IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C': NEW DELHI

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No. 5319/Del/2012
Assessment Year: 2004-05

DCIT, Circle-11(1), Room No. 312, C.R. Building New Delhi	Vs.	Infrasoft Technologies Ltd. 6th Floor, A-Wing, Trade Star Andheri Kurla Road, Andheri(East) Mumbai (PAN: AAACB2817R)
(Appellant)		(Respondent)

And

C.O. No. 101/Del/2015
(In ITA No. 5319/Del/2012)
Assessment Year: 2004-05

Infrasoft Technologies Ltd. 6th Floor, A-Wing, Trade Star Building, Andheri Kurla Road Andheri (East), Mumbai (PAN: AAACB2817R)	Vs.	DCIT, Circle-11(1), Room No. 312, C.R. Building, New Delhi
(Appellant)		(Respondent)

Appellant by : Sh. Yatendra Singh, Sr. DR
Respondent by : None

Date of hearing: 18.11.2015
Date of pronouncement: 30.11.2015

ORDER

PER O.P. KANT, A.M.:

The present appeal by the Revenue as well as the cross objection by the assessee are directed against the order of learned Commissioner of Income-tax

(Appeals)-V, New Delhi, dated 31.08.2012 passed for the assessment year 2004-05.

ITA No. 5319/Del/2012 for AY 2004-05

2. First, we shall take up the appeal of the Revenue in ITA No. 5319/Del/2012, wherein the Revenue raised the following effective ground of appeal:

> ñOn the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting addition of Rs. 2,71,68,758/- made u/s 10A of the Income Tax Act, 1961 ignoring the facts that the Ld. CIT(A) as well as ITAT have upheld the action of AO in AY 2001-02.ò

2. The brief facts of the case as culled out from the orders of lower authorities and other material filed by the parties are that the assessee was engaged in export of computer software and filed return of income for the year under consideration on 01.11.2004 declaring income of Rs. 3,10,81,920/- including claim of deduction of Rs. 2,71,68,758/- under Section 10A of the Income-tax Act, 1961 (hereinafter referred to as ñthe Actò). In the course of scrutiny proceedings, the learned Assessing Officer (in short ñthe AOò) observed that no new industrial undertaking was setup and old undertaking on which the assessee claimed deduction under section 80HHE of the Act in earlier years ,had only was used for claiming deduction under section 10A of the Act. The ld AO held that the assessee had not followed the condition of section 10A(2)(ii) of the Act and therefore following the findings in the assessment order u/s 143(3) of the Act for AY 2001-02 and the decision of the Hon'ble Allahabad High Court in the case of Babu Ram Ramesh Chand [(1991) 190 ITR

535, 539 (All.)], he disallowed the claim of deduction under Section 10A of the Act. Simultaneously, he allowed fresh/alternate claim of the assessee for deduction under Section 80HHE of the Act amounting to Rs. 90,56,253/-. The relevant para of the assessment order allowing deduction under section 80HHE is reproduced as under:

> ñ3.2 The assessee company vide letter dated 18.12.2006, has made a fresh/alternate claim of 80HHE of Rs. 90,56,253/- and also filed the auditors certificate in Form No. 10CCAF for entertaining the claim. In view of the facts and circumstances of the case, the assessee company is allowed deduction u/s 80HHE of Rs. 90,56,253/- as claimed by it.ò

Aggrieved, the assessee filed an appeal before the learned Commissioner of Income-tax(Appeals) , who allowed the appeal of the assessee holding that in AY 2001-02 and 2002-03 , the claim of the deduction under section 10A of the Act was disallowed by his predecessors in office on the ground that condition of Section 10A(9) of the Act was not fulfilled but the said condition has been omitted by the Finance Act w.e.f. 01.04.2004, and therefore the assessee was eligible for deduction under section 10A of the Act. Aggrieved with the order of ld. CIT(A), the Revenue is before us with the present appeal and the assessee has also filed the cross objections.

3. The Senior Departmental Representative submitted that the Hon'ble ITAT, Delhi bench in the case of assessee for AY 2002-03 in ITA No. 1899/Del/2008, has already decided the issue in question and held that the Software Technology Park (in short óSTPô) unit for which deduction under Section 10A has been claimed, was converted from the existing software unit

and therefore, the business being already in existence, the assessee company was not entitled for deduction under Section 10A of the Act.

4. None represented on behalf of the assessee.

5. We have heard Senior Departmental Representative and perused the material on record, including the decision of the ITAT, Delhi Bench, in the case of assessee for AY 2002-03. The ITAT has analysed validity of the claim of deduction under section 10A of the Act in the aforesaid order. The Tribunal has observed that the assessee started manufacturing of software from unit established in assessment year 1996-97. In the appellate proceedings before the Tribunal in that year the assessee claimed that a new unit was setup on 28th March, 2000 in Software Technology Park and deduction under section 10A was claimed in respect of that unit, however, after detailed analysis of facts , The Tribunal held that the STP unit was not a new unit and it was merely a conversion of an existing software unit. The relevant findings of the Tribunal are as under:

> *"10.1 Now we have to consider the contention of the assessee as to whether there is conversion of the undertaking established in assessment year 1996-97 into STP unit? The ld. CIT (A) has recorded a finding of fact that the assessee in its application for STP registration did not refer to its proposal either for establishment of a new undertaking or expansion of existing STP unit. It was unequivocally stated that the proposal was for "conversion of an existing software export unit to STP unit" which had been approved by STPI. The contention of ld. AR of the assessee is that a separate unit was set up for which new building was taken on rent and computers and other systems were acquired. In order to verify the contention of assessee we called for the copy of application form for setting up units under Software Technology Park (STP) Scheme for 100% Export of Computer Software and the case was re-heard. It was submitted by the ld AR of the assessee that in 1996 domestic unit was set up and not an export unit. The assessee set up a new unit on 28.03.2000 when STP registration was granted. In order to ascertain the facts we examined the application form for STP registration filed during the course of clarification proceedings. The following facts emerge on perusal of the said application:*

(i) In the application the address of the undertaking is given as "2nd Floor Karmayog Building Parsi Panchayat Road, Andheri East, Mumbai- 400069" which is the address of the undertaking set up in 1996.

(ii) The item 'IV A' of application form required the assessee to indicate whether the proposal was for (1) Establishment of a New Undertaking or (2) Expansion of existing STP unit or (3) Conversion of an Existing software Export Unit to STP Unit. The assessee ticked item 'IV A. (3)' i.e. "Conversion of an Existing software Export Unit to STP Unit". Item 'IV B" required information about investment proposed to be made by a new undertaking. Against this the assessee indicated as 'N.A.'.

(iii) Item 'IX' contains the information about fixed assets required for STP unit i.e. land, building and equipments both indigenous and imported. The assessee had given details of indigenous equipments under the column 'Existing' at 128 and proposed equipments both indigenous and imported required during the period of five years.

(iv) In Item 'XIII' the assessee gave details of existing (40) and proposed staff and labour (837) requirements for the implementation of the STP project during five years.

(v) Item 'XVI' contains details of "Space requirement/ Built up land". Against this, the assessee gave information as " Existing Unit on Appx. 5000 sft . Build up".

(vi) In item 'XVIII' the assessee was required to indicate establishment time required for commencement of development/export from the date of issue of permission. Against this the assessee mentioned " Export Development in Process".

From above facts one may find that the assessee had intended to use 280 existing indigenous equipments, 5000sq. ft area of existing unit, existing staff and labour numbering 40[managerial (4); Supervisory (1); Supervisory non-technical (1); labour skilled (35)]. The assessee had also stated that export development was in process. There is neither any whisper of a word in STP registration application suggesting that assessee had intended to set up a new unit nor such intention can be gathered from the said application or from the conduct of the assessee while seeking for STP registration from the competent authority. Rather from the information extracted from STP registration application as above, it is clear that the assessee required STP registration for existing undertaking and not for new undertaking. The assessee had categorically mentioned in application for conversion of the existing unit. If the assessee had intended to set up altogether a new unit, it would not have included infrastructure, staff & skilled labour etc. of existing unit in STP registration application form. These facts belie the contention of the assessee that a new unit was set up when STP registration was obtained.

10.2 Now coming to the contention of the assessee that new unit was located at 2nd Floor of the Karmayog Building Parsi Panchayat Road and existing unit was shifted to ground floor of the said building. For this he relied on the bonded warehouse licence granted to the assessee by the Custom's Department. We have gone through the license granted by Customs Department dated 30.03.2000 (page 71of P.B.). The said license was granted to the assessee for storage of imported capital goods i.e. Computers, Workstation communication equipments, software packages, network management equipments without payment of customs import duty on importation thereof subject to certain conditions. The assessee was licensed to warehouse these capital goods and other required items as permitted for STP unit 100% (Export Oriented Unit). The

warehouse was located at 2nd Floor of the Karmayog Building Parsi Panchayat Road Mumbai. From these facts it is evident that the existing floor area occupied by the assessee was converted into custom bonded warehouse to keep imported capital goods for the use in manufacturing / processing and not to store goods manufactured by the STP unit.

11. Another contention of the assessee is that new computers were purchased and new staff was employed for new undertaking. It is undisputed fact that technology is changing very fast and computers are becoming obsolete within short period of duration and therefore, the assessee had to purchase new computers and their peripherals. It is also fact that the assessee has intended to expend the existing unit for the purpose of 100% EOU. For this purpose the assessee had to recruit more staff and purchase computers and other equipments. Mere purchase of new equipments and employing more staff will not prove the contention of the assessee that new unit was set up.

12. There is another aspect of the matter. The assessee had claimed deduction u/s 80HHE in assessment year 2001-02 which disallowed on the ground that assessee was claiming deduction u/s 80HHE of the Act. This fact is also clear from the order of ITAT for assessment year 2001- 02 wherein it has been held that deduction u/s 10 will be available to the units which have enjoyed benefit of section 80HHE in earlier years if all the conditions of section 10A were satisfied. If it was a case of a new unit altogether, the assessee would not have claimed deduction u/s 80HHE in assessment year 2001-02 and would not have come to the Tribunal in appeal against disallowance of deduction u/s 10A. Moreover, the reasons for switch over to deduction undersection 10A from 80HHE was that from AY 2001-02 a new sub section (1B) was inserted insection 80HHE through which deduction under section 80-HHE was gradually being phased off with the result that from AY 2005-06 no deduction under section 80HHE would have been available to the assessee. The assessee with a view to avail of the benefit of section 10A got the existing unit registered as STP unit which was set up in free trade zone.

From above discussion it is clear that the assessee had intended to convert the existing unit set up in assessment year 1996-97 to STP unit. Therefore, contention of the assessee that a new unit was set up is an after thought and nothing more. We, therefore, uphold the findings of the ld CIT (A) that it was a case of conversion of an existing software export unit to STP unit which would connote conversion of a unit already set up."

6. The Tribunal also observed that the assessee did not fulfill the condition of section 10A(9) of the Act and therefore also the assessee was not eligible for deduction for the relevant year. Though, the condition under section 10A(9) of the Act has been omitted w.e.f. 1-4-2004 but still the assessee failed to satisfy the condition of unit not setup from reconstruction of the old or existing unit or business as held by the Tribunal in aforesaid order.

Respectfully, following the above findings of the Tribunal in the case of the assessee for AY 2002-03, we hold that the assessee has failed to fulfill the conditions of Section 10A(2)(ii) of the Act and therefore, the assessee is not entitled for deduction under Section 10A of the Act. We, therefore, reverse the findings of the CIT(A) on this issue. Further, we observe that the assessee has already been allowed the deduction under Section 80HHE of the Act in respect of the same profit/income by the learned Assessing Officer and therefore the assessee cannot be allowed deduction for the same profit/income twice under two different provisions of the Act.

7. Accordingly, the appeal of the Revenue is allowed.

C.O. No. 101/Del/2015 (In ITA No. 5319/Del/2012)

8. Now, we take up the cross objection filed by the assessee. The assessee raised the following cross objection:

i. That on the basis of material on record, the learned CIT(A) ought to have held that a new independent undertaking, eligible for Section 10A benefits, was set up on 28th March, 2000.
ii. The assessee craves to add, amend, alter or delete any grounds of appeal before hearing.

9. None appeared on behalf of the assessee. On behalf of the Revenue, Senior Departmental Representative was present.

9. In its ground, the assessee claimed that the CIT has erred in holding that the new independent undertaking was not set up on 28th March, 2000. We would like to mention here that this issue has already been dealt with by ITAT, Delhi bench in the assesseeôs case for AY 2002-03 in ITA No. 1899/Del/2008,

wherein the bench held that the Software Technology Park (STP) unit , which the assessee is claiming as new unit , was converted from an existing unit only. The issue has already been discussed in appeal of the Revenue in ITA No. 5319/Del/2012 for AY 2004-05

10. Respectfully following the decision of the Tribunal in the case of the assessee for AY 2002-03, we hold that no new unit was set up on 28th March, 2000. Accordingly, the cross objection filed by the assessee is dismissed.

11. In the result, the appeal filed by the Revenue is allowed and the Cross Objection filed by the assessee is dismissed.

The decision is pronounced in the open court on 30th November, 2015.

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

Dated: 30th November, 2015.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi