

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'K' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.2641/Mum/2016
(Assessment Year :2006-07)**

&

**ITA No.585/Mum/2017
(Assessment Year :2007-08)**

M/s. Larsen & Toubro Infotech Ltd. Taxation Dept. L & T House 2 nd Floor, N.M. Marg Ballard Estate Mumbai – 400 001	Vs.	The Deputy Commissioner of Income Tax Circle 2(2)(1) Room No.545 5 th Floor, Aayakar Bhawan, M.K. Marg Mumbai – 400 020
PAN/GIR No.AAACL1681P		
(Appellant)	..	(Respondent)

Assessee by	Shri P.J.Pardiwala / Ms. Aarti Sathe / Mr. Sasavari Kadam
Revenue by	Shri Yogesh Kamat
Date of Hearing	13/11/2023
Date of Pronouncement	30/11/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeals have been filed by the assessee against separate impugned orders dated 11/01/2016 for the A.Y.2006-07, passed by Id. CIT (Appeals)-57, Mumbai; and 16/02/2023 for the A.Y.2007-08 passed by Id. CIT (Appeals)-5,

Mumbai for the quantum of assessment passed under Section.143(3) r.w.s. 147.

2. In both the years, facts and issues involved are identical, therefore, same were heard together and are being disposed of by way of this consolidated order.

3. We will take up the appeal for A.Y.2006-07 wherein assessee has raised following grounds:-

“The learned Commissioner of Income-tax (Appeals) [“CIT(A)”] erred in confirming the order passed by the Assessing Officer [“AO”] u/s. 143(3) r.w.s. 147 of the Income-tax Act, 1961 [“Act”] without appreciating that re-opening of assessment u/s. 147 after a period of four years from the end of relevant assessment year was not warranted having regard to the facts of the case. The CIT(A) ought to have appreciated that neither any income has escaped assessment nor the appellant has failed to disclose fully and truly all material facts necessary for assessment u/s. 143(3).

Without prejudice to Ground No. 1, on the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the AO's action of treating the onsite software development services rendered by the appellant as "supply of manpower" and "body shopping" and not as "export of software" so as to reduce the claim of the appellant u/s. 10A of the Act by Rs. 17,98,78,041/-

Without prejudice to Ground no. 1 and 2, on the facts and the circumstances of the case and in law, the CIT(A) erred in confirming the AO's action of treating revenue generated from overseas branches as not export service from India and as not derived from Software Technology Park Units (“STPI units”) located in India and on that basis holding that in any case the deduction under Section 10A needed to be recomputed and reduced by Rs. 17,98,78,041/-.”

4. Apart from this, assessee has also raised additional ground challenging that the impugned order passed by the Assessing Officer under Section.143(3) r.w.s. 147 is bad in law as the same has been passed without issuance of notice under Section.143(2) which is a mandatory requirement for computation of assessment. *Secondly*, reopening under Section.147 is based on “change of opinion”; and *lastly*, assessee has challenged the violation of principles of natural justice as the AO has passed assessment order within four days from the disposal of the objections.

5. The brief facts are that the assessee company is engaged in the business of software development and provisions of software solutions of varied applications and industries. It had 15 branches in various countries performing similar software development activities as performed in India. The software offshore development centers were extension of client onsite business performed through dedicated offshore centers. For the A.Y. 2006-07 assessee has filed return of income on 07/11/2006 declaring total income of Rs.1,87,66,319/- under the normal provisions of the Act and computed book profit of Rs.5,41,39,748/- u/s.115JB. Thereafter, assessee's case was selected for scrutiny and the order u/s. 143(3) was passed vide order dated 18/12/2009 at an income of Rs.6,16,82,070/-. The assessee in the return of income had claimed exemption under Section 10(A) of Rs.80,12,73,491/-. However, during the course

of original assessment proceedings, deduction u/s.10A was withdrawn to the extent of Rs.4,88,37,287/-.

6. After the completion of assessment, notice u/s.148 was issued on 22/03/2013 after recording following 'reasons':-

Reasons recorded for reopening the assessment:

31.03.2013

The assessee company has filed its return of income on 07.11.2006 declaring total income at Rs.1,87,66,319/ In the return exemption u/s 10A was claimed at Rs.80,12,73,491/ The assessment u/s 143(3) was completed on 18.12.2009 by DCIT-2(2), Mumbai at an income of Rs.6,16,82,070/- In the assessment deduction u/s 10A was withdrawn to the extent of Rs 4,88,37,287/-.

In the scrutiny assessment for A.Y.2009-10, it was noted that the assessee has incurred substantial expenditure in foreign currency. Such expenditure is incurred in respect of employees posted abroad and also expenditure on maintenance of branches. In the scrutiny assessment for A.Y. 2009-10, copies of contract with the clients were also called upon. On perusal of these contracts, it is noted that the assessee has not developed computer software as such, rather it has deputed its staff wholly and exclusively for the use of the clients. Further, the contracts with clients suggest that the assessee has a Permanent Establishment (P.E.) in the countries wherein its clients are located. On this factual finding it was held that the assessee has not developed any computer software in respect of expenditure incurred in foreign currency and such expenditure Incurred in foreign currency has not resulted into an income which is derived from the undertaking located in India and eligible for deduction u/s 10A.

On verification, it is noted that in the current year also the assessee has incurred expenditure in foreign currency at Rs.348.95 crores. Therefore, corresponding income earned in respect of this expenditure cannot be considered an income derived from undertaking eligible for deduction u/s 10A

Therefore, to that extent, excess deduction is claimed u/s 10A which needs to be withdrawn. In A.Y. 2006-07, such information was not provided by the assessee and hence there is a failure on part of the assessee to disclose truly and fully all material facts required for assessment.

Further, the amount of such excess deduction is more than Rs. 1 lakh. In view of the above, statutory approval is solicited for issue of notice u/s 148 of the Income Tax Act, 1961.

7. Thereafter, assessee filed detailed objections which has been rejected by the Assessing Officer vide separate order dated 28/03/2014 holding that assessee's objections are not acceptable because-

a) Subsequent to the findings during the assessment proceedings for A.Y 2009-10 the fact came to light that the assessee is not eligible for deduction u/s 10A to the extent. Hence the assessment proceedings are validly initiated within the stipulated period as prescribed in the Act.

b) The issue of escapement is established in the A.Y 2009-10 and in view of the same it was found that the assessee has been allowed excess deduction for the A.Y. 2006-07.

c) Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure.

8. The Assessing Officer required assessee to explain why the salary paid outside India should not be considered as 'body shopping' and other costs incurred outside India and should not be considered as expenditure incurred for the purpose of earning

income not derived from eligible business unit and why the claim for deduction under Section.10A should not be disallowed. In response, assessee filed its detailed submissions which have been incorporated in the impugned assessment order from pages 2-7. However, Assessing Officer from the perusal of the sample agreements submitted by the assessee observed that basic role was to supply the manpower as per the specification provided by the client, which enjoys almost full control over such personnel. These personnel are engaged by offshore clients on 'full time' basis and for two years which many extended to completion of the project. Thus, such type of arrangement according to him is 'body shopping' and the benefit derived from services cannot be treated as derived from export and computer software. Accordingly, he disallowed profits in ratio of software development expenses incurred out of India to the total software development expenses of the assessee company. He noted that total software development expenses were as under:-

Nature of Exp.	Cost incurred in India	Cost incurred outside India	Total Rs.
Software Development Expenses	2,13,29,43,760	2,89,92,85,940	5,03,22,29,700

9. Thus, AO held that nearly 57.61% of the software development expenses had been carried out outside India, hence, income in respect of eligible units to the extent of 57.61% needs to be disallowed. Accordingly, he computed disallowance from

the claim of deduction under Section.10A of Rs.48,15,41,883/-. Thereafter, he observed that if without prejudice it is held that services provided by the assessee are not in the nature of 'body shopping', the said profit derived from overseas branches cannot be considered export services from India allowable as exempt under Section.10A due to following reasons:-

(i) The onsite staffs are controlled by the Overseas branches of the assessee and such branches have Permanent Establishment in respective countries. Hence revenue generated from such employees and branches cannot be considered as export services from India and derived from STPI located in India.

(ii) The billing to customers are made through such overseas branches and hence the revenue generated there from cannot be considered as having derived from exports from India.

10. Thus, he computed the disallowance after observing as under:-

In aforesaid circumstances, it is justified to make the disallowance of profits in the ratio of Software Development Expenses/ Administration & Other Expenses incurred out of India" to the total Software Development Expenses/ Administration & Other Expenses of the assessee company. Vide its letter dated 31.03.2014, the assessee has submitted break-up of Software Development Expenses/ Administration & Other Expenses, as under:-

<i>Nature of Exp.</i>	<i>Cost incurred in India</i>	<i>Cost incurred outside India</i>	<i>Total Rs</i>

<i>Software Development Expenses</i>	2,132,943,760	2,899,285,940	5,032,229,700
<i>Administrati on & Other Expenses</i>	1,286,392,560	536,071,286	1,822,463,846

11. The ld. CIT (A) has confirmed the finding of the Assessing Officer both on legal grounds as well as on merits following the directions of the DRP for the A.Y.2009-10.

12. Before us, ld. Sr. Counsel for the assessee Shri P.J. Pardiwala submitted that here in this case, all the material facts relating to software development expenses including cost incurred outside India were fully disclosed and the computation of deduction u/s.10A was one of the subject matter of scrutiny before the Assessing Officer who after analysing the details has even made disallowance out of claim of such deduction. Now, after the expiry of four years from the end of the relevant assessment year, the Assessing Officer has recorded the reasons based on same set of material facts which was there before the Assessing Officer. From the bare perusal of the reasons recorded it can be seen that the only basis which has been stated is that in the scrutiny assessment for the A.Y.2009-10, it was noted that assessee has incurred substantial expenditure in foreign currency in respect of employees posted abroad and on scrutiny of copies of contracts, and assessee has not developed computer software rather it has deputed staff wholly and exclusively for the use of clients. This expenditure incurred in foreign currency has

not resulted into any income and therefore, for this reason it is not eligible deduction u/s.10A. First of all, nowhere Assessing Officer has pointed out what was the failure to disclose truly and fully all material facts required for the assessment. A view taken in A.Y.2009-10 cannot be taken as failure on the part of the assessee to disclose truly and fully all material facts because all the facts were already part of the record during the course of assessment proceedings. Further, in any case the Tribunal in A.Y. 2009-10 have rejected this view taken by the Assessing Officer in pursuance of the directions of the DRP and has allowed this issue in favour of the assessee after detailed discussion and wherein we found same contracts which have been discussed by the Assessing Officer. Thus, there cannot be any failure on part of the assessee and consequently, the assumption of jurisdiction under Section.147 is bad in law and on merits also the additions are not sustainable.

13. On the other hand, ld. DR strongly relied upon the order of the CIT(A) and further submitted that once in A.Y.2009-10 it was found that the assessee has done 'body shopping' and has claimed deduction under Section.10A on such expenditure incurred on personnel which has not resulted into income from software development.

14. We have heard both the parties and also perused the relevant material referred to before us. As noted above, in this case already assessment under Section. 143 (3) was completed and the entire working of deduction and claim under Section.10A

was fully and truly disclosed during the course of assessment proceedings. Based on those materials Assessing Officer has computed deduction under Section.10A and has also made disallowance of more than Rs.4.88 Cores under Section.10A. Now, based on certain observations and finding given in the scrutiny assessment for A.Y.2009-10, assessee's case has been reopened beyond the period of four years alleging that there is a failure on the part of the assessee to disclose truly all material facts required for the assessment. First of all, merely because a different view has been taken by the AO in the assessment for A.Y.2009-10 on the same set of facts, that does not lead to inference, that there is failure on the part of the assessee. On given set of facts if the assessee has disclosed fully and truly all material facts, then the inference which has to be drawn from such material facts or law is the duty of the Assessing Officer and failure cannot be ascribed to the assessee. If the reopening under Section.147 is hit by the limitation and conditions provided in the *proviso* u/s.147, that is, where the assessment has been completed u/s 143(3) and if the assessment is being sought to be reopened beyond the period of four years from the end of relevant assessment year, then one of the basic requirement to assume jurisdiction is that, there should be failure on the part of the assessee disclosed fully and truly all material facts. The failure on part of the assessee has to be clearly specified, that particular materials facts necessary for the assessment has been not disclosed fully and truly and some tangible material have come on record to show that there was

failure of disclosure by the assessee. If no such failure is ascribed then AO cannot assume jurisdiction to reopen the completed assessment beyond the period of 4 years. Before us, ld. Counsel has relied upon the decision of the Hon'ble Karnataka High Court in the case of Infosys Ltd in Writ Petition No.29828/2011 and other writ petitions wherein on similar issue and similar kind of facts, the Hon'ble High Court had quashed the reopening u/s.147.

15. Undisputedly, the case of the assessee is hit by the *proviso* to Section 147, ergo, the limitation and the condition provided therein has to be satisfied, whether AO has assumed valid jurisdiction or not. The case of the AO is that, the issue of escapement is established in the A.Y 2009-10 when the fact came to light that the assessee is not eligible for deduction u/s 10A to the extent and in view of the same it was found that the assessee has been allowed excess deduction for the A.Y. 2006-07. There is no whisper that any material or information has come on record that assessee was not incurring expenditure for software development outside India, but doing body shopping by deputing the personnel for the outside clients, albeit, from same set of facts a different view has been taken in A.Y.2009-10 that revenue generated from such employees and branches cannot be considered as export services from India and derived from STPI located in India, which inference of the AO on same fact ultimately has been found to be incorrect by Tribunal. Consequently the whole premise of reopening gets vitiated. Thus, reopening has been done merely on the basis of inference

drawn by the AO on same facts and is not based on any material coming on record which can prove that there was failure on part of the assessee in so far as disclosure of correct facts are concerned. A different view taken on same set of facts which was part of the record in subsequent years does not tantamount to failure on part of the assessee. Accordingly, we hold that, there is no failure on the part of the assessee to disclose truly and fully material facts required for the assessment and the reopening has been done simply on the basis of a different view taken by the Assessing Officer in A.Y.2009-10 and there is nothing tangible material which has been found in A.Y.2009-10 pertaining to A.Y. 2006-07 or 2007-08. Thus, we accept the contention of the ld. Sr. Counsel that the entire reopening is bad in law and accordingly whole reassessment proceedings and order passed by the AO u/s 147/143(3) is quashed.

16. Otherwise, on merits also, the Tribunal has reversed finding of the DRP/AO in A.Y.2009-10 which is the entire basis of reopening and addition in these years. This itself goes to show that there was no failure on the part of the assessee albeit, the claim of the assessee itself was allowable. The relevant observation and the finding of the Tribunal on this issue in A.Y.2009-10 are reproduced hereunder:-

“Larsen & Toubro Infotech Limited (LTIL) India is engaged in providing software development services to global clients in the areas of Financial Services, Manufacturing and Product Engineering Services (Telecom). LTIL India has software development centres at Mumbai (Powai and Navi Mumbai), Pune, Chennai, Bangalore and Mysore.

*LTIL uses a mixed/hybrid model for providing Software Development Services, wherein, services are rendered both from offshore development centres in India and at onsite locations of the customers in various countries. Nearly 98% of customer contracts in terms of revenue are of this type containing both offshore and onsite software development projects. Very small proportion of contracts (i.e. only 2% of revenue), are in the nature of pure onsite contracts and these are in the nature of Software Development Projects for SAP/ERP Development & Implementation which are required to be executed at client site. Employees working onsite are under the supervision and control of the Project/Delivery Manager from LTIL India. E.g. **contract with Mushrif Trading & Contracting Company is enclosed herewith for your reference.***

Providing software services to overseas customers requires a combination of onsite services and offshore services. This is required for the following reasons: when a customer is transitioning the work from his IT team to outsourced vendor like us, detailed knowledge transfer is planned followed by scoping of work that needs to be done onsite as it requires proximity to customer and the work that can be offshored. Second, there is a need of certain technical staff to be onsite for better understanding of customer's ongoing requirements and translating the same to the offshore team for cost effective and timely delivery of services to the customer. Third, in cases where certain software development services are required to be integrated with other systems at customer's end, it requires interaction at customer site. Thus, onsite and offshore services are an integral part of software services delivery and are managed in a manner which ensures cost effective and timely execution. From customer's viewpoint, the customer is interested in keeping the onsite requirement to the minimum considering the higher cost involved for onsite services.

The onsite as well as offshore employees work under the supervision and control of LTIL'S Engagement Manager/ Delivery Manager Project Manager. There are service level agreements on key parameters of service delivery such system up-time, response time, level of compliance to customer's standards etc. and these are jointly delivered by the onsite and offshore teams.

LTIL has branch offices in various countries, through which ting is done to customers in both cases of Offshore and Onsite services provided to the customers.

*This is done basically to comply with the local laws of the respective countries and ease of collection of service fees charged from customers in those specific countries in many countries, there are VAT/ GST regulations requiring un to charge the same to the clients which necessitate billing to be done in respective countries. We have been trying to get the customers to agree to enter into contract with India address and we have been able to achieve this for certain clients such as Chevron Texaco Inc, USA, Freescale Semiconductor Inc., USA, Motorola Inc., USA, Samsung Electronics, South Korea, etc. E.g. **contract with Chevron is enclosed for your reference.***

*As regards contracts entered into with customers through overseas branches, these branches are part of LTIL India organization only and operate as front-end offices of the company in various countries where customers are located. These front end offices are basically working as marketing arm of LTIL India. E.g. **contract with Hitachi Ltd is enclosed herewith for your reference.***

*In certain cases, customer wants control of the data shared during software development projects, due to the confidentiality requirements. In some other cases, customers observe our capabilities and in the Initial phase, they require our professionalsto be onsite and once we gain their trust, we are able to get work orders involving onsite and offshore work or some work orders which can be largely executed from offshore. E.g. **contract with the Thales is enclosed for your reference.***

From the above explanation of LTIL's business model, it can be observed that in LTIL'S business model of providing software development services through a combination of onsite and offshore services, the onsite services are effectively connected with offshore services. Hence, the onsite services are not in the nature of "Manpower Supply" which is referred to as "Body Shopping".

*Even in case of the small proportion of 2% business which is done through onsite project development, the onsite activities are under the control and supervision of LTIL-India. E.g. **contract with***

Mushrif Trading & Contracting Company as also enclosed above for your reference.

Hence we submit that LTIL India is eligible for exemption on its 100% export profits as it has complied with all the conditions required for claiming benefit of Sec 10A.”

In order to support the above submission, the Ld. Sr. Counsel for the Appellant took us through the relevant clauses of various contracts placed at Page 63 to 222 of the paper-book.

23. Further, the Ld. Sr. Counsel appearing for the Appellant also relied upon submissions, dated 12.02.2013, to contend that the Assessing Officer had erred in excluding communication expenses of INR 9,54,60,091/- and other expenditure incurred in foreign currency aggregating to INR 8,82,15,41,969/- from the export turnover on the ground that provisions of Explanation 2(iv) to Section 10A of the Act are not attracted. In this regard, reliance was placed on the decision of the Tribunal in the case of M/s Patni Telecom P. Ltd. vs. ITO [2009] 308 ITR (AT) 414 (Hyderabad). Without prejudice to the aforesaid, the Ld. Senior Counsel appearing for the Appellant submitted that, in any case, as per the decision of the Special Bench of the Tribunal in the case of Income-tax Officer, Company Ward- VI(1), Chennai vs. Sak Soft Limited :[2009] 121 TTJ 865 (Chennai) (SB)[06-03-2009] if the „export turnover“ is arrived at after excluding certain expenses, the same should also be excluded in computing the “total turnover”.

24. Per contra, the Ld. Departmental Representative vehemently contended that the Appellant would not engaged in the business of Software Development and therefore, not entitled to claim depreciation for the revenue stated to have been received by the Appellant from on-site development of software. He submitted that the Appellant was engaged in Body Shopping and in this regard relied upon clauses contained in various contracts placed on record by the Appellant pertaining to „supplier staff“ or „staffing“. He submitted that the clients exercise full control over the personnel provided by the Appellant on full time basis to the clients. He submitted that the overseas branches generated revenues from the aforesaid employees which could not have been considered as export of services from India derived from eligible units located in India. Without prejudice to the foresaid, the Ld.

Departmental Representative submitted that the Assessing Officer was correct in excluding communication expenses and other expenses incurred in foreign currency as mandated by the provisions of Explanation 2(iv) to Section 10A of the Act.

25. We have considered the rival submissions and perused the material on record including the judicial precedents cited during the course of hearing. Before dealing with the issue raised in the present appeal, we deem it appropriate to refer to the legal background as succinctly noted by the Tribunal in its decision in the case of DCIT Circle 11(4), Bangalore, Vs. M/s. iGate Global Solutions Ltd. [IT(TP)A No.286/BANG/2013, Assessment Year 2007-08, dated 05/08/2019] which read as under:

“19. Section 10A is a special provision in respect of newly established undertakings in free trade zones etc. Sub-section (1) of this section provides for a deduction of profits and gains as are derived by an undertaking from the export, inter alia, of computer software for a specified period. It is not disputed that the assessee satisfied all the requisite conditions for becoming eligible to deduction under this section, which is apparent from the action of the AO in himself allowing deduction to some extent. The dispute is only to restricting the amount of deduction in respect of the alleged profits derived by the assessee from DTM and onsite charges, which in the opinion of the AO, were not derived from export of computer software.”

20. The assessee is engaged in the business of computer software development from its eligible units. At this stage, it would be apposite to consider the meaning of ‘Computer software’ given in Explanation 2(i) of section 10A as: ‘(a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or (b) any customized electronic data or any product or service of similar nature, as may be notified by the Board, - which is transmitted or exported from India to any place outside India by any means’. It transpires from the definition of the ‘computer software’ that it has two clauses. The first clause deals with a computer programme which is recorded on any disc or tape etc., which may usually be off the shelf product or in other words, a product which is available as such with the assessee and is not required to be customized. The second clause deals

with a customized electronic data or any product, which is required to be tailor-made. Whereas the first clause encompasses a computer programme which has already been developed by the assessee on a standard basis and is exported as such, the second clause covers developing a new computer software as per the specific requirements of the customer.

21. One has to pass through various stages to develop a computer software, such as, Conceptualization, Planning, Designing, Developing, Testing and then Maintaining. In the Conceptualization stage, the requirements of the customer are first identified to form a view of the work to be done. In the Planning stage, an overall plan of proceeding with is formalized. In the Designing stage, blueprint of the work to be done is drawn. In the Development stage, which is also called coding stage, the actual work is started for translating the plan into action. It is one of the most important stages of software development. In this stage, the work is divided into several modules/programmes, each of which is independently developed and coded. This activity of development of modules and coding may be done simultaneously or one after another, depending upon the nature of module and its placement or setting within the overall product. The development stage produces a final software product, which is then tested on stringent standards to ensure that it measures up to the required specifications. Once the computer software or the product passes through the testing stage, it is given to the customer for actual use. Any product so developed may need maintenance and then upgradation with the passage of time. A close scrutiny of the life cycle of a customized software, as discussed above, discerns that a lot of interaction is required between the computer software developer and the customer, which is almost present in most of the stages of software development, starting with conceptualization itself. In developing a computer software of large magnitude, it is quite possible that a Software Developer may have to visit the site of the customer several times for having an on the spot information and properly appreciating the needs so as to make the final product compliant with the requirements. There can be several other reasons necessitating a customer abroad insisting a software developer in India to develop software fully or partly at his site overseas. The

stage of testing in a customized software can be properly done only at the site of the customer. The nitty-gritty of the matter is that a customized software cannot be ordinarily developed without spending some time on site with the customer. Considering the objective of deduction u/s 10A and realizing practical issues and difficulties, the Finance Act, 2001 inserted Explanation 3 w.e.f. 1.4.2001 providing: 'For the removal of doubts, it is hereby declared that the profits and gains derived from on site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.' The Explanation contains a deeming provision and gives a practical solution to the problem by providing that profits from on site development of computer software and services for development of software outside India shall be deemed to be the profits and gains derived from the export of computer software outside India. Undeterred by the Explanation 3, some of the authorities kept on refusing the claim of the assesses u/s 10A, as is the case under consideration, to the extent of the profits derived from onsite development of computer software and rendering of services by technical manpower outside India. The CBDT had to step in by issuing a Circular No.1/2013 dated 17.1.2013 providing that (a): 'it is clarified that the software developed abroad at a client's place would be eligible for benefits under the respective provisions, because these would amount to 'deemed export' and tax benefits would not be denied merely on this ground' and (b) 'that profits earned as a result of deployment of Technical Manpower at the client's place abroad specifically for software development work pursuant to a contract between the client and the eligible unit should not be denied benefits under sections 10A, 10AA and 10B provided such deputation of manpower is for the development of such software and all the prescribed conditions are fulfilled.' It was brought to the notice of the CBDT that the AOs were not even following the clarification given in the Circular dated 17.1.2013. Once again, **the CBDT issued Instruction No. 17/2013 dated 19.11.2013** clarifying that: 'The undersigned is directed to convey that the field authorities are advised to follow the contents of the Circular in letter and spirit. It is also advised that further appeals should not be filed in cases where orders were passed prior to issue of Circular but the issues giving rise to the disputes have been

clarified by the Circular'. There is hardly any need to accentuate that income-tax authorities are mere implementing agencies of the Parliament intent expressed through the enactment. They cannot suo motu usurp the power to indirectly legislate by not following the mandate of the provisions. Other income-tax authorities are bound to follow the command of the CBDT given through Circulars, even if they are not personally agreeable with the same.

22. On going through the directive of the Explanation 3 and the Circulars issued by the CBDT, which are binding on the authorities under the Act, it is vivid that the benefit of deduction under section 10A caters not only to profits earned from export simplicitor of computer software but also to any profits and gains derived from onsite development of computer software and also services for development of software rendered outside India. **So long as there remains a live link between onsite development of computer software and services for development of software with the development of software from the eligible undertaking, the consideration awarded for onsite development for computer software and rendering services for development of services outside India cannot be excluded from the purview of deduction u/s.10A.** However, what is essential for such onsite development or rendering of software development services outside India to qualify for the benefit of deduction is that these should be in furtherance of the development of the software product undertaken by the eligible enterprise. If onsite services are de hors the product which the assessee undertook to deliver to the foreign customer, then any profit and gain arising from such services cannot be considered as eligible for deduction. **The determinative test to qualify for the benefit of deduction, in our considered opinion, is that the rendition of onsite services etc. outside India by the assessee should be an integral part of the overall computer software development project, which the assessee undertook to do for its foreign customer.** So long as the onshore activities etc. performed outside India remain in furtherance of the final product to be delivered, there can be no doubt on the eligibility of profit from such activities for deduction.”

26. In the appeal before us also, it is not disputed that the Appellanthad units eligible for deduction under Section 10A of the

Act. The Assessing Officer has allowed part deduction claimed by the Appellant under Section 10A of the Act and the dispute before us is limited to the Revenue derived from on-site software development services. The contention of the revenue is that the Appellant is engaged in providing personnel and is, therefore, engaged in body shopping. On the other hand, the contention of the Appellant is providing software development services to the customers in discharge of its contractual obligations. Thus, the first issue is arises for consideration is whether the Appellant is engaged in providing software development services as claimed by the Appellant. The answer to a query regarding the nature of services provided by an assessee would depend upon the facts and circumstances of each case requiring examination of the business model and contractual obligations of such assessee. It is admitted position that 98% of the Revenue is earned by the Appellant under mixed/hybrid model requiring, both, services in India and onsite services outside India. Only 2% of the Revenue earned by the Appellant comes from the pure onsite services rendered outside India. The Appellant has placed before us the extracts of the following contracts (at page 63 to 222 of the paper-book) (a) Contract for Information Technology Services with Mushrif Trading & Contracting Co. [for short „Mushrif Contract“] (b) Information Technology Services Agreement with Chevron U.S.A. Inc. [for short „Chevron Agreement“] (c) Master Services Agreement on Software Development with Hitachi Limited, Japan [for short “Hitachi Agreement”] and (d) Fixed Price Agreement with Thales, France (DAG/S&HT/2007/A262) [for short “Thales Agreement”]. The Ld. Senior Counsel for the Appellant appearing before us relied upon the recitals and various clauses of the aforesaid agreement dealing with the scope/provision/location of services, obligations of the Appellant in relation to staff/personnel working on the project, price/consideration for services and its payment, to support the contention that the Appellant was engaged in providing software development services as per the contracts entered into by the Appellant with its clients. Countering the aforesaid submissions, the Ld. Departmental Representative placed reliance upon Clause 12 „Supplier Staff“ of Chevron Agreement and Clause 14 „Staffing“ of Hitachi Agreement to drive home the point that the Appellant was engaged in body shopping. He vehemently contended that Appellant was essentially supplying personnel who were under complete control and

management of the clients and, therefore, Assessing Officer has rightly denied deduction claimed by the Appellant under Section 10A of the Act. However, on perusal of the agreements including the specific clauses highlighted by the Ld. Departmental Representative, we are of the view that the Appellant is not engaged in body shopping in view of the following:

26.1 Perusal of Mushrif Contract we find that according to the recital the Appellant has been engaged to implement, develop, create, test and deliver ERP/Software services. Clause 4 of the Mushrif Agreement dealing with „Notice of Delay”, inter alia, provides that the Appellant could hire sub-contractors to provide some or all of the services set out in the relevant work order with prior written consent of the client. Further, the compensation structure provided in Clause 5 included fixed price compensation payable on completion of the services/milestone. Clause 10 dealing with “Ownership and Rights” provided, inter alia, that the intellectual property rights developed pursuant to work orders shall be owned by the client. As per Clause

11 dealing with “Representation and Warranties”, the Appellant represented that it shall perform services in accordance with the degree of scale and care exercised by a service provider providing substantially similar services. The aforesaid agreement did not have any clauses pertaining to staff/personnel.

26.2. Next we take up the Chevron Agreement. The Ld. Departmental Representative had relied upon Clause 12 „Supplier Staff” of the Chevron Agreement and therefore, we proceed to first examine the same. The Ld. Departmental Representative had highlighted the facts Clause 12.1 provides that subject to approval by the client “Supplier Account Executive” appointed by the Appellant would serve on a full time basis as the primary representative and shall have overall responsibilities for managing/coordinating the performance of obligations by the Appellant and shall also be authorized to act on behalf of the Appellant. Similarly, Clause 12.2 provides that all „Key Supplier Personnel” working on the project shall work on full time basis. Before assigning any individual to key supplier position, the Appellant is required to notify the client, provide resume/ regarding such individual and obtain written approval of the client for such assignment. Further, Clause 12.2 (c) provides that the Appellant shall not replace “Supplier Account

Executive"/"Key Supplier Personnel" for a period of two years. In our view, the terms and conditions highlighted by the Ld. Departmental Representative must be read in understood in the context of the rights and obligations of the parties under the agreement. On perusal of various provisions contained in Clause 12 we find that the provisions are intended to ensure continuous supply of quality services as represented by the Appellant. The limited control exercised by the client over assignment for specified duration and removal of the staff for the project cannot be treated at par with the right to appoint and terminate the employment of staff. As per Clause 12.1, the „Supplier Account Executive" bares the responsibilities of managing/coordinating the Appellant's obligations and also has the authority to act on behalf of the Appellant. Clause 12.2(c)/(d) do not bar replacement/re-assignment of personnel and also recognizes the right to the Appellant to terminate services of the employee/staff. Clause 12.3 clearly casts obligation on the Appellant to recruit/hire „Project Staff" required for providing the services under the agreement. Clause 12.4 and 12.5 requires to application maintain „Buffer Staff" and "Relief Staff" of 15 to 20% of the Project Staff and 3 to 5% of Project Staff, respectively. The aforesaid clauses when read with the Clause 3 "Services" read with Exhibit 2 „Statement of Work" giving details of possible services which could be availed by the client, clearly shows that the subject matter of the agreement under consideration is software development services and not supply of personnel as contended by the Revenue.

26.3 Under Hitachi Agreement also the Appellant has been engaged for providing program support and services as specified in Article 3 of the said agreement for a firm/fixed price to be settled between the parties for each work/supplement project. In our view, merely because the Hitachi Agreement requires that the personnel deployed for the contract would serve on a full time basis with the client (and not for any other client of the Appellant) cannot lead to a conclusion that the Appellant is supplying personnel and not providing services to its clients.

26.4. Perusal of Thales Agreement shows that it is a fixed price contract for work including software development, associated technical documentation, etc. The aforesaid agreement does not

contain a clause akin to Clause 12 of the Chevron Agreement, however, according to the Ld. Departmental Representative as per the terms of the agreement the Appellant can change assigned employee only after approval from Thales. In our view, the limited right/control exercised by the client cannot be viewed de-hors the other terms and conditions contained in contract to arrive at a conclusion that the Appellant is engaged in body shopping.

26.5. *Thus, on perusal of the extract of various contracts placed before us and the clauses of contracts relied upon by the Assessing Officer in the assessment order and referred to by the Ld. Departmental Representative during the course of arguments, we are of the view that the Appellant is not engaged in body shopping qua the contracts/agreements placed before us. There is nothing on record to suggest that the Appellant is engaged in body shopping. Accordingly, we hold that for the Assessment Year 2009-10 deduction claimed by the Appellant cannot be denied on the ground that the Appellant is engaged in body shopping. Accordingly, Ground No. 2 raised in the present appeal is allowed and therefore, Ground No. 3, raised by the Appellant on without prejudice basis, as well as Additional Ground raised by the Appellant is disposed off as being infructuous.*

17. Thus, in view of the aforesaid judgment, on merits also, the addition is unsustainable and accordingly, the addition is deleted.

18. In the result, appeal of the assessee for A.Y.2006-07 is allowed.

19. As admitted by both the parties, similar reasons have been recorded in A.Y.2007-08 and assessment also was computed u/s. 143(3) on 13/12/2010 wherein exemption under Section.10A to the extent of Rs.13,34,58,851/- was withdrawn. Our finding given in the appeal for A.Y.2006-07 will apply mutatis mutandis in the appeal for A.Y.2007-08 also and

accordingly, both on legal ground as well as on merits, the appeal of the assessee is allowed.

20. In the result, both the appeals of the assessee are allowed.

Order pronounced on 30th November, 2023.

Sd/- (S RIFAUR RAHMAN) ACCOUNTANT MEMBER	Sd/- (AMIT SHUKLA) JUDICIAL MEMBER
Mumbai; Dated 30/11/2023 KARUNA, sr.ps	

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai