

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

BEFORE SHRI. JASON P. BOAZ, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL MEMBER

I.T.A No.1339/Bang/2018
(Assessment Year : 2005-06)

M/s. Simplex Solutions P. Ltd,
No.116/C-1, 3rd floor, 5th Block, KHB Colony,
Behind Airtel Customer Care,
Koramangala, Bengaluru .. Appellant
PAN : AABCS8796H

v.

Income-tax Officer,
Ward – 12(2), Bengaluru .. Respondent

Assessee by : Shri. Lokesh Jain, CA
Revenue by : Dr.P. V. Pradeep Kumar, Addl. CIT

Heard on : 28.08.2018
Pronounced on : 14.09.2018

ORDER

PER LALIET KUMAR, JUDICIAL MEMBER :

The present appeal is filed by the assessee against the order of the CIT (A), Bengaluru -6, Bengaluru, dt.30.11.2017, for the assessment year 2005-06, on the following grounds :

1. The Appellant had filed its original Return of income for the AY 2005-06 on 31st October, 2005 by declaring a Taxable Income of Rs. 1,31,078/- and paid a tax amount of Rs. 51,260/- accordingly.
2. The appellant's case was re-opened for the Assessment year 2005-06 and Notice U/s 148 was issued on 13.4.2009. The issue to be considered u/s 147 was whether the Appellant had reduced the expenditure incurred in foreign from the Export turnover for calculation of Exemption u/s 10A.
3. The appellant exports software and is a STPI unit eligible for exemption u/s 10A. During the year, the appellant had claimed Rs. 2,18,55,380 as exemption u/s 10A on profit of Rs. 2,20,94,480 of the Indian STPI unit.
4. The Assessing Officer has considered the export of Software of the appellant as just an inter branch transfers and disallowed the exemption claimed under the provisions of section 10A.
5. Apart from the Indian STPI unit, the appellant has two branches outside India, one In Japan and the other in USA. Having established branches in those respective countries, the appellant has created permanent Establishment in those countries as per the provisions of Article 5 of the India - USA DTAA and India-Japan DTAA.
6. The appellant through its authorized representative initially provided details in respect of the foreign exchange expenditure incurred by the appellant and reasons why the same was not be reduced from the export turnover for the purpose of determining the 10A benefit.
7. The Assessing officer further enquired other details of the Company as may be required in a regular assessment and the authorized representatives furnished all the details called for by the Assessing officer and also furnished the country wise profit and loss account to the AO.
8. The Officer's order disallowing the exemption u/s 10A and taxing the profits of both the foreign branches in India has resulted in a demand of Rs. 1,63,65,869/-.

9. Being aggrieved by the addition made by the Assessing Officer vide order of Learned Income Tax Officer 12(2) dated 27-12-2010, Bengaluru under section 143(3) read with section 147 of the Income Tax Act, 1961 by rejecting Appellant's claim on exemption under section 10A and addition of the whole of the profits of foreign branches situated in Japan & USA to the total income of the Appellant, the appellant filed an appeal u/s 246A on 27-01-2011.
10. However, the CIT(A), vide Appellate order dated 30-11-2017, took note on contentions of AO stating that the appellant had no infrastructure to export software or render software consultancy services to earn revenue amounting to Rs.3.12 crores and the interbranch transfers shown as sales to M/s Simplex Solutions Japan against which remittances were received were only transfers of money and not transfer of sale proceeds. CIT(A) rejected the contentions of the Appellant and dismissed appeal stating that the Appellant failed to substantiate its claim for export and upheld the addition made by AO vide the Assessment order without considering the ground wise remand report issued by the AO and the rejoinder provided by the appellant for the same and not appreciate the fact that the appellant was in off shore software development services which takes place at the client location and no large infrastructure is required in the STPI unit at Bangalore.

02. Brief facts are, the assessee is a company registered under the Companies Act, 1956. It filed the return of income for the assessment year 2005-06 declaring total taxable income of Rs.1,31,078/-. The case of the assessee was reopened and notice u/s.148 of the Act was issued. In para 2, the AO mentioned the broad reasons for reopening of the assessment. From the reading of above it is clear that the assessee has neither asked for the reasons for reopening nor has filed objection to the reopening of completed proceedings. As such the AO proceeded to reassess the income of the assessee based on the material available on record.

