



IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 20TH DAY OF OCTOBER 2014

PRESENT

THE HON'BLE MR.JUSTICE N.KUMAR

AND

THE HON'BLE MR.JUSTICE B.MANOJAR

INCOME TAX APPEAL NO.411/2008

BETWEEN:

M/s.Tata Elxsi Limited,
ITPL Road, Whitefield,
Bangalore – 560 048
Ramadas Kamath K,
Corporate Manager Finance.

...Appellant

(By Sri.Chythanya K.K, Advocate)

AND:

The Assistant Commissioner of
Income Tax, Circle 12(3),
Bangalore.

...Respondent

(By Sri.Jeevan J.Neeralgi, Advocate)

This ITA is filed under Section 260-A of I.T. Act, arising out of Order dated 31.12.2007 passed in ITA.No.57/BNG/2005 for the assessment year 2001-2002 praying to formulate the substantial question of law therein and to allow the appeal and set aside the order passed by the ITAT Bangalore in ITA.No.57/BNG/2005 dated 31.12.2007.

This appeal coming on for Hearing this day, **N.Kumar J.**, delivered the following:

J U D G M E N T

The assessee has preferred this appeal challenging the order passed by the Tribunal holding that the assessee is not entitled to the benefit of Section 10A of the Income Tax Act in respect of sales effected by them to other STP, as it does not amount to a deemed export.

2. The assessee, M/s.Tata Elxsi Limited is having a STP unit, which was registered with Software Technology Park, India, on 24.5.1993, which started production of software from 24.8.1993. The assessee claimed profits from this undertaking amounting to Rs.14,75,12,687/- as deduction under Section 10A of the Income Tax Act, 1961 (for short hereinafter referred to as 'the Act'). The assessee has given the break-up of details of sales and services from 10A unit vide their letter dated 10.3.2003. The assessee has taken Rs.4,49,09,602/- being sales and services to Texas Instruments (I) Ltd., as part of export turnover. The

assessee was asked to explain why the said amount should not be treated as domestic sales from 10A unit. The assessee stated that it provides software services to Texas Instruments India Pvt. Ltd., (for short hereinafter referred to as TI IPL), which is also a registered STP unit at Bangalore. The software development services are provided on a principal to principal basis and based on the purchase orders placed by TI IPL on the assessee with the instructions to bill and deliver to TI IPL. The software development work done by the assessee for TI IPL is exported out of India by TI IPL. Therefore, the software development services provided to TI IPL would be eligible for deduction under Section 10A of the Act, as it has satisfied both the conditions prescribed being,

- (a) *export of computer software from India indirectly (i.e., the software development work done by the Company for TI IPL is exported out of India by TI IPL which is a registered STP unit) and*
- (b) *the consideration for the software work done by the Company is received in convertible foreign exchange within the specified period.*

3. The assessee in support of its contention relied on the notification dated 30.4.1995 issued by the CBDT in respect of Software Technology Park Scheme. It provides that supplies made from a DTA to a STP unit will be regarded as 'deemed export' and will be eligible for the benefits specified at paragraphs 106 and 122 of the Export and Import Policy. The assessing authority rejected the said contention on the ground that the consideration the assessee received in respect of sales to TIPL forms part of its domestic turnover only and not its export turnover. Aggrieved by the said order, the assessee preferred appeal to the Commissioner of Income Tax (Appeals).

4. The appellate authority held that as per the provisions of Section 10A of the Act, exemption is in respect of profits and gains as are derived by an undertaking from the export of articles or things or computer software. As per the provisions of Section 10A(3), if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into India by the assessee in convertible foreign exchange, then the Section

applies. From the provisions of Section 10A of the Act, it is crystal clear that the exports have to be outside India similar to the provisions of Section 80HHE. As such, the assessee's contention that the distinction between the provisions of Section 80HHE and Section 10A is without any basis and not tenable. If the meaning of 'export' has to be adopted from STP unit, it is not tenable in view of Section 10A of the Act. If the assessee's contention is to be accepted that the sales made to TIPL should be treated as 'deemed export' and exemption under Section 10A of the Act should be allowed, it will amount to two separate undertakings i.e., TIPL and the assessee will be claiming exemption under Section 10A of the Act in respect of same export turnover. To allow exemption under Section 10A of the Act, in respect of same exports to two different assessee's, could not be the legislative intention behind the provisions of Section 10A of the Act. Therefore, in view of provisions of Section 10A(3) of the Act, the assessing authority treating the sales to TIPL as domestic turnover for the purpose of exemption under Section 10A of the Act, is incorrect and

accordingly, the said finding was confirmed. Aggrieved by the said order, the assessee preferred appeal to the Tribunal.

5. The Tribunal, after referring to Chapter VIII of the Exim Policy, which has defined 'deemed export' and the benefits under the said provisions and after referring to clause 6.12 of the said policy, held that whatever benefit given should be as per the provisions of Section 10A and 10B of the Act. Apart from the benefit conferred under the aforesaid Chapter, nothing has been indicated in respect of any 'deemed export' under the Act. The Exim Policy obviously does not include in respect of benefit to be given under the Act other than the one referred to under Chapter 6.12(a). Therefore, it was held that the sales effected to the STP by the assessee would not constitute a 'deemed export' and therefore, confirming the orders of lower appellate authorities, the appeal came to be dismissed. Aggrieved by the said order, the assessee is before this Court.

