A.O & CIT(A).

5. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above the assesse claimed that Pune unit was registered as 100% export oriented undertaking with the Software Technology Park at Pune (STP) and was eligible for a deduction u/s 10A of the Act. Earlier the assesse had claimed deduction u/s 10B of the Act in respect of Pune Unit under a bonafide belief on being a 100% export oriented unit (EOU) from assessment year 2003-04 to assessment year 2006-07. However, it was realized during the year under consideration on finalization of the account that assesse was eligible for claiming deduction u/s 10A being export oriented unit registered with the Software Technology Park (STP) and not u/s 10B of the I.T. Act. The ld. CIT(A) vide order dated 30.08.2011 has decided the issue in favour of the assesse and directed the A.O to grant deduction u/s 10A at the amount of Rs.6,65,18,613/- claimed by the assesse. Thereafter, the ITAT vide order dated 12.10.2012 set aside the matter to the A.O regarding determining quantum of deduction available to the assesse. In the set aside proceedings the A.O stated that assesse is not eligible for claiming deduction u/s 10A for the reason as discussed supra in this order. During the course of assessment and appellate proceedings the assesse has filed all the relevant detail as discussed. The assesse has explained before the ld. CIT(A) that the provision of Sec. 10A and Sec. 10B of the I.T. Act were similar to each other in its submission dated 13.10.2016 and explained the similarities in these sections. The assesse has also explained that if assesse was to make claim for deduction u/s 10B in respect of Section 10A, the quantum of deduction claimed by the assesse will not vary at all. The assesse also

explained that quoting wrong section should not deprive the assesse from deduction so long as the other conditions for making the claims were satisfied. The assesse has also placed reliance on the decision of Mumbai ITAT in the case of ITO vs. Accentia Technologies Ltd. Vide ITA No.1871/Mum/2011 wherein it is held that it is the duty of the A.O to guide the assesse with regard to eligibility to claim deduction, in the instant case when the assesse claimed deduction u/s 10B the A.O ought to have guided the assesse with regard to eligibility to claim deduction u/s 10A of the Act. The assesse also referred the decision of Hon'ble Supreme Court in the case of CIT Vs. Mahalaxmi Sugar Mills Company Ltd. (1986) 160 ITR 920 wherein it is held that there is duty cast on the Income Tax Officer to apply the relevant provisions of Indian Income Tax Act for the purpose of determining the true figure of the assessee's taxable income and the consequential tax liability. The assesse has also referred the CBDT Circular No.14 (XV-35) of 1955 which states that Income tax authorities should not take any advantage of ignorance of assesse in relation to any benefit for which he is eligible as per law and same is not claimed by it due to ignorance or mistake.

In the case of DCIT Vs. M/s Varsum Technologies P. Ltd vide ITA No. 688/Hyd/2013 it is held that assesse is entitled for deduction u/s 10A, in particular, and the same has to be granted to the assesse after considering the conditions laid down u/s 10A of the Act, as the assesse cannot be deprived of exemption u/s 10A on the reason that the assesse has made claim u/s 10B, if any and not filed revised return of income for such exemption.

In the case of M/s Cell Works Research India Pvt. Ltd. Vs. CIT, the ITAT Banglore held that when wrong claim is made by the assesse u/s 10B instead of Sec. 10A in the return of income, the department cannot thrust upon the assesse to avail the claim u/s 10B only.

The ITAT, Mumbai in the case of ACIT vs. Jaswant Kanetkar vide ITA No. 150/Nag/2011 held that the main reason for denial of deduction u/s 10A was that the assesse claimed deduction u/s 10B instead of Sec. 10A. The provision of Sec. 10A and 10B are similar. The format of form no. 56F & 56G are same, therefore, this was a technical defect if any and only on account of technical and venil defect benefit liable to the assesse should not have disallowed by the assessing officer.

6. We have also gone through the decision of ITAT Pune in the case of Clarion Technologies (P) Ltd. Vs. DCIT (2015) 57 taxman.com 351 (Pune Trib) wherein it is held as under:

> *"Section 10A, read with section 10B, of the Income-tax Act, 1961 Free trade zone (Export incentives) - Assessment year 2010-11 - Assessee had been denied deduction under section 10B which was in earlier years allowed Since assessee could not have envisaged denial of its claim of deduction under section 10B and prima facie 100 per cent EOU of assessee, being registered with STPI, was eligible to stake claim for deduction under section 10A, assessee should be granted an opportunity to put forth its claim for deduction under section 10A - Held, yes [Paras 16 and 17] [Matter remanded]"*

We have also perused the submission of the assesse reproduced in the order of ld. CIT(A) dated 04.01.2019 explaining that the provision of Sec. 10A & Sec. 10B of the Income Tax Act, 1961 are similar to each other and the quantum of deduction/methodological of computing the claim under both sections remains the same though the conditions for availing of the deduction under both the sections are a bit different and the assesse has fulfilled the conditions for claiming the deduction u/s 10A as per the audit report in form no. 56F filed. The assesse also explained that in the earlier years because of technical error the claim was incorrectly made u/s 10B instead of Sec. 10A of the Act. It is undisputed fact that Pune Unit was 100% export oriented undertaking was granted permission for development/manufacture of computer software under Software Technology Park scheme by STPII vide letter dated 19.04.2002. The date of commencement of

manufacture/production of the computers software was 07.06.2002. It was also explained that Pune Unit was not formed by splitting/reconstruction of business or by transfer of old machinery since no additional claim was made by the assesse and it was only claiming a deduction u/s 10A instead of wrong Section 10B of the Act. In the light of the above facts and findings as discussed supra we direct the A.O to allow the claim of deduction made by the assesse u/s 10A instead of Sec. 10B of the Act. Therefore, this ground of appeal of the assesse is allowed.

2nd Ground: Excess levy of interest u/s 234B amounting to Rs.95,77,946/-:

7. In the case of the assesse the A.O passed the regular assessment order u/s 143(3) of the Act on 31.12.2010 and the second regular assessment order u/s 143(3) r.w.s 254 of the Act was passed by the A.O on 20.03.2014. Thereafter the A.O has charged interest u/s 234B of the Act on the basis of income determined as per 2nd regular assessment order dated 20.03.2014.

8. In the appeal the ld. CIT(A) upheld the action of the A.O for charging interest u/s 234B of the Act up to the assessment u/s 143(3) r.w.s. 254 of the Act.

9. Heard both the sides and perused the material on record. During the course of appellate proceedings before us the ld. Counsel has referred the decision of ITAT, Delhi in the case of Freightship Consultant Pvt. Ltd. Vs. ITO, Ward 11(3) (2008) 110 ITD 377 (Delhi).

10. With the assistance of ld. Representative we have perused the decision of ITAT, Delhi as referred supra wherein it is held that the A.O is duty bound to charge interest u/s 234B up to the date of original order of assessment passed by him and not up to the date of

reassessment order passed by him in pursuance of Tribunal order. The assesse has also referred the decision of ITAT, Ahmedabad in the case of ACIT Vs. Sallauddin M. Kadari vide ITA No. 2426/Ahd/2009 wherein the decision of ITAT Delhi in the case of Freightship Consultant Pvt. Ltd. Vs. ITO, Ward 11(3) (2008) 110 ITD 377 (Delhi) was followed. Following the decision of ITAT, Delhi we direct the AO to charge interest u/s 234B up to the date original order of assessment, therefore, this ground of appeal of the assesse is allowed.

11. In the result, the appeal of the assesse is allowed.

Order pronounced in the open court on 29.12.2022

Sd/-	Sd/-
(Vikas Awasthy) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 29.12.2022
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.