

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 11TH DAY OF JULY 2018

PRESENT

THE HON'BLE Dr.JUSTICE VINEET KOTHARI

AND

THE HON'BLE Mrs.JUSTICE S.SUJATHA

I.T.A.No.228/2013

BETWEEN:

1. COMMISSIONER OF INCOME TAX
C.R. BUILDINGS, QUEENS ROAD
BANGALORE.
2. ASSISTANT COMMISSIONER OF INCOME TAX
COMPANY CIRCLE-IV, CHENNAI.

...APPELLANTS

(By Mr. E.I. SANMATHI, ADV.)

AND:

M/S. M PACT TECHNOLOGY SERVICES PVT. LTD.
(SINCE MERGED WITH M/S. WIPRO LTD.,)
DODDAKANNELI, SARJAPUR ROAD
BANGALORE-560025.

...RESPONDENT

(By Mr. T.V. AJAYAN, ADV., FOR
Mr. RAJESH CHANDER KUMAR, ADV.,)

THIS I.T.A. IS FILED UNDER SECTION 260-A OF I.T. ACT, 1961, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN. SET ASIDE THE APPELLATE ORDER DATED 21/12/2012 PASSED BY THE INCOME TAX APPELLATED TRIBUNAL, 'A' BENCH, BANGALORE IN APPEAL PROCEEDINGS ITA No.1682/Chny/2011 ANNEXURE-A.

THIS I.T.A. COMING ON FOR HEARING, THIS DAY
S. SUJATHA J. DELIVERED THE FOLLOWING:-

JUDGMENT

Mr. E.I. Sanmathi, Adv. for Appellants- Revenue
Mr. T.V. Ajayan, Adv. for
Mr. Rajesh Chandes Kumar, Adv. Respondent - Assessee

1. The Appellants-Revenue have filed this appeal **u/s.260A** of the Income Tax Act, 1961, raising purportedly certain substantial questions of law arising from the order of the **ITAT, Bangalore Bench 'A', Bangalore**, dated **21.12.2012** passed in **ITA No.1682/Chny/2011** (*M/s.Mpact Technology Services Pvt. Ltd., vs. The Asst.Commissioner of Income-tax*) for **A.Y.2007-08**.

2. The proposed substantial questions of law framed in the Memorandum of appeal by the Appellants-Revenue are quoted below for ready reference:-

"1. Whether in the given facts and circumstances of the case, the Tribunal is correct

in law in holding that assessing authority has not justified in invoking the provisions of section 10B(7) read with section 80IA(10) in order to reduce the eligible profit/deduction under section 10A on the basis of Arms Length Price (for short ALP) computed by the TPO without giving any independent finding on the issue of assessee showing more than ordinary profits?

2. *Whether in the given facts and circumstances of the case, the tribunal is justified on coming to the conclusion that Transfer Pricing regime is different from regular computation of income including application of provisions of section 10A and such income should be computed independently without adopting the findings recorded in the Transfer Pricing order?*

3. *Whether in the given facts and circumstances of the case, the tribunal is right in law in directing the assessing authority to exclude travel expenses and telecommunication expenses incurred in foreign currency towards onsite development of computer software from export turnover with appreciating the fact that it is a statutory requirement as per clause (4) of explanation 2 below sub-section 8 of section 10A*

that any expenditure incurred in foreign currency shall be excluded from the Export Turnover?

4. *Whether the Tribunal is correct in law in holding that the deduction under section 10A should be computed in the above manner following the judgment of this Hon'ble High Court in the case of CIT v/s TATA Elxsi Ltd, which has been challenged by Revenue before Apex Court and SLP is pending?*

5. *Whether the Tribunal is correct in law in not adjudicating the main issue of applicability of provisions of section 40(a)(ia) in respect of disallowance of sub-contracting charges of Rs.16,21,851/- made by assessing authority on the ground that the assessee had failed to deduct tax at source under section 194C of I.T. Act?*

6. *Whether the Tribunal is justified in law in directing the assessing authority to allow deduction under section 10A in respect of amount disallowed under section 40(a)(ia) without appreciating the fact that the income enhanced on account of deeming provisions cannot be considered for the purpose of claiming benefit under the provisions of the section 10A?"*

3. The learned counsel appearing for the Appellants – Revenue Mr.E.I.Sanmathi submitted that in so far as the **substantial question of law Nos.3 and 4** are concerned, the same are covered by the decision of the Hon'ble Apex Court in the case of **Commissioner of Income-tax, Central -- III vs. HCL Technologies Ltd., [2018] 93 Taxmann.com 33(SC)**.

The relevant portion of the judgment of the Hon'ble Supreme Court in the case of **HCL Technologies Ltd. (supra)**, is quoted below for ready reference:-

“17. The similar nature of controversy, akin this case, arose before the Karnataka High Court in CIT v. Tata Elxsi Ltd. [2012] 204 Taxman 321/17/taxman.com 100/349 ITR 98. The issue before the Karnataka High Court was whether the Tribunal was correct in holding that while computing relief under Section 10A of the IT Act, the amount of communication expenses should be excluded from the total turnover if the same are reduced from the export turnover? While giving the answer to the issue, the High

Court, inter-alia, held that when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to it, the said ordinary meaning is to be in conformity with the context in which it is used. Hence, what is excluded from 'export turnover' must also be excluded from 'total turnover', since one of the components of 'total turnover' is export turnover. Any other interpretation would run counter to the legislative intent and would be impermissible.

18. XXXXXX

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 IT 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.

20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes

the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well”.

Regarding substantial questions of law Nos. 1 and 2 -

4. The learned Tribunal, after discussing the rival contentions of both the Appellants-Revenue and the Respondent-assessee, has given the following findings against Revenue with regard to various issues raised before it with regard to **‘Transfer Pricing’** and **‘Transfer Pricing Adjustments’** made by the concerned authorities below. We consider it appropriate to quote the relevant portions hereunder:-

“8. Having heard both the parties and having considered their rival contentions, we find that this issue is squarely covered by the decision of the Tribunal at Chennai in the case of Visual Graphics (cited Supra). The decision relied upon by the learned DR is distinguishable on facts as in that case there was no reference to TPO for

determination of ALP and the reduction of eligible profits for deduction u/s 10A was not made on the basis of TPO's order but was made independently by the AO. As held by the Tribunal in the case of Visual Graphics, the AO to apply the provisions of 10A(7) r.w.s 80(i)(a)(10) of the Act, has to independently come to the conclusion that the assessee has entered into the transaction with its AE to claim higher deduction. In the case before us the AO has not carried out any such exercise nor has he come to such conclusion independently. It is the DRP who has applied the above provisions, again without carrying out such exercise. The Tribunal in the case of Visual Graphics (cited Supra) at para 24 to 28 has held as under:..

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9. As facts and circumstances are similar in this case before us, the grounds against the restriction of eligible profit for deduction u/s 10A on the basis of transfer pricing order are allowed.

5. In so far as the **substantial question of law**

Nos.5 and 6 are concerned, learned counsel for the Revenue submitted that the ITAT in its Order dated

21.12.2012 has recorded the findings, the relevant portion of which is extracted below for ready reference:-

14. *Having heard both the parties and having considered their rival contentions, we find that the disallowance u/s 40a (ia) is to be made of the expenses incurred and claimed by the assessee but before the payment of which, the assessee has failed to deduct tax at source. The genuineness of the expenditure is not in dispute. The dispute is whether TDS was to be made before making the payment. Without going into the nature of the transaction, we are inclined to accept the alternate plea of the assessee that the disallowance of the expenditure would automatically enhance the taxable income of the assessee and the assessee is eligible for the deduction u/s 10A of the Income-tax Act on the enhanced income. Thus, this ground of appeal is allowed”.*

6. The relevant portion of the Circular **No.37/2016** dated **02.11.2016** issued by the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India, relating to the subject:

Chapter VI-A deduction on enhanced profits, is quoted hereunder:

“The issue of the claim of higher education on the enhanced profits has been a contentious one. However, the courts have generally held that if the expenditure disallowed is related to the business activity against which the Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits. Some illustrative cases upholding this view are as follows:

[i] If an expenditure incurred by assessee for the purpose of developing a housing project was not allowable on account of non-deduction of TDS under law, such disallowance would ultimately increase assessee’s profits from business of developing housing project. The ultimate profits of assessee after adjusting disallowance under section 40[a][ia] of the Act would qualify for deduction under section 80IB of the Act. This view was taken by the courts in the following cases:

[a] Income-tax Officer-Ward 5[1] vs. Keval Construction, Tax Appeal No.443 of

2012, December 10 2012, Gujarat High Court

[b] Commissioner of Income-tax-IV,
Nagpur vs. Sunil Vishwambharnath Tiwari,
IT Appeal No.2 of 2011, September 11
2015, Bombay High Court

[ii] *If deduction under section 40A[3] of the Act is not allowed, the same would have to be added to the profits of the undertaking on which the assessee would be entitled for deduction under section 80-IB of the Act.”*

7. Applying the same analogy, it can be held that if deduction u/s. 40[a][ia] of the Act is not allowed, the same would have been to be added to the profits of the undertaking on which the Assessee would be entitled for deduction u/s. 10A of the Act. This view is fortified by the decision of Bombay High Court in the case of **‘Commissioner of Income Tax v. Gem Plus Jewellery India Ltd.,’ [2011] 330 ITR 175 [Bom]** , wherein it is held thus:

“13. By reason of the judgment of the Supreme Court in Commissioner of Income Tax v. Alom Extrusions Limited [2009] 319 ITR 306 the employer's contribution was liable to be allowed, since it was deposited by the due date for the filing of the return. The peculiar position, however, as it obtains in the present case arises out of the fact that the disallowance which was effected by the Assessing Officer has not, the Court is informed, been challenged by the assessee. As a matter of fact the question of law which is formulated by the Revenue proceeds on the basis that the assessed income was enhanced due to the disallowance of the employer's as well as the employees' contribution towards Provident Fund /ESIC and the only question which is canvassed on behalf of the Revenue is whether on that basis the Tribunal was justified in directing the Assessing Officer to grant the exemption under Section 10A. On this position, in the present case it cannot be disputed that the net consequence of the disallowance of the employer's and the employee's contribution is that the business profits have to that extent been enhanced. There was, as we have already noted, an add back by the Assessing Officer to the income. All profits of the unit of the assessee have

been derived from manufacturing activity. The salaries paid by the assessee, it has not been disputed, relate to the manufacturing activity. The disallowance of the Provident Fund/ESIC payments has been made because of the statutory provisions - Section 43B in the case of the employer's contribution and Section 36(v) read with Section 2(24)(x) in the case of the employee's contribution which has been deemed to be the income of the assessee. The plain consequence of the disallowance and the add back that has been made by the Assessing Officer is an increase in the business profits of the assessee. The contention of the Revenue that in computing the deduction under Section 10A the addition made on account of the disallowance of the Provident Fund / ESIC payments ought to be ignored cannot be accepted. No statutory provision to that effect having been made, the plain consequence of the disallowance made by the Assessing Officer must follow. The second question shall accordingly stand answered against the Revenue and in favour of the assessee."

8. This Court in **ITA No.536/2015 C/w ITA**

No.537/2015 delivered on **25.06.2018**

(Prl. Commissioner of Income Tax & Anr. Vs. M/s. Softbrands India Pvt. Ltd.,) has held that in these type of cases, unless an *ex-facie* perversity in the findings of the learned Income Tax Appellate Tribunal is established by the appellant, the appeal at the instance of an assessee or the Revenue under **Section 260-A** of the Act is not maintainable.

The relevant portion of the said judgment is quoted below for ready reference:

“ Conclusion:

55. *A substantial quantum of international trade and transactions depends upon the fair and quick judicial dispensation in such cases. Had it been a case of substantial question of interpretation of provisions of Double Taxation Avoidance Treaties (DTAA), interpretation of provisions of the Income Tax Act or Overriding Effect of the Treaties over the Domestic Legislations or the questions like Treaty Shopping, Base Erosion and Profit Shifting (BEPS), Transfer of Shares in Tax Havens (like in the case of Vodafone etc.), if based on relevant facts, such substantial questions of law could*

*be raised before the High Court under **Section 260-A** of the Act, the Courts could have embarked upon such exercise of framing and answering such substantial question of law. On the other hand, the appeals of the present tenor as to whether the comparables have been rightly picked up or not, Filters for arriving at the correct list of comparables have been rightly applied or not, do not in our considered opinion, give rise to any substantial question of law.*

56. *We are therefore of the considered opinion that the present appeals filed by the Revenue do not give rise to any substantial question of law and the suggested substantial questions of law do not meet the requirements of **Section 260-A** of the Act and thus the appeals filed by the Revenue are found to be devoid of merit and the same are liable to be dismissed.*

57. *We make it clear that the same yardsticks and parameters will have to be applied, even if such appeals are filed by the Assesseees, because, there may be cases where the Tribunal giving its own reasons and findings has found certain comparables to be good comparables to arrive at an '**Arm's Length Price**' in the case of the assesseees with which*

*the assesseees may not be satisfied and have filed such appeals before this Court. Therefore we clarify that mere dissatisfaction with the findings of facts arrived at by the learned Tribunal is not at all a sufficient reason to invoke **Section 260-A** of the Act before this Court.*

58. The appeals filed by the Revenue are therefore dismissed with no order as to costs.”

9. Having heard the learned counsels for the parties, we are therefore of the opinion that no substantial question of law arises in the present case also. The appeal filed by the Appellants-Revenue is liable to be dismissed and it is **dismissed** accordingly. No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

Srl.