6. The learned Counsel for the assessee assailing the impugned orders contended that the word 'export' is not defined under the Act. Therefore, it has to be understood in the context of definition contained in the Exim Policy. Section 10A of the Act being beneficial provision, it gives incentive for export and earning foreign exchange. If the assessee, being a STP, has earned foreign exchange by export of its software, Section 10A of the Act, is attracted and would be entitled to the said benefit. In the instant case, obviously the assessee exported the software to another STP unit, the said STP unit after adding value exported the same outside the country and the foreign exchange realized is shared between the two Companies and there is no double benefit claimed by both these STP units. Therefore, he submits that the entire approach of the authorities is contrary to law and opposed to the object with which the provisions is introduced and is not in consonance with the object with which Exim Policy was introduced by the Government. Therefore, he submits that the orders are required to be set aside and the benefit is required to be extended to the assessee.

7. Per contra, the learned counsel for Revenue submitted that 'export' means export outside the country. When the assessee has not exported the software outside country and when it has supplied the same to another STP in the country, it is a domestic sale and therefore, Section 10A of the Act is not attracted and therefore, the authorities were justified in refusing the benefit.

8. In the light of the aforesaid facts and the arguments advanced, the substantial question of law that arises for our consideration in this appeal is as under:

“On the facts and circumstances of the case, whether the Appellate Tribunal is right in holding that the computer software sales to M/s. Texas Instruments India Ltd. do not fall under the expression ‘export turnover’ for the purpose of deduction under Section 10A of the Income Tax Act, 1961?”

9. With a view to encourage establishment of export oriented industries in the free trade zones, Section 10A was inserted in the Income Tax Act by the Finance Act, 2000, which

makes a special provision in respect of newly established industrial undertakings in free trade zones. The new Section provides for complete tax exemption in respect of profits and gains derived from an industrial undertaking set-up in any free trade zone for a period of ten initial assessment years.

10. For the purpose of expression, 'Free Trade Zone' means Kandla Free Trade Zone and the Santacruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by a notification in the Official Gazette, specify for the purposes of this Section.

11. The tax exemption is granted with reference to the assessing year relevant to the previous year in which the industrial undertaking begun or begins to manufacture or produce articles or things or computer software and each of the nine immediately succeeding assessment years.

12. Section 10A of the Income Tax Act reads as under:

“10A. Special provision in respect of newly established undertakings in free trade zone, etc.-

(1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee:

Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to deduction referred to in this sub-section only for the unexpired period of the aforesaid ten consecutive assessment years:

Provided further that where an undertaking initially located in any free trade zone or export processing zone

is subsequently located in a special economic zone by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment years referred to in this sub-section shall be reckoned from the assessment year relevant to the previous year in which the undertaking began to manufacture or produce such articles or things or computer software in such free trade zone or export processing zone:

Provided also that for the assessment year beginning on the 1st day of April, 2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software:

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, 2012 and subsequent years.

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(2) This section applies to any undertaking which fulfils all the following conditions, namely :—

(i) it has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year—

(a) commencing on or after the 1st day of April, 1981, in any free trade zone; or

(b) commencing on or after the 1st day of April, 1994, in any electronic hardware technology park or, as the case may be, software technology park;

(c) commencing on or after the 1st day of April, 2001, in any special economic zone;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of any undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertakings as is referred to in section 33B, in the circumstances and within the period specified in that section;

(iii) It is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Explanation.—The provisions of Explanation 1 and Explanation 2 to sub-section (2) of section 80-I shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(3) This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation 1.—For the purposes of this sub-section, the expression “competent authority” means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

Explanation 2.—The sale proceeds referred to in this sub-section shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

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Explanation 2.—For the purposes of this section,—

(i) “computer software” means—

(a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or

(b) any customized electronic data or any product or service of similar nature, as may be notified by the Board,

which is transmitted or exported from India to any place outside India by any means;

(ii) “convertible foreign exchange” means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder or any other corresponding law for the time being in force;

(iii) “electronic hardware technology park” means any park set up in accordance with the Electronic Hardware Technology Park (EHTP) scheme notified

by the Government of India in the Ministry of Commerce and Industry;

(iv) “export turnover” means the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into India by the assessee in convertible foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India;

(v) “free trade zone” means the Kandla Free Trade Zone and the Santacruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette, specify for the purposes of this section;

(vi) “relevant assessment year” means any assessment year falling within a period of ten consecutive assessment years referred to in this section;

(vii) “software technology park” means any park set up in accordance with the Software Technology Park Scheme notified by the Government of India in the Ministry of Commerce and Industry;

(viii) “special economic zone” means a zone which the Central Government may, by notification in the Official Gazette, specify as a special economic zone for the purposes of this section.”

13. Sub-Section (3) of Section 10A makes it clear that Section 10A applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf. Therefore, the intention of the legislature is manifest that the encouragement is given for establishment of export oriented industries with the object of receiving convertible foreign exchange.

14. Explanation 2 (iv) to Section 10A defines 'export turnover' for the purpose of this Section as 'the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into, India by the assessee in convertible foreign exchange in accordance with Sub-Section (3)'. Further, it makes it clear that 'export turnover' does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India.

15. Sub-Section (2) of Section 10A makes this provision applicable to undertakings which have begun or begin to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year commencing on or after the 1st day of April, 1981, in any free trade zone; or commencing on or after the 1st day of April, 1994, in any electronic hardware technology park, or, as the case may be,

software technology park; commencing on or after the 1st day of April, 2001, in any special economic zone.

16. The 'software technology park' as well as 'free trade zone' are defined for the purpose of this Section in Explanation 2 to Sub-Section (9) of Section 10A.

17. The word 'export' has been defined under Section 2(18) of the Customs Act, 1962. As per the said definition, 'export', with its grammatical variations and cognate expressions, means taking out of India to a place outside India.

18. As Section 10A was introduced to give effect to the Exim Policy of the Central Government, we have to take into consideration the provisions of the Exim Policy.

19. Paragraph 6.10 of the Exim Policy speaks about exchange through others. It provides that a EOU/EHTP/STP/BTP unit may export goods manufactured / software developed by it

through another exporter or any other EOU/EHTP/STP/SEZ unit subject to the conditions mentioned in paragraph 6.19 of Handbook. The conditions to be fulfilled if a Unit has to export through other exporters is as under:

“6.19 An EOU/EHTP/STP/BTP unit may export goods manufactured / software developed by it through other exporter or any other EOU/EHTP/STP/SEZ/BTP unit subject to condition that:

- a) Goods shall be produced in EOU/SHTP/STP/BTP unit concerned.*
- b) Level of NFE or any other conditions relating to imports and exports as prescribed shall continue to be discharged by EOU/EHTP/STP unit concerned.*
- c) Export orders so procured shall be executed within parameters of EOU/EHTP/STP/BTP schemes and goods shall be directly transferred from unit to port of shipment.*

- d) *Fulfillment of NFE by EOU/EHTP/STP/BTP units in regard to such exports shall be reckoned on basis of price at which goods are supplied by ECUs to other Exporter or other EOU/EHTP/STP/BTP/SEZ unit.*
- e) *All export entitlements, including recognition as Status Holder would accrue to exporter in whose name foreign exchange earnings are realized. However, such export shall be counted towards fulfillment of obligation under EOU/EHTP/STP/BTP scheme only.”*

20. From the aforesaid provisions, it is clear that if a assessee wants to claim the benefit of Section 10A, firstly he must export articles or things or computer software. Secondly, the said export may be done directly by him or through other exporter after fulfilling the conditions mentioned therein. Thirdly, such an export should yield foreign exchange which should be brought into the country. If all these three conditions are fulfilled, then the object of enacting Section 10A is fulfilled and the assessee would be entitled to the benefit of exemption from payment of Income Tax

Act on the profits and gains derived by the Undertaking from the export.

21. Clause 6.11 of Exim Policy dealing with entitlement for supplies from the DTA states that supplies from the DTA to EOU/EHTP/STP/BTP units will be regarded as 'deemed export', besides being eligible for relevant entitlements under paragraph 6.12 of the Policy. They will also be eligible for the additional entitlements mentioned therein. What is of importance is when a supply is made from DTA to STP, it does not satisfy the requirements of export as defined under the Customs Act. However, for the purpose of Exim Policy, it is treated as 'deemed export'. Therefore, when Section 10A of the Act was introduced to give effect to the Exim Policy, the supplies made from one STP to another STP has to be treated as 'deemed export' because Clause 6.19 specifically provides for export through Status Holder. It provides that an EOU/EHTP/STP/BTP unit may export goods manufactured /software developed by it through other exporter or Status holder recognized under this policy or any other

EOU/EHTP/STP/SEZ/BTP unit. What follows from this provision is that to be eligible for exemption from payment of income tax, export should earn foreign exchange. It does not mean that the undertaking should personally export goods manufactured / software developed by it outside the country. It may export out of India by itself or export out of India through any other STP Unit. Once the goods manufactured by the assessee is shown to have been exported out of India either by the assessee or by another STP Unit and foreign exchange is directly attributable to such export, then Section 10A of the Act is attracted and such exporter is entitled to benefit of deduction of such profits and gains derived from such export from payment of income tax. Therefore, the finding of the authorities that the assessee has not directly exported the computer software outside country and because it supplied the software to another STP unit, which though exported and foreign exchange received was not treated as an export and was held to be not entitled to the benefit is unsustainable in law. The substantial question of law is answered in favour of the assessee and against the revenue. The appeal is allowed. The

impugned orders are set aside. The assessee is held to be entitled to deduction of such profits and gains derived from the export of the computer software. No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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