03. During the assessment proceedings, besides the reasons enumerated in the appeal before us, the AO has also examined

various issues which came to his notice and accordingly made various additions to the income of the assessee. In the course of assessment proceedings, the AO had disallowed the exemption claimed by the assessee u/s 10A of the Act, which was beyond the reasons mentioned for reopening in the Para 2 of assessment order. Aggrieved by the order of the AO, the assessee appealed before the CIT (A), however assessee failed before CIT(A) as well. Hence present appeal was filled by the assessee on the grounds mentioned herein above.

04. For the purposes of the present controversy it would be necessary to state the grounds raised by the assessee before the CIT (A) which is as under :

- *1. *The Learned Income Tax Officer, Circle 12 (2) has erred in doing a roving enquiry instead of restricting the assessment enquiries to the treatment of foreign exchange expenditure while computing 10A benefit which is bad in law and not jurisdictional.*
2. *The Learned Income Tax Officer, Circle 12(2), Bangalore has erred in law by disallowing the entire claim of exemption u/s 10A by treating the export made by the Appellants STPI unit as mere transfer of funds between branches without considering that the export have been made by the Appellants to both third party customers as well as the Appellants Japan and US branches.*
3. *The Learned Income Tax Officer, Circle 12(2), Bangalore has erred in not providing sufficient opportunity to the Appellant to substantiate that the Appellant in fact was exporting software. The Learned officer raised the issue of doubting the export only in the Assessment order and not before that.*
4. *The Learned Income Tax Officer, Circle 12(2), Bangalore has erred in not understanding the business model of the Appellant which is onsite development of software which requires minimum infrastructure at the Indian unit accordingly has erred in decided that the infrastructure at the unit is not commensurate for software export revenue declared by the Appellant.*
5. *The Learned Officer has erred in law by taxing the profits of foreign branches(i.e. the permanent establishment) ignoring the various jurisdictional Karnataka High Court and Supreme court decisions provided by the Appellant which laws down that the profits once taxed outside India need not be taxed in India.*
6. *Without prejudice to the above, the officer has erred in considered all the remittances received from Japan as money transfers from branch and not as export realizations without considering the Export Realization statement*

provided by the Appellant during the course of assessment and also supported by the invoices raised by the Appellant on the Japan branch.

7. *The Learned Income Tax Officer, Ward 12(2) has erred in stating that the Profit & Loss account does not match with the schedules to the profit & loss account without considering the Annexure -6 explanation submitted by the Appellant vide its letter dated 21-10-2010."*

05. The CIT (A) has not decided the above preliminary grounds, despite seeking the ground wise remand report from the AO, and has only decided the issues on merit. As these grounds were decided on merit by CIT(A) therefore we are restricting ourselves to the ground nos.1 and 2 raised before us as preliminary grounds.

06. The CIT (A) in response to ground no.1 raised before him has recorded at pages 5 and 6 of the impugned order, to the following effect :

A remand report was received from Assessing Officer on 29/10/2012. Relevant portion of the same is reproduced as under:-

The assessee has raised, in all, .8 grounds of appeal, supplemented by 3 written submissions dated 08.02.2012, 24.02.2012 and 23.05.2012 against the order u/s 143(3) r.w.s. 147 passed on 27.12.2010. The comments on each of ground of appeal, as directed by the CIT(A):are submitted as under:

Ground.No.1 : "The learned Income-tax Officer, Circle 12(2) has erred in doing a roving enquiry instead of restricting the assessment enquiries to the treatment of foreign exchange expenditure while computing 10A benefit which is bad in law and not jurisdictional".

The assessee has elaborated on this ground of appeal at para 1 of its written submission dated 08.02.2012.

Comments: The assessee's contention is that the words "and also" according to section 147 signify that unless the AO assesses the income with respect to which he has formed reason to believe within the meaning of section 147, it would not be open for him to assess or reassess any other income Chargeable to tax which has escaped assessment. It is contended that the AO, having reopened the case on the ground that the expenses incurred in foreign currency (being deputation expenses) were not reduced from the export turnover, concluded the assessment on the basis of his other findings... This question would have arisen in a case where the AO, having reopened the assessment to examine the claim of exemption u/s 10A, did not examine the claim and assessed some other income not connected with the claim of exemption u/s 10A. On the contrary, what the AO disallowed is the claim of exemption u/s 10A and nothing else. It is only in connection with the examination of claim u/s 10A that the AO conducted enquiries, which the assessee is calling a 'roving enquiry'. The case of Ranbaxy laboratories Ltd. Vs. CIT was a case. where there was no live nexus between reasons recorded and the assessment framed. The incomes believed to have escaped assessment in that case were the items like club fees, gifts and provision for leave encashment whereas the disallowances made were under section 80HH and 80-I. In the present case, the assessment was reopened to exclude the expenditure claim of deputation expenses from the export turnover which had an impact on the computation of deduction u/s 10A. During the course of verification, since the AO found that the eligible pro& claimed by the assessee as excessive, and since the assessee did not substantiate, the entire profit was added by disallowing the claim u/s 10A. This was further on the basis of the inference that the assessee did not have any infrastructure to export software of render software consultancy services to earn revenue of Rs. 3.12 crores and that, the remittances were nothing but the transfer of money from its branch, which were given the colour of export. The AO, therefore confined himself to restricting the deduction u/s 10A and did not bring in any other income to be added to the total income, as was done in the case of Ranbaxy Laboratories Ltd., cited by the assessee.

However as recorded hereinabove, the CIT (A) has not adjudicated these grounds while passing the order impugned before us.

07. Before us it was submitted by the Ld. AR that the order of the lower authorities is not correct firstly it is the duty of the AO to provide the reasons for reopening of the assessment proceedings, secondly AO should call objections from the assessee and then pass the order disposing the objections raised by the assessee. However, we are afraid this plea of supply of reason and passing of the order was neither raised before us nor before the CIT (A). Hence this issue need not be adjudicated by us.

08. The next issue rose before us is that the AO has issued the notice for reopening for the reason mentioned in para 2 of the assessment order. However the AO has not made any addition on this count and the AO made the disallowance u/s.10A, on the premise that there was no infrastructure available with the assessee for claiming 10A exemption during the assessment year under consideration. It was further held by the AO that export made from India was not infact export of software or rendering the software consultancy services to earn foreign exchange, rather the assessee has transferred the money from its branch to another branch by giving its colour of export.

On the basis of above it was submitted by AR that reasons for reopening and reasons for passing the reassessment order were different. We would be summarising the two in the following table :

Reasons for reopening	Grounds for additions/ disallowance
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The assessee has not excluded the expenses incurred in foreign currency for delivery of software from the export turnover for the purposes of computing the deduction u/s.10A of the Act	It was further held by the AO that export made from India was not in fact export of software or rendering the software consultancy services to earn foreign exchange, rather the assessee has transferred the money from its branch to another branch by giving its colour of export.
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It was submitted that the reason for reopening was not at all relatable to the addition made by the AO. It was submitted that it is not open for the AO to make addition on the grounds which are not relatable to the grounds for reopening of the assessment. Our attention was drawn by the Ld. AR to the judgment of the Hon'ble Bombay High Court in the matter of CIT v. Jet Airways India P. Ltd [331 ITR 236] and the Hon'ble Delhi High Court in Ranbaxy Laboratories Ltd v. CIT [336 ITR136], where the Hon'ble Delhi and Bombay High Courts have held that if the reassessment proceedings do not culminate in making addition on the ground mentioned for reopening in the reassessment notice and rather the addition was made on other grounds, found during the course of reassessment proceedings, then the entire addition made by the AO is liable to be quashed being invalid in law.

09. Per contra, the Ld. DR vehemently argued and drew our attention to Hon'ble jurisdictional High Court judgment in the matter of N. Govindaraju v. ITO [60 taxmann.com333], where the Hon'ble High Court after discussing the above two judgments of

Bombay and Delhi High Courts, in para 33, 34 and 41, held as under :

33. It is thus clear that once satisfaction of reasons for the notice is found sufficient, i.e., if the notice under section 148(2) is found to be valid, then addition can be made on all grounds or issues (with regard to 'any other income' also) which may come to the notice of the Assessing Officer subsequently during the course of proceedings under section 147, even though reason for notice for 'such income' which may have escaped assessment, may not survive.

34. In the case of CIT v. Jet Airways (I) Ltd. [\[2011\] 331 ITR 236/\[2010\] 195 Taxman 117](#) the Bombay High Court has held that "Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance or core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, afresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee."

....

41. If there is ambiguity in the main provision of the enactment, it can be clarified by insertion of an Explanation to the said section of the Act. Same has been done in the present case. Section 147 of the Act was interpreted differently by different High Courts, i.e., whether the second part of the section was independent of the first part, or not. To clarify the same, Explanation 3 was inserted by which it has been clarified that the Assessing Officer can assess the income in respect of any issue which has escaped assessment and also 'any other income'

(of the second part of section 147) which comes to his notice subsequently during the course of the proceedings under the section. After the insertion of Explanation 3 to section 147 it is clear that the use of the phrase "and also" between the first and the second parts of the section is not conjunctive and assessment of 'any other income' (of the second part) can be made independent of the first part (relating to 'such income' for which reasons are given in notice under section 148), notwithstanding that the reasons for such issue ('any other income') have not been given in the reasons recorded under section 148(2) of the Act. We are thus in agreement with the view taken by the Punjab & Haryana High Court in the cases of Majinder Singh Kang and Mehak Finvest (supra).

On the basis of the above, it was submitted before us that the interpretation given by the Hon'ble jurisdictional High Court is binding on the Bangalore Tribunal and therefore even if the additions were not made pursuant to the reason mentioned in the reassessment order, however if the additions were made on any of the reason which is found connected with the reason mentioned in the reassessment notice, than the reassessment order is valid. Further it was submitted the reasons provided for reassessment has not been challenged by the assessee, hence addition made by the authorities below are required to be upheld. Our attention was also drawn to decision of the Hon'ble Delhi High Court in the matter of PCIT v. Jakhotia Plastics P. Ltd [94 taxmann 89] , in which hon'bel Court had concurred with the view of the Hon'ble Karnataka High Court referred hereinabove in the matter of N. Govindraju v. ITO [60 taxmann.com 333]. The assessee in that matter has approached the Hon'ble Supreme Court by filing the SLP, which was dismissed by the Hon'ble Apex Court.

10. We have heard the rival contentions and perused the record. Without commenting upon the legal proposition canvassed before us with respect to the scope and ambit of reassessment proceedings u/s.148 of the Act, we deem it appropriate to remand the matter to the file of the CIT (A), as the CIT(A) had not decided these issues, with a direction to decide the ground no.1 and 2 raised before him on the basis of the legal proposition mentioned hereinabove by the assessee as well as the Revenue, as also any other judgment which comes to his notice and decide the issue in accordance with law. Needless to say it is for the assessee to establish that there is no live connection with the reasons for reopen and with the additions made by the AO. We are in agreement with the Ld. AR that if the foundation (reasons to believe/ grounds referred therein) on which the whole structure of additions were made is itself not sustainable in the eyes of law or it (reasons to believe/ grounds referred therein) does not have any live connection with the additions made, in that eventuality no such additions is sustainable. However if the CIT (A) comes to the conclusion that there is a live connection and the reasons to reopen is interdependent and interwoven with the addition made then said additions are sustainable in the eyes of law.

13. As we are sending back the ground no.1and 2 to the file of the CIT (A), therefore, we do not deem it appropriate to adjudicate the remaining other grounds as they are dependent on the adjudication of ground no.1and 2 by the CIT (A). In the light of the above, we remand the entire matter to the file of the CIT (A) to decide the

same afresh after giving due opportunity of being heard to the assessee.

14. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 14th day of September, 2018.

Sd/-
(JASON P. BOAZ)
ACCOUNTANT MEMBER

Sd/-
(LALIET KUMAR)
JUDICIAL MEMBER

Bengaluru

Dated : 14th September, 2018

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

Senior Private Secretary,
Income Tax Appellate Tribunal,
Bangalore.