

आयकर अपीलीय अधिकरण, 'ए' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI "A" BENCH
सर्वश्री राजेन्द्र, लेखा सदस्य एवं पार्थसारथी चौधरी, न्यायिक सदस्य
Before S/Sh. Rajendra, Accountant Member & Parthasarathy Choudhury, Judicial Member
अपील सं./ITA No.146/Mum/2014, निर्धारण वर्ष/Assessment Year-2010-11

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| Income tax Officer-8(2)(2) Room No.212,1216A, 2nd floor Aayakar Bhavan, M.K. Road Mumbai-400 020. | Vs | Learning Mate Solutions Pvt. Ltd. Level 2, Trade Globe Andheri Kurla Road, Andheri (E), Mumbai-400 059 PAN:AAACL 9067 F |
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by

:ShriAjitKumarJain

राजस्व की ओर से/ Revenue by

: Shri S.R. Kirtane

सुनवाई की तारीख/ Date of Hearing:31- 08 -2015

घोषणा की तारीख / Date of Pronouncement : **21-10-2015**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dt.17.10.2013 of CIT(A)- I 7, Mumbai,the Assessing officer(AO)has raised following Grounds of Appeal:

"1. On the facts and in the circumstances of the case and in law, the Id. CIT(A)erred in allowing deduction u/s. 10A on the export proceeds not realised within the due date of filing of return amounting to Rs.2,43,92,689/- without appreciating that the assessee had not applied for the extension of time for realisation from the competent authority as clearly provided in the Act and also the assessee itself agreed in the assessment proceedings that the export proceeds not realised before 30.09.2010 are not eligible for deduction u/s. 10A.

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A)erred in upholding the action of the assessee in including the expenditure incurred in foreign currency of Rs.4,44,62,168/- in export turnover without appreciating that the said expenditure is incurred for providing onsite technical services outside India and hence, liable to be excluded from the export turnover.

3. On the facts and in the circumstances of the case and in law, the Id. CIT(A)erred in granting credit for TDS of Rs.48,361/- without appreciating that the corresponding income has not been offered in the year under consideration and therefore, corresponding TDS cannot be granted in view of the provisions of section 199 r.w. Rule 37BA.

4. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that the AO be restored.

5. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary. "

Assessee-company,engaged in the business of manufacturing and export of software,filed its return of income on 15.10.2010,declaring total income of Rs.23,88,818/-.It claimed deduction of Rs.4.29 Crores u/s.10A of the Act.The AO completed assessment u/s.143(3) of the Act,on 17.01.2013.determining income of the assessee at Rs.1,27,33,750/-.

2.First ground of appeal is about allowing deduction u/s.10A of the Act on export proceeds not realised within stipulated period,amounting to Rs.2.43 crores.During the assessment proceedings the AO found that the assessee had shown export turnover of Rs.29.73 Crores.Accordingly,he asked the assessee to produce the evidence that export proceeds were realized before 30.09.2010.He found that many of the realisations were received after the due date. Vide its letter,dtd.28.11.2012,filed before the AO,the assessee admitted that export proceeds to the tune of Rs.2,43,92,689/-were received after 30.09.2010.It admitted that same were not eligible for deduction u/s.10A of the Act.The AO reduced RS.2.43 Crores from the export turnover for the purposes of calculation of deduction u/s. 10A of the Act.

2.1.Aggrieved by the order of the AO the assessee preferred an appeal before the First Appellate Authority(FAA).Before him the assessee argued that,vide circular No.50(DIR Series)dated 03.06.2008,the RBI had extended the time limit for realisation of export proceeds for the STPI units to 12 months from the date of export,that the AO had not taken into consideration of same and proceeded to disallow the claim,that details of export and realization were provided to the AO. After considering the assessment order and the submissions of the assessee,the FAA held that provisions of section 10A were introduced in the Act to provide incentives to export oriented units located in Free Trade Zones/SEZs,that the AO had not properly appreciated the provisions of section 10A(3)of the Act,that the assessee had claimed that an amount of Rs.1.21 Crores,out of the total amount of RS.2.43 crores,was not realised prior to 12 months from the date of export, that out of Rs.1.21 Crores export invoices amounting to Rs.1.12 Crores had been realised shortly after 12 months from the date of export.He directed the AO to verify the claim made by the assessee and to restrict the disallowance to the extent of amount not realized within a period of one year. He referred to the case of Agnite Education Limited(ITA/20 121 Mds/2011 dtd. 22.05.20 12),Gia Exports(ITA/5667/Mum/2009)

2.2.Before us,the Departmental Representative(DR)supported the order of the AO.Authorised Representative(AR)contended that all the details with regard to the export were made available to the AO,that time limit for realisation of export proceed was 12 months for the year under appeal.He referred to pages no.33-35 of the paper-book.

