

IN THE INCOME TAX APPELLATE TRIBUNAL  
BENGALURU BENCH 'C', BENGALURU

BEFORE SHRI. A. K. GARODIA, ACCOUNTANT MEMBER  
AND  
SHRI. LALIT KUMAR, JUDICIAL MEMBER

I.T.A No.808/Bang/2016  
(Assessment Year : 2010-11)

Joint Commissioner of Income-tax (OSD),  
Circle -12(4), Bengaluru .. Appellant

v.

M/s. Toshiba Software (India) P. Ltd,  
(erstwhile Toshiba Embedded Software (India) P Ltd,  
No.3A, "Essae Vishnavi Solitaire", 3<sup>rd</sup> Block,  
Koramangala, Bengaluru .. Respondent  
PAN : AAGCS4693C

I.T.A No.748/Bang/2016  
(Assessment Year : 2010-11)  
(By the Assessee)

Assessee by : Shri. K. R. Vasudevan, Advocate  
Revenue by : Shri. M. K. Biju, JCIT

Heard on : 30.05.2017  
Pronounced on : 09.06.2017

**ORDER**

**PER LALIT KUMAR, JUDICIAL MEMBER :**

These are cross appeals filed by the Revenue and the assessee respectively, against the order passed by the CIT (A)-7, Bengaluru, dt.28.01.2016, for the assessment year 2010-11.

**ITA.808/Bang/2016 - Revenue's appeal :**

02. Following are the grounds raised by the Revenue before us :

2. Whether the CIT (A) is correct in reversing the finding of the AO that the expenditure incurred in foreign currency, towards telecommunication and travelling expenses, to be deducted from export turnover for the purpose of computation of deduction u/s.10A of the Act ?

3. Whether the CIT (A) is correct in taking into consideration Explanation 2(iv) of section 10A of the Act which clearly contemplated that such expenditure was liable to be deducted from the export turnover for the purpose of computing deduction u/s.10A of the Act ?

4. Whether the CIT (A) is correct in law in holding that the deduction u/s.10A should be computed in the above manner following the judgments of jurisdictional High Court in the case of CIT v. Tata Elxsi which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Apex Court ?

03. The Ld. DR for the Revenue supported the orders of the lower authorities. He submitted that the issue grounds 2 to 4 are covered in favour of the assessee by the judgment of the Hon'ble Karnataka High Court rendered in the case of CIT v.Tata Elxsi [349 ITR 98].

04. We have considered the rival contentions and perused the materials on record. We find that the CIT (A) had followed the judgment of Hon'ble jurisdictional High Court in the case of Tata Elxsi Ltd v. CIT [349 ITR 98],

in directing exclusion of items deducted from export turnover from total turnover also for working out the deduction u/s.10A of the Act. Just for a reason that appeal has been filed by the Revenue against the judgment of jurisdictional High Court would not be a reason not to follow the jurisdictional High Court's judgment. We do not find any lacunae in the order of CIT (A). We uphold the order of the CIT (A).

05. Revenue's appeal is dismissed.

**ITA.748/Bang/2016 – Assessee's appeal :**

06. Grounds raised by the assessee are as under :

**1 Computation of revised profits of the undertaking by reducing the interest income – Rs. 96,40,085**

- 1.1 The learned CIT(A) erred in holding that the interest income should be reduced from the profits of the STPI unit for the purposes of computing deduction under section 10A of the Act.
- 1.2 The learned CIT(A) has erred in concluding that the above mentioned income does not have any direct nexus to the export business of the Appellant.
- 1.3 The learned CIT(A) has erred in not appreciating the fact that the Appellant has only one undertaking and there is no activity apart from the business activity of this undertaking.

## 2 Computation of revised profits of the undertaking by reducing the other income – Rs. 4,91,596

- 2.1 The learned CIT(A) erred in holding that the other income should be reduced from the profits of the STPI unit for the purposes of computing deduction under section 10A of the Act.
- 2.2 The learned CIT(A) has erred in concluding that the above mentioned income does not have any direct nexus to the export business of the Appellant.
- 2.3 The learned CIT(A) has erred in not appreciating the fact that the Appellant has only one undertaking and there is no activity apart from the business activity of this undertaking.
- 2.4 The learned CIT(A) erred in not observing that the other income is business income comprising of the following –

Sl. No.	Particulars	Amount (in Rs.)
1.	Receipt from Ex-employee towards breach and violation of agreement	328,701
2.	Reimbursement of Demurrage charges from Dell India	76,232
3.	Sale of battery	32,000
4.	Reimbursement of amount paid on behalf Toshiba Japan	51,852
5.	Other Miscellaneous Income	2,811
<b>TOTAL</b>		<b>491,596</b>

## 3 Non grant of credit of taxes paid abroad – Rs. 1,37,02,380

The learned CIT(A) erred in not giving a clear finding for grant of credit for taxes paid abroad.

07. The Ld. AR has submitted that the AO in the assessment proceedings has not considered the income from other sources earned by the assessee by way of interest income, and other income by way of Service Tax refunds amounting to Rs.1,40,90,613/- on the pretext that these income do not have a direct nexus with the business of the assessee company. It was further

submitted that in the order passed by the CIT (A) , the CIT (A) has granted the relief for Service Tax refunds amounting to Rs.39,58,932/- and had not granted the relief in respect of interest income and other income.

08. It was submitted that the case of the assessee is covered by the judgments of the jurisdictional High Court in CIT v. Motorola India Electronics P. Ltd [46 taxmann.com167] and also in the matter of M/s. Subex Ltd v. ITO [ITA.46/2009, dt.28.10.2014. The Ld. AR also relied upon the following judgments :

- CIT v. Hindustan Gum & Chemicals Ltd [(2016) 72 taxmann.com 90 (Cal)] ;
- Livingstones Jewellery (P) Ltd v. DCIT [(2009) 31 SOT 323 (Mum-ITAT)]
- Bank of Baroda v. H. C. Shrivatsava [(2012) 122 Taxman 330 (Bom)]
- UOI v. Kamalakshi Finance Corporation Ltd [AIR 1992 SC 711-1994)(SC)]
- K. Subramanian v. Siemens India Ltd [(1983) 15 taxman 594 (Bom)]

09. We have heard the rival contentions and perused the records. We find that in the matter of CIT v. Motorola India Electronics P. Ltd, (supra), the Hon'ble High Court dealt with the issue in para 8 as under :

**8.** In the instant case, the assessee is a 100% EOU, which has exported software and earned the income. A portion of that income is included in EEFC account. Yet another portion of the amount is invested within the country by way of fixed deposits, another portion of the amount is invested by way of loan to the sister

concern which is deriving interest or the consideration received from sale of the import entitlement, which is permissible in law. Now the question is whether the interest received and the consideration received by sale of import entitlement is to be construed as income of the business of the undertaking. There is a direct nexus between this income and the income of the business of the undertaking. Though it does not partake the character of a profit and gains from the sale of an article, it is the income which is derived from the consideration realized by export of articles. In view of the definition of Income from Profits and Gains' incorporated in Sub-section (4), the assessee is entitled to the benefit of exemption of the said amount as contemplated under Section 10B of the Act. Therefore, the Tribunal was justified in extending the benefit to the aforesaid amounts also. We do not find any merit in these appeals. Therefore, the first substantial question of law raised in ITA No.428/2007 is answered in favour of the revenue and against the assessee and the first substantial question of law in ITA No.447/2007 is answered in favour of the assessee and against the revenue.

As is discernible from the above said facts of the case, it is clear that in the case of Motorola India Electronics P. Ltd (supra), the assessee was compelled to temporarily invest a portion of the income in EEFC and the remaining was to be invested in the form of FD way of loan to the sister concern. As there was a compulsion for depositing the amount in FD by the assessee with the sister concern on account of the restriction placed by the RBI, the Hon'ble jurisdictional High Court had held that there is a direct nexus between the income and the business of the undertaking, though it does not partake the character of sale of articles or things.

Similarly, in the matter of *M/s. Subex Ltd v. ITO* (supra), the assessee is a public limited company engaged in the business of development and export of software. It is a 100% EOU approved by STPI. It was submitted that the assessee had entered into a non-cancellable lease for a period of 36 months from 01.06.2001 to 31.05.2004. As the assessee company does not carry on any activity other than the development of software in Canada and the let out property is not connected with the business of the assessee, part of rental has been claimed as part of Section 10A. In that case, the issue was whether if the assessee let out the leased premises for a temporary period and derives rental income, it would constitute the profit of the business of the undertaking and the assessee is entitled to the benefit of Section 10A of the Act. In those facts and circumstances of the case, the jurisdictional High Court relying upon the explanation given in sub-section (4) to Section 10A, held that profit derived from export of articles or things or software shall be the amount derived from the profit of the business of the undertaking. It was further held that though the profits are not derived from export of articles or things or software, by virtue of sub-section (4), it is deemed to be profit of the business of the undertaking for the purpose of extending the benefit of exemption of payment of tax u/s.10A. This was done considering the fixed term of lease of rented premises and no business

activity of the assessee from the premises and it was necessary to mitigate the loss on account of non usage of rented premises. Similarly in the matter of CIT v. Hindustan Gum & Chemicals Ltd (supra), the Hon'ble Calcutta High Court had held that the interest earned on chemical business by an 100% EOU deposited with the bank is business income. After relying upon the judgment of Motorola India Electronics P. Ltd (supra).

If we look into the facts of the present case, we find that the assessee had invested the surplus fund available with the company from the export realisation and advance receipt. It was further submitted that the assessee had made the FDs with the bank from the export realisation and advance received from the entities to whom exports were realised and it was further submitted that the interest was earned on the said FDs by the assessee. There was no necessity to made FDRs from the export surplus amount for the assessee before us.

10. For the purposes of falling in explanation to sub-section (4) , the profit derived from export of articles or things, it is essential that the undertaking shall be entitled for the benefit of sub-section (1), (1A) and Section.10A, if the profit is derived from the business of the undertaking. The moot question to be decided by us is whether the interest earned from

the FDs with the bank can be said to be the profit derived from the business of the undertaking.

It is an admitted position that the assessee unit was set in STTP and section 10A is applicable to newly established undertaking in duty free zone doing export of articles or things or computer software. Thus earning interest on the FDRs was not one of the businesses of the assessee and therefore it cannot be termed as the profit of the assessee from the business of the undertaking. For the purposes of treating the interest income earned by the assessee there has to be some correlation relation between interest income and the activities of the assessee in STTP. Further we have to keep in mind the object sought to be achieved by giving the benefit under section 10 A to newly established undertaking i.e to earn export income by exporting the article or things or computer software. In our view, by depositing the surplus amount in the FDR and earning interest thereon, without any compulsion or necessity, would not help in any manner for increase in export of article, things or computer software. If the earning of interest on the amount in FDR, has correlation with doing of business of the assessee or compulsion or requirement in doing the export business then in that eventuality, the interest earned on the FDR can allowed to be

treated as exempt income under section 10 A of the Act. As there is no correlation of interest income with the business of assessee therefore no interference in the order of lower authority is called for. Accordingly this ground of assessee is dismissed

11. Ground no.2 is with respect to computation of revised profits of the undertaking by reducing the other income. The other income earned by the assessee is as under :

Sl. No.	Particulars	Amount In Rs.
1	Receipt from Ex-employee towards breach and violation of agreement	3,28,701
2	Reimbursement of Demurrage charges from Dell India	76,232
3	Sale of Battery	32,000
4	Reimbursement of amount paid on behalf of Toshiba Japan	51,852
5	Other miscellaneous income	2,811
	Total communication charges	4,91,596

From the heads of other income, it is clear that the income earned by the assessee was from the business of the undertaking and the assessee is entitled to the benefit of Section 10A of the Act. In view thereof, we allow this ground of the assessee.

12. Ground no.3 is with respect to non-grant of credit of taxes paid abroad of Rs.1,37,02,380/-. This ground was not pressed before us and not argued by the Ld. AR for the assessee. In this regard, it will be sufficient to issue a direction to the CIT (A) to give a clear-cut finding on this issue. In view thereof, this ground is allowed for statistical purpose.

13. To summarise the result, Revenue's appeal is dismissed and the assessee's appeal is allowed for statistical purpose.

Order pronounced in the open court on the 9th day of June, 2017.

Sd/-

Sd/-

(A. K. GARODIA)  
ACCOUNTANT MEMBER

(LALIT KUMAR)  
JUDICIAL MEMBER

MCN\*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar