

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH : COCHIN

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA.No.380/COCH./2016

ALONG WITH

Stay Application No.26/COCH./2018

Assessment Year 2008-2009

M/s. IBS Software Services Private Limited, 5 th Floor, NILA, Technopark Campus, TRIVANDRUM – 695 581. PAN AAACI6825N	vs.	The ACIT, Circle-1(1), Aayakar Bhavan, Kowdiar, TRIVANDRUM. KERALA.
(Appellant)		(Respondent)

For Assessee :	Shri Rajakannan, Advocate
For Revenue :	Dr. S. Pandian, CIT-DR

Date of Hearing :	21.08.2024
Date of Pronouncement :	07.11.2024

ORDER

PER SATBEER SINGH GODARA, J.M.

This assessee's appeal ITA.No.380/COCH./2016 along with stay application S.A.No.26/COCH./2018, for assessment year 2008-2009, arise against the order of the learned CIT(A),

Trivandrum in appeal ITA.No.4/TVM/CIT(A),TVM/2015-16, dated 12.07.2016, in proceedings u/sec.143(3) r.w.s.144A of the Income Tax Act, 1971 (in short the "Act")

Heard both the parties. Case files perused.

2. The assessee pleads the following substantive grounds in the instant appeal :

The grounds stated hereunder are independent of, and without prejudice to one another. The Appellant submits as under:

1. **The learned Commissioner of Income Tax (Appeals) ('CIT(A)') erred in upholding :**
 - i. the disallowance made by Assistant Commissioner of Income-tax ('ACIT') on the Appellant's claim under Section 10A of the Income Tax Act 1961 ('the Act'),
 - ii. the disallowance made by ACIT on the Appellant's claim under Section 10AA of the Act; and
 - iii. the ACIT's disallowance under Section 14A of the Act.

2. **The learned CIT(A) ought to have held that the Appellant fulfilled all the conditions under Section 10A and Section 10AA of the Act, and hence, was entitled to the exemption under the Section 10A and Section 10AA of the Act as claimed by it.**

3. **The learned CIT(A) ought to have :**
 - i. Upheld the Appellant's claim under Section 10A of the Act,
 - ii. Upheld the Appellant's claim under Section 10AA of the Act, and
 - iii. Deleted the disallowance under Section 14A of the Act made by the ACIT.



The learned CIT(A) order is vitiated, by the following factually erroneous allegations reproduced below which are contrary to the material and evidence on record :

- i. *The Appellant never proved that it had satisfied the conditions contemplated under Section 10A. [Page 6 of the CIT(A)order – line 5]*
- ii. *It is also be noted that the Appellant never given any factual details contrary to the findings of the Assessing Officer with regard to its spilt-up or reconstruction from the said company based on the said agreement. [Page 6 of the CIT (A) order – line 6].*
- iii. *The appellant has not brought out at any point of given time documentary evidence so as to prove that this was actually verified and accepted by the then Assessing Officers without which the appellant cannot say that the issue was actually verified [Page 8 of the CIT(A) order – line 1]*
- iv. *Same is the case of the appellant wherein the claim of deduction made u/s 10A seems to have not been verified in previous years and since the conditions contemplated has not been met with, the claim of deduction made u/s 10A has rightly been denied, the decision of which doesn't require further interference [Page 8 of the CIT(A) order – line22]*
- v. *It is on this unit the appellant made the claim of deduction under the above mentioned section which the Assessing Officer has not entertained in the absence of documentary evidences brought into record to demonstrate that the SEZ unit is not formed out of the unit which is already in existence [Page 10 of the CIT(A)order, paragraph 5 – line 4].*
- vi. *Even during the course of the appeal proceedings, nothing was brought into record so as to prove that all the conditions contemplated under section 10AA have rightly met with. [Page 10 of the CIT(A)order, paragraph 5 – line 11].*
- vii. *As the case of the appellant has already proved to be a business which came into existence with taking over of all the men and materials already used by another company, have no other option but to agree with the Assessing officer that the appellant failed to demonstrate that it is a new unit and not formed out of a unit which was already in existence without which no deduction u/s 10AA could be claimed. [Page 10 of the CIT(A)order – paragraph 5, line 13]*

5. The learned CIT(A) order is erroneous and is vitiated *inter-alia* by:

- i. non-application of mind,
- ii. failure to consider the material and evidence on record; and
- iii. on account of it being contrary to the evidence and material on record.



6. Without prejudice to the above, the CIT(A) has wrongly retained the erroneous computation of disallowance under Section 14A of the Act amounting to Rs 1,054,082 without considering the fact that the majority of the foreign investments included for computing disallowance under Section 14A of the Act are those yielding taxable income and therefore, falling outside the purview of Section 14A of the Act

7. **Consequential levy of interest under Section 234B of the Act**

On the facts and circumstances of the case, the learned ACIT erred in levying the consequential interest under Section 234B of the Act.

8. **Relief**

8.1 The Appellant prays that directions be given to grant all such relief arising from the above grounds and also all relief consequential thereto; and

8.2 The Appellant craves leave to add to or alter, by deletion, substitution or otherwise, the above grounds of appeal, at any time before or during the hearing of the appeal.

3. Suffice to say, the assessee's first and foremost substantive ground seeks to raise sec.10A deduction claim which has been rejected by both the learned lower authorities. It emerges during the course of hearing that the instant first and foremost issue is no more *res integra* keeping in mind the fact that this tribunal's earlier learned coordinate bench; dealing with the assessee's appeals itself ITA. Nos. 855 to 857/ Coch./2001 and ITA.No.847/Coch./2007 for the assessment years 2000-2001 to

2004-2005, had partly accepted the same for statistical purposes; which in turn, stands upheld in hon'ble jurisdictional high court's judgment dated 20.07.2018 in assessee's Tax Appeals arising therefrom ITA.No.415/2009; reading as under :

Four appeals by the assessee [I.T.A.Nos.411, 412, 415 & 418 of 2010] and one by the Revenue [I.T.A.No.416 of 2010]. The appeals of the assessee raise a common question insofar as the exemption applicable to them being a 100% Export Oriented Unit [EOU].

2. The question of law raised, in the case of the assessee, is re-framed as follows:

Whether the assessee is eligible to exemption under Annexure-A notification brought out by virtue of Section 3 of Foreign Trade (Development and Regulation) Act, 1992 [for brevity "FTDR Act"]?

3. The assessee was granted benefits by the Assessing Officer under Section 10A of the Income Tax Act, 1961 [for brevity "IT Act"]. The assessee took up the matter in appeal, asserting that they are entitled to blanket exemption as available

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under Annexure-A notification [produced in the assessee's appeals]. The first appellate authority allowed the same. The Revenue filed an appeal before the Tribunal, which held that the assessee can claim exemption only under the IT Act.

4. The question that arose in the Revenue's appeal is as to whether the travel charges, telephone charges and professional consultancy charges reimbursed by the foreign client for services rendered outside the country are to be excluded from the total turnover under Section 10A of the IT Act when the same has to be excluded from the export turnover. The Tribunal found that when the same is excluded from the numerator, it has to be necessarily excluded from the denominator also; numerator being the export turnover and denominator being the total turnover.

5. The question of law raised in the Revenue's appeal is as follows:

Whether the reimbursement of expenses obtained by the assessee for services rendered outside the country has to be excluded from the total turnover, since it stands excluded from the export turnover?

6. The assessee is a 100% EOU and a software exporter, who claimed benefit under the Software Technology

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Parks (STP) Scheme formulated by the Central Government under Section 3 of the FTDR Act. The notification at Annexure-A was under Section 3 of the FTDR Act, which granted complete exemption from the income tax payable for five years from the date of commencement. The Assessing Officer, however, refused to grant the claim under the notification at Annexure-A, but allowed it under Section 10A of the IT Act. The Tribunal reversed the order of the CIT and upheld that of the Assessing Officer. The assessee had contended before the Tribunal that even though the exemption was not specifically provided under the IT Act, the exemption provided under the Unit Trust of India Act, 1963, the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and the Small and Medium Enterprises Development Act, 2006 were granted independent of the IT Act.

7. The Tribunal, according to us, rightly found that all the aforesaid enactments had a *non obstante* clause, conferring the provisions there under to have overriding effect over any other provision of law; which is absent in the FTDR Act. The STP Scheme as floated by the Government of India and the notification issued under the FTDR Act would enable the

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assessee to claim the deduction as available under the IT Act is the finding of the Tribunal. We are in agreement with the finding so entered by the Tribunal. We are informed that the assessee, after the aforesaid order of the Tribunal, has, for the subsequent years, claimed the benefit under Section 10A of the IT Act. In such circumstances, the question of law raised in the appeals of the assessee is answered in favour of the Revenue and against the assessee. The appeals filed by the assessee stand dismissed.

8. As far as the question of law raised in the appeal of the Revenue, the issue is no longer *res integra* and is covered by the decision of the Hon'ble Supreme Court in ***CIT v. HCL Technologies Ltd.*** [(2018) 404 ITR 719 (SC)]. Suffice it to extract paragraph 19:

“19. In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under section 10A of the Income-tax Act are allowed only in export turnover but not from the total turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the respondent which could have never been the intention of the Legislature”.

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The order of the Tribunal to that extent is unassailable. The question of law is answered, following the judgment of the Hon'ble Supreme Court, in favour of the assessee and against the Revenue. The appeal filed by the Revenue stands dismissed.

Ordered accordingly. Parties are left to suffer their respective costs.

4. It is in this factual backdrop that we adopt judicial consistency in absence of any distinction pinpointed so far as the assessee's impugned sec.10A deduction and direct the learned Assessing Officer to re-adjudicate the assessee's instant first and foremost substantive grounds in very terms. Ordered accordingly.

5. Next comes the assessee's second substantive ground that both the learned lower authorities ought not to have rejected it's sec.10AA deduction claim raised for the first time in the impugned assessment year i.e., A.Y. 2008-2009.

6. Learned DR invited our attention to para-5 page-10 of the CIT(A)'s lower appellate discussion that the latter has

affirmed the assessment findings once the assessee had not placed on record the cogent supportive material.

7. Learned counsel's case on the other hand is that assessee had raised the impugned deduction claim u/sec.10AA of the Act for the first time qua a new undertaking and also placed on record the relevant facts before the lower appellate authority. He further refers to assessee's pleadings in ground no.4 in this regard. Coupled with this, learned counsel has filed three paper books as well in support of the assessee's sec.10AA deduction claim. Faced with this situation, we deem it appropriate in the larger interest of justice to restore the assessee's second substantive ground back to the Assessing Officer for his afresh adjudication, preferably within three effective opportunities of hearing, subject to the rider that it shall be the taxpayer's onus and responsibility only to plead and prove all the relevant facts in consequential proceedings. Ordered accordingly.

8. Lastly comes sec.14A read with Rule 8D disallowance of Rs.10,54,082/- made in the course of assessment and upheld in the lower appellate discussion. Learned counsel *inter alia* submits that not only the assessee had derived its exempt income from investments made in foreign subsidiaries which is taxable but also investments

considered in computing the disallowances herein have not been restricted only *qua* those which have actually yielded exempt income in the relevant previous year. The Revenue's case in light of these circumstances once we are restoring the assessee's former twin substantive grounds to the Assessing Officer; this last issue may also follow the suit. We accordingly allow the ground of the assessee for statistical purposes in very terms. Ordered accordingly.

9. This assessee's appeal ITA.No.380/Coch./2016 is allowed for statistical purposes in above terms. It's stay application S.A.No.26/Coch./2018 stands rendered academic and dismissed. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 07.11. 2024.

Sd/-

[AMARJIT SINGH]
ACCOUNTANT MEMBER

Sd/-

[SATBEER SINGH GODARA]
JUDICIAL MEMBER

Cochin, Dated 7th November, 2024

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	The CIT concerned
4.	The D.R. ITAT, Cochin Bench, Cochin.
5.	Guard File.

//By Order//

//True copy//

Sr. Private Secretary, ITAT, Cochin Bench,
Cochin