2.3. We have heard the rival submissions and perused the material before us. We find that the assessee had filed necessary details of realisation of export proceeds during the course of assessment proceedings,that the FAA had directed the AO to verify the claim made by it and to restrict the amount that was not realised within the prescribed time. The REI had extended the period for realizing the export proceeds to twelve months w.e.f.03.06.2008 till 30.12.2012.Considering these facts we are of the opinion that the order of the FAA does not suffer from any legal infirmity.Therefore,confirming his order,we decide ground no. 1 against the AO.

3. Next ground pertains to expenditure incurred in foreign currency of Rs.4,44,62,168/- with regard to Export Turnover(ET).During the assessment proceedings,the AO found that the assessee in the process of exporting software was also incurring expenses in foreign currency for providing technical services,that most of the expenses were incurred through the subsidiaries located in Canada and UK,that it had entered into an agreement with the subsidiaries for providing onsite services,that the subsidiaries would regularly raise invoices of actual expenditure incurred for providing necessary onsite services with markup being their profit.He further observed that total of such expenditure incurred in foreign exchange was of Rs.4.44 Crores for the year under appeal,that it was spending foreign exchange to earn foreign exchange for which it would be getting benefit of waiver of income tax on its income.He directed the assessee to justify admissibility of such expenditure for working out the deduction u/s.10A of the Act.Referring to the provisions of section of sub-section 2(iv)of the Sec. 10A,he held that any expenditure incurred in foreign exchange in providing onsite technical service outside India was not eligible for deduction u/s. 10Aof the Act.He reduced the said amount from the ET for the purpose of calculating the deduction u/s.10A of the Act.

3.1.In the appellate proceedings before the FAA,the assessee contended that the marketing fees paid to subsidiary company,travelling expenses and legal and professional fees had neither been included in the ET nor were charged separately and recovered from them,that as the expenses under all the above referred three heads had not been charged for in the invoice,that same should not be excluded from ET,that the assessee was not receiving the anything as a consideration towards fees paid to subsidiary company.It relied upon the cases of Patni Telecom Private Ltd.(22S0T26)Softsol India Ltd.(22S0T27 I).The FAA,after considering the submissions, held that that the assessee has entered in a marketing services agreement with Learning Mate Solutions Canada Limited(LMC)and Learning Mate Solutions UK Limited(LMUK) to build a customer base in US and UK respectively,that the primary responsibility of LMC and LMUK was to solicit customers in the e-learning domain for the assessee,that the main functions to be performed' by the both the foreign entities were to procuring customers by assisting in advertising and promotion of services offered by LM India,to brief customers on various promotional initiatives and new service launches of LM India,to assisting in market analysis/business plan analysis and to following up for collections.He further held that the assessee had incurred expenditure of Rs.24,796,526/- Rs 5,326,830/-towards LMC and LMUK respectively,that the provision of marketing services by the subsidiary companies of assessee could not be construed to be technical services so as to be excluded from the ET.He referred to the case of Gama Industries Ltd.(54S0TI049),wherein it has been held that marketing services rendered outside India cannot be treated as technical services in terms of the India-UK tax treaty,that marketing services does not involve making available any technical knowledge, experience, skill know-how or processes,that there was not any development or transfer of any technical plan or technical design,that the India-Canada tax treaty also provided the 'make available clause,that the principals of the aforementioned judgment could be applied to the marketing fees paid to LMC as well,that the marketing services from subsidiary companies could not be treated par with technical services rendered outside India.The FAA observed that the assessee had not included the marketing fees paid to subs-idiary company,travelling expenses and legal and professional fees in the ET. He referred to the matter of Patni Telecom Private Limited(22S0T26) wherein it was held that the Internet Service Providing(ISP) expenses should not be excluded from the ET

since the ere not recovered,that the expenditure on ISP did not come within the scope of telecommunication charges as provided in cl.(iv) of Expln. 2 to section 10A,that ISP was for transmitting the software developed by the assessee,that the ISP expenses incurred were inrespect of development of software,that same were not attributable to the delivery of computer softv are,that such expenses were not required to be excluded from consideration in foreign exchange,the exclusion from ET and Total Turnover(TT)of the expenditure incurred in foreign currency is required to be done only where an assessee is involved in rendering technical services outside India.Such an exclusion is not required to be made when a company incurs expenditure in foreign currency in connection with computer software development, that where an assessee involved in computer programme creation,it should be regarded as an entity being engaged in the development of computer software and not as engaged in the business of rendering technical services,

3.2.Before us.the OR supported the order of the AO.The AR argued that that the assessee had raised invoices on its overseas customers and foreign currency and records the INR equivalent of the same in its books of accounts as on the date of sale by debiting the customer account and crediting sales,that on receipt of the amounts from the overseas customers which was after some time gap,that the INR equivalent of the foreign currency received was changed from what was recorded at the time of booking the sale and thereby leaving a balance in the customer account,that the amount could be less of more depending upon the currency price prevalent at the point of receipt.

3.3. We have heard the rival submissions and have perused the material before us. We find that the marketing fees paid to subsidiary company,travelling expenses,legal and professional fees had neither been included in the ET nor were charged separately or were recovered from them,that the IT Services were directly exported from the STP Unit and on site element was not involved .. Therefore,we are of the opinion that the expenditure on ISP did not come within the scope of telecommunication charges as provided in cl.(iv) of Expln. 2 to section 10A and the assessee was not engaged in rendering technical services outside India. We are also of the opinion that if the gross total income includeed the particular category of income, the assessee would be eligible for deduction of the whole or part of such income, that before deduction without something being included' earlier there could not be any exclusions from such income.In other words there can be subtraction from-something which is already included and not otherwise,that the words 'received' and 'but not include' used in cl. (iv) of Expln. 2 to section 10A would be of no use.In the present case the assessee received consideration against software,that the agreement, invoices and the turnover clearly showed that the assessee did not recover any such expenditure,so,there was no scope for any exclusion from the ET on account of such expenses. In short if the expenditure was to be excluded for the purpose of ET then it had to excluded from TT, i.e.that elimination had be from both the denominator and the numerator.As the Aa had not reduced those receipts from ET as well as TT,so,confirming the order of the F AA we decide ground no.2 against the AO.

4.Last ground of appeal is about granting credit for TDS of Rs.48,361/-in contravention of the provisions of section 199 of the' Act.During the course of assessment proceedings,the assessee stated that as per 26AS the appellant received income of Rs. 12,48,042/- from M/s. Vodafone

Essar Ltd,that the income was not appearing in the breakup of sales credited to P&L account,that as per the provisions of section 199 of the Act r.w.r. 37BA of. Rules the credit of taxes deducted was to be given in the year such income was offered to tax. The AO was of the view that the claim made by the assessee could not accepted for the year under appeal.Therefore,credit of taxes of Rs.48,316/-deducted from the above referred income was denied by him.

4.1.During the appellate proceedings,before the FAA,it was submitted that the AO had denied credit for the TDS in relation to the taxes deducted by Vodafon .Essar Limited amounting to Rs and by Pfizer Limited amounting ,that the incomes were offered to tax during FY.2008-09 on receipt basis,that the aforementioned customers provided the TDS certificates during FY. 2009.The assessee relied upon the case of Ashok Holdings Ltd.(6 ITD 83).After considering the submissions of the assessee the F AA held that the case law relied upon by the assessee was of no help , that in that matter the Tribunal had held that the real question to be considered was whether merely because the assessee has returned the interest income on accrual basis in the return of income for the asst. yr.1979-80, the assessee could get the benefit of tax deducted at source even though the date on which the deduction took place fell beyond the A Y.1979-80.He held that the simple test to give the benefit of tax deducted at source was contained in s.199 and that was the production of the certificate furnished under s.203,that on a plain reading of ss.199 and 203 it was clear that the benefit of tax deducted at source had nothing to do with the income that is returned,that the simple rule of procedure prescribed was to produce the certificate,that the certificate furnished by the assessee clearly showed that deduction took place on dates which did not fall within the assessment year at all,that in the assessee's case TDS were given by the deductors in subsequent financial year,that there was no way the assessee could have claimed the deductions in the earlier year as it was not in possession of the TDS certificate.Finally,he held that the assessee could not claim the deduction in the earlier year and that the deduction was to be allowed in the year of deduction alone.

4.2.Before us.the OR fairly conceded that the F AA had not allowed the credit of TDS in the year under appeal.AR left the issue to the discretion of the Bench. We find that the F AA has not dismissed the ground filed by the assessee.In these circumstances ground no.3 filed by the AO becomes infructous.

As a result,appeal filed by the AO stands dismissed.

फलतः निर्धारिती अधिकरी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 21st,October,2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 21 अक्टूबर,2015 को की गई।

Sd/-

(पार्थसारथी चौधरी / Parthasarathy Choudhury)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai,दिनांक/Date: 21.10.2015

Sd/-

(राजेन्द्र / RAJENDRA)

लेखा सदस्य / ACCOUNTANT MEMBER

व.नि.स./Jy.Sr.PS.

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

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ,आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.