

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

**RESERVED ON: 31.07.2012
PRONOUNCED ON: 17.09.2012**

+ ITA Nos. 69/2008, 783/2009 & 1239/2011

THE COMMISSIONER OF INCOME TAX Appellants

Through : Ms. Rashmi Chopra, Sr. Standing counsel
with Mr. Harpreet Singh Ajmani, Advocate

versus

REGENCY CREATIONS LTD. Respondent

Through: Mr. Kuldip Singh, Advocate.

ITA Nos.2002/2010, 438/2012, 439/2012, 440/2012, 441/2012

CIT Appellant

Through : Ms. Rashmi Chopra, Sr. Standing counsel
with Mr. Harpreet Singh Ajmani, Advocate

versus

VALIANT COMMUNICATIONS LTD. Respondent

Through : Mr. Harish Malhotra, Sr. Advocate with
Mr. Rajender Aggarwal, Advocate

**CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR**

MR. JUSTICE S.RAVINDRA BHAT

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1. These appeals have been preferred by the Revenue claiming to be aggrieved by the common orders of the Income Tax Appellate Tribunal (ITAT) in respect of the two assessees, i.e. M/s. Regency Creations Ltd. and Valiant Communications Ltd. The questions of law which arises in all the appeals is common, i.e.

“Whether the Tribunal fell into error in holding that the claim of deduction under Section 10-B of the Income Tax Act in respect of the assessee’s income derived from export of computer software was permissible.”

2. The facts pertaining to the cases of M/s. Regency Creations Ltd. (ITA Nos. 69/2008 and 783/2009) in respect of Assessment Years 2003-04 and 2004-05 are that it is engaged in 100% export of artware handicrafts, home furnishing and software exports. The assessee had three divisions respectively, in connection with the said three activities – i.e. artware handicrafts, home furnishing and software division, which was named M/s. Maxtech iSolution. The assessee claimed exemption under Section 10B in respect of its software export income. The Assessing Officer held that to qualify for such benefit, the assessee should be a 100% Export Oriented Unit (EOU) and approved by the Central Government through its

appropriate authority under Section 14 of the Industries (Development and Regulation) Act, 1951 (IDR Act). The Assessing Officer concluded that the Assessee had no valid certificate for software export and had not mentioned in its Articles of Memorandum of Association that it could carry-out business in computer software and that M/s. Maxtech iSolution was not shown to be an undertaking of the assessee, in its Articles of Memorandum of Association. The assessee's appeal was allowed for academic years 2003-07; the Appellate Commissioner held that the claim for exemption under Section 10B was admissible since it was registered with the Central Government, i.e. Software Technology Park of India (STPI) and that the business activity of software export was permissible with the main and the ancillary object spelt-out in the Memorandum of Association. The CIT (Appeals) relied upon a Circular of the Central Board of Direct Taxes (CBDT). The Revenue appealed to the Tribunal, which dismissed the appeal, holding as follows:

“5. We have considered the rival contentions and found from the record that the assessee had established a software division under the name and style of Maxtech iSolutions, which was approved and registered with the STPI, a unit of Ministry of Information and Technology. This is a nodal agency for grant of approval for establishment of 100% export oriented software. As per the permission letter dated 7th November, 2006, as placed on the record, we found that STPI had granted registration to the assessee vide letter dated 5.12.2000 for setting up a 100% EOU under Software Technology

Park Scheme which was valid for 5 years. The assessee was granted extension to continue the operations under Software Technology Park Scheme up to 31.03.2009. CBDT in its Circular No. 149/194/2004/TPL dated 06.01.2005 and Circular No. 200/20/2006/Income Tax Act, 1961-I dated 31.3.2006 has directed to treat the grant of registration by STPI as valid agency for purposes of Section 10B.

6. *In the instant case, the assessee has got approval from STPI, an organization of government duly authorized by CBDT Circular as stated above. Memorandum of Association of the Company in its main object clause clearly states the export of all kinds of goods all over the world. Goods thus includes computer software. Clause 11 of the Incidental objects as set out in memorandum empowers to set up any unit or division by the company for carrying on any business. Thus the setting up of Maxtech iSolution is one of the divisions of assessee is authorized by Memorandum. The details about branches and production units of assessee have been clearly informed to Assessee Officer during the assessment proceedings which he ought to have treated as sufficient compliance. The information about the places of business of assessee have been clearly mentioned in CA report which accompanies the return.*

7. *In view of the above, we do not find any infirmity in the order of the CIT (Appeals) for granting exemption under sec. 10-B to the assessee unit. The finding recorded by the CIT (Appeals) at pages 5 & 6 of his appellate order has not been controverted by the department by bringing any positive material on record."*

3. For the assessment year 2004-05, the Assessing Officer disallowed the claim for deduction under Section 10B. The Appellate

Commissioner accepted the assessee's argument following his previous order for the assessment year 2003-04 and also after observing that the appellant had exported computer software through proper banking channels and after duly complying with conditions for getting export invoices endorsed by the STPI, (the Central Government body which is also the nodal agency established for monitoring exports of computer software). The Revenue's appeal was allowed by the ITAT which followed its previous order.

4. For the assessment year 2007-08, the Assessing Officer and the Appellate Commissioner rejected the claim for benefit under Section 10B. The assessee in its appeal relied upon the previous two orders of the Tribunal. Before the Tribunal, the assessee relied upon Ex. No. 62 – Press Note 5 (1997 Series) and Ex.No. 38 – Press Note 2 (1993 Series) and also the letter dated 31.03.2011 issued by the Ministry of Commerce and Industry. The Tribunal noticed that Press Notes 2 and 5 which had been relied upon clearly stated that the Inter-Ministerial Standing Committee for EHTPS and ESTPC was competent to grant approval for STPI units to claim 100 % benefits under EOU Scheme. On the basis of this interpretation placed upon the letter dated 09.03.1993 (which was disclosed through communication dated 31.03.2011), the Tribunal held that the assessee was entitled to benefit of deduction under Section 10B of the Act. The said communication/letter dated 31.03.2011 reads as follows:

“Please refer to your RTI application dated March 10, 2011 received on 17.03.2011) on the subject mentioned above and to inform that no approval/ratification of STPI approval is required from BOA formed by Ministry of Commerce by power conferred under Section 14 of IDR Act, 1951. Inter-Ministerial Standing Committee for EHTPs and ESTPs (IMSC) is competent in grant approval for STPI unit to claim all benefits under 100% EOU Scheme as per Press Note 2 of 1993 (copy enclosed).”

5. The facts in respect of M/s Valiant Communications (ITA 2002/2010 – Assessment Year 2005-06; ITA 438 to 441/2012 – Assessment Years 2003-04, 2004-05, 2006-07 and 2007-08) are that the assessee, like in the case of Regency claimed deduction under Section 10B. It is engaged in the business of manufacturing and export of telecom transmission equipment. It had a registered unit with the Software Technology Park of India as a 100% EOU under Electronic Hardware Technology Park (EHTP) Scheme. The Assessing Officer had rejected the claim, stating that approval from STPI cannot be equated with the approval of the Board appointed under Section 14 of the Industries (Development and Regulation) Act, 1951. The CIT (Appeals) had held that the assessee was entitled to the benefit. The Revenue’s appeal before the Tribunal for the appeal year 2005-06 was rejected; the Tribunal had relied upon its ruling in the case of Regency Creations.

6. It is argued by the Revenue in all the appeals that the benefit of deduction under Section 10B of the Act is radically different from the one envisioned under Section 10A. It was held that the Press Note -2 and Press Note 5 which had been relied upon by the Tribunal merely indicated that the Inter-Ministerial Standing Committee had been set-up for considering applications to set-up units under EHTP Scheme and the STP Scheme. Such Inter-Ministerial committees were deemed to be for the purpose of Section 10A. This position was clarified by Circular No. 1 of 2005 relied upon during the course of Tribunal's orders. Similarly, Instruction No. 1 of 2006 also underlined the fact that the Software Technology Park Scheme notified under Section 3 of the Foreign Trade Development (Regulations) Act, approvals received by the Inter-Ministerial Standing Committee qualified for deduction under Section 10A. It was submitted that neither of these circulars nor even the subsequent clarification dated 06.05.2009 ever spelt-out any misunderstanding on the part of the income tax authorities that approval by the Director STPI could be deemed valid approval for the purpose of Section 10-B.

7. Learned counsel for the assesseees contended that the *rationale* for granting approval for Software Technology Park units was with the intention of their exporting services and products. The intention of Section 10B had to be, therefore, read in the context of the concerned Scheme, i.e. ETPI and STPI which was meant to permit growth of

foreign trade in the sector, i.e. computer software. It was argued, besides, that the rule of consistency, enunciated by the Supreme Court in *Radhasoami Satsang Soami Bagh, Agra v. CIT* AIR 1992 SC 377 = (1992) 193 ITR 321 (SC) and followed by this Court in *CIT v. Jagson International Limited* 2008 214 CTR 227 (Del), estopped the Revenue from contending that the assessee did not possess the requisite approval. It is also submitted that the Tribunal had correctly relied upon a clarification dated 31.03.2011 which put the matter beyond any shadow of doubt, i.e. that Press Notes 2 and 5 enured in favor of the assessee. They could clearly avail the benefit of deduction under Section 10B.

8. It is argued that the Appellate Commissioner and Tribunal were alive to the fact that the power to give approvals was initially with the Inter-Ministerial Standing Committee which was later delegated to the Director STP by the Note No. 5 (1997 Series). The assessees further relied upon the following extract of the CBDT circular dated (Notification under SO 388(E) dated 30.04.1995, which by para 2.10 stated as follows:

“2.10 The provisions of paragraphs 96,104,109, 110 and 112 to 117 of Chapter IX of the Export and Import Policy (1992-97) applicable to export oriented units (EOUs) and units in Export Processing Zones (EPZs) shall also apply to the STP units subject to the following modifications:

a. *The word “STP” shall be substituted for the word “EOU/EPZ” “EOU” OR “EPZs” wherever they occur, in the paragraphs.*

b. *The words “Development Commissioner” wherever they occur shall be substituted by the words “Chief Executive of the STP Society.”*

c. *The word “BOA” wherever it occurs, shall be substituted by the word “IMSC”.*

9. Learned counsel for the assessee urged that the construction or interpretation to be adopted by the Court should be in consonance with the liberal interpretation of Parliament in promoting growth and development. In this regard judgment of the Supreme Court in *Bajaj Tempo Ltd. v. CIT* 196 ITR 188 was relied upon. The Supreme Court in that case had held as follows:

“A provision in taxing statute granting incentive for promoting growth and development should be construed liberally, the restriction on it too has to be construed so as to advance objective of the provision and not to frustrate it.”

Provisions of Law

10. Before a discussion about the rival contentions regarding merits of the case, it would be necessary to extract the relevant provisions, i.e Sections 10-A and Section 10B. They read as follows:

*“Section 10A .SPECIAL PROVISION IN RESPECT OF
NEWLY ESTABLISHED INDUSTRIAL UNDERTAKINGS IN
FREE TRADE ZONES*

(1) Subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which this section applies shall not be included in the total income of the assessee.

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

(i) It has begun or begins to manufacture or produce articles or things during the previous year relevant to the assessment year

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(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;

(ia) In relation to an undertaking which begins to manufacture or produce any article or thing on or after the 1st day of April, 1995, its exports of such articles or things are not less than seventy-five per cent of the total sales thereof during the previous year;

(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 industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking 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) The profits and gains referred to in sub-section (1) shall not be included in the total income of the assessee in respect of any five consecutive assessment years, falling within a period of eight years beginning with the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things specified by the assessee at his option

Provided that nothing in this sub-section shall be construed to extend the aforesaid five assessment years to cover any period after the expiry of the said period of eight years.....

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Explanation : For the purposes of this section, -

(i) "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 316 for the purposes of this section;

(ii) "Relevant assessment years" means the five consecutive assessment years specified by the assessee at his option under sub-section (3);

(iii) "Manufacture" includes any -

(a) Process, or

(b) Assembling, or

(c) Recording of programmes on any disc, tape, perforated media or other information storage device.

(iv) "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 318b ;

(v) "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;

(vi) "Produce", in relation to articles or things referred to in clause (i) of sub-section (2), includes production of computer programmes....”

“SECTION 10B. SPECIAL PROVISION IN RESPECT OF NEWLY ESTABLISHED HUNDRED PER CENT EXPORT-ORIENTED UNDERTAKINGS.

(1) Subject to the provisions of this section, any profits and gains derived by an assessee from a hundred per cent export-oriented undertaking (hereafter in this section referred to as the undertaking) to which this section applies shall not be included in the total income of the assessee.

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

(i) It manufactures or produces any article or thing;

(ia) In relation to an undertaking which begins to manufacture or produce any article or thing on or after the 1st day of April, 1994, its exports of such articles and things are not less than seventy-five per cent of the total sales thereof during the previous year;

(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 industrial undertaking 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) The profits and gains referred to in sub-section (1) shall not be included in the total income of the assessee in respect of any

consecutive assessment years, falling within a period of eight years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things, specified by the assessee at his option :

Provided that nothing in this sub-section shall be construed to extend the aforesaid five assessment years to cover any period after the expiry of the said period of eight years.....

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Explanation : For the purposes of this section, -

(i) "Hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act...."

Notifications, circulars and instructions referred to

11. During the proceedings in this case, the Tribunal as well as the assessee relied upon certain circulars to say that once a software technology park received approval to function as such, since the notified approval was in the Central Government's circulars, given by an Inter Ministerial Committee, which in turn had been delegated to the Director, the unit was also entitled to avail the benefit under Section 10-B. It would therefore, be relevant to notice the circulars; they are extracted below.

12. The Tribunal relied on a circular of 2005; it reads as follows:

“CIRCULAR NO.1 OF 2005, DT. 6TH JAN., 2005

Sub: Tax holiday under section 10B of the Income-tax Act to 100% Export Oriented Undertaking – Certain clarification – Reg

6/1/2005

Exemptions

Section 10B

Section 10B of the Income-tax Act provides for 100% deduction of profits derived by a hundred per cent export oriented undertaking, form export of articles or things or computer software manufactured or produced by it. The deduction is available 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 articles or things or computer software. However, no deduction under section 10B is available after assessment year 2009-10.

2. The deduction under section 10B is available to an undertaking which fulfils all the following conditions:

(i) it manufacturers or produces any article or thing or computer software;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence except in the circumstances specified under section 33B of the IT Act.

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

3. Representations have been received from various quarters as to whether an undertaking set up in Domestic Tariff Area, which is subsequently approved as 100% EOU by the

Board appointed by the Central Government in exercise of powers conferred under section 14 of the Industries (Development and Regulation) Act, 1951, is eligible for deduction under section 10B of the Income-tax Act.

4. The matter has been examined and it is hereby clarified that an undertaking set up in Domestic Tariff Area (DTA) and deriving profit from export of articles or things or computer software manufactured or produced by it, which is subsequently converted into a EOU, shall be eligible for deduction under section 10B of the IT Act, on getting approval as 100% export oriented undertaking. In such a case, the deduction shall be available only from the year in which it has got the approval as 100% EOU and shall be available only for the remaining 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 articles or things or computer software, as a DTA unit. Further, in the year of approval, the deduction shall be restricted to the profits derived from exports, from and after the date of approval of the DTA Unit as 100% EOU. Moreover, the deduction to such units in any case will not be available after assessment year 2009-10.

5. To clarify the above position, certain illustrations are given as under:

(i) Undertaking 'A' is set up in Domestic Tariff Area and starts manufacture or production of computer software in financial year 1999-2000 relevant to assessment year 2000-01. It gets approval as 100% EOU on 10th September, 2004 in the financial year 2004-05 relevant to assessment year 2005-06. Accordingly, it shall be eligible for deduction under section 10B from assessment year 2005-06 i.e., the year in which it fulfills the basic condition of being a 100% EOU. Further, the deduction shall be available only for the remaining period of ten years i.e. from assessment year 2005-06 to assessment year

2009-10. This deduction under section 10B for assessment year 2005-06 shall be restricted to the profits derived from exports, from and after the date of approval of the DTA unit as 100% EOU.

(ii) Undertaking 'B' set up in Domestic Tariff Area, begins to manufacture or produce computer software in financial year 1996-97 relevant to assessment year 1997-98. It gets approval as 100% EOU in Financial year 2007-08 relevant to assessment year 2008-09. No deduction under section 10B shall be admissible to undertaking B as the period of 10 years expires in financial year 2005-06 relevant to assessment year 2006-07, prior to its approval as 100% EOU.

(iii) Undertaking 'C' is set up in Domestic Tariff Area in the financial year 2000-01 relevant to assessment year 2001-02 and engaged in the business of providing computer related services, other than those notified by the Board for the purpose of section 10B. In financial year 2002-03, it acquires more than 20% of old plant and machinery and starts manufacturing computer software. It also gets approval as 100% EOU in financial year 2002-03. Undertaking 'C' shall not be eligible for deduction under section 10B, as there has been transfer of old plant and machinery.

(iv) Undertaking 'D' is set up and starts producing computer software in financial year 2003-04 relevant to assessment year 2004-05. It gets approval as 100% EOU in financial year 2006-07 relevant to assessment year 2007-08. It shall be eligible for deduction under section 10B from assessment year 2007-08. However, the deduction shall not be available after assessment year 2009-10.

(v) Undertaking 'E' is set up and starts producing computer software prior to 31st March, 1994. It gets approval as 100% EOU in financial year 2004-05 relevant to assessment year 2005-06. Undertaking 'E' shall not be eligible for deduction

under section 10B as the period of deduction of 10 years expires prior to assessment year 2005-06.”

The second document relied on were the Instructions of 2006, dated 31st March, 2006:

*“INSTRUCTIONS NO.1 OF 2006, DT. 31ST MARCH, 2006
SUB: Deduction under Section 10A-Clarification-Reg.*

*31/3/2006
EXEMPTIONS*

SECTION 10A

- 1. Section 10A of the Income-tax Act, 1961 provides for 100 per cent deduction of profits and gains derived by an undertaking from export of articles or things or computer software manufactured or produced by it. The deduction is available 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. The tax benefit under section 10A is available to an undertaking which fulfils all the following conditions:*

- (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 1st April, 1981, in any Free Trade Zone; or*

- (b) commencing on or after 1st April, 1994, in any Electronic Hardware Technology Park or Software Technology Park; or*

(c) commencing on or after 1st 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 except in the circumstances and within the period specified in section 33B of the Income-tax Act;

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

2. 'Software Technology Park' has been defined to mean 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.

3. In exercise of the powers conferred by sub-section (1) of section 3 of the Foreign Trade (Development and Regulation) Act, 1992, the Ministry of Commerce notified the Software Technology Park Scheme wherein it was provided that a Software Technology Park may be set up by the Central Government, State Government, Public or Private Sector Undertakings or any combination thereof. An STP may be an individual unit by itself or it may be one of such units located in an area designated as STP Complex by the Department of Electronics. The scheme was required to be administered by the Department of Electronics, Government of India, through Directors of respective Software Technology Parks which form part of the Software Technology Parks of India (STPI), a society established by the Department of Electronics and registered under the Societies Registration Act, 1860. An application in the prescribed form for establishing a STP unit was required to be submitted to the Chief Executive of STP Complex along with the details of the Software

project. Such application was to be considered by an Inter-Ministerial Standing Committee (IMSC) constituted under the Chairmanship of Secretary, Department of Electronics, Government of India.

- 4. Subsequently, vide Notification No. 4/(RE-95/92-97), dated 30th April, 1995 issued by the Director General (Foreign Trade), Ministry of Commerce, in exercise of powers conferred in sub-section (1) of section 3 of the Foreign Trade (Development and Regulation) Act, 1992, notified the amended STP Scheme. Para 2.3 of the aforesaid notification provides that the scheme is administered by the Department of Electronics, Government of India, through Directors of respective STPs which form part of the STPI, a society established by the Department of Electronics and registered under the Societies Registration Act, 1860. An application in the prescribed format for establishing a STP unit may be submitted to the Chief Executive of STP Complex along with the details of the software project. Such application will be considered by an Inter-Ministerial Standing Committee constituted under the Chairmanship of Secretary, Department of Electronics.*
- 5. Instances have been brought to the notice of the Board that a large number of units registered/approved by the Directors of the STPI are claiming deduction under section 10A whereas the STP scheme requires approval by the Inter-Ministerial Standing Committee of the Department of Electronics. Accordingly, the cases of such claimants have been reopened by the field authorities.*
- 6. The matter has been examined in consultation with the officers of the Department of Information Technology (earlier, Department of Electronics). In view of the*

ambiguity in the legal status of the approval by Director of STPs, the Inter-Ministerial Standing Committee will meet to consider the approvals by Director of STPs issued in the past. Therefore, with a view to avoid infructuous demand raised in assessment and reassessment of assessees claiming deduction under section 10A, it has been decided that the claim of deduction under section 10A of the Income-tax Act, shall not be denied to STP units only on the ground that the approval/registration to such units has been granted by the Directors of Software Technology Parks. However, it has to be ensured that all other conditions specified in section 10A are fully satisfied before allowing any such claim.

7. *In cases where assessments/reassessments have already been completed, and the claim, under section 10A, has been disallowed only on the ground that the approval to the STP has not been granted by the Inter-Ministerial Standing Committee in accordance with the Scheme, the demand so arising should be kept in abeyance until further orders.”*

12. It would also be relevant at this stage to notice that Circular No. 694, dated 23-11-1994, one of the earliest instructions issued by the Central Government, pertinently stated that:

“....it is clarified that units in EPZs/EOUs which export software are as much eligible for availing of the five-year tax holiday under sections 10A and 10B as any other units in EPZ/EOU, even for the period prior to the previous year relevant to the assessment year 1994-95. The conditions stipulated in the provisions have, of course, to be fulfilled. The insertion of the Explanation of the term "produce" in 1993 should not be taken as a ground for denying the tax holiday to such units for earlier years.”

Earlier, the Department of Industrial Development, Ministry of Industry had, by notification No. 117-E dated 22-2-1993 constituted a committee to perform the functions specifically delegated, including the grant of approval for EHTPs and STPs. The said Notification reads as follows:

“Ministry of Industry

(Department of Industrial Development)

New Delhi, the 22nd Feb., 1993

Notification

S.O. No. 117(E)--In exercise of the powers conferred by Section 14 of Industries (Development and Regulation) Act, 1951 (65 of 1951), r/w Sub-rule (2) of Rule 10 of the Registration and Licensing of Industrial undertakings Rules, 1952 the Ministry of Industry, Department of Industrial Development, hereby appoints the following committee which shall perform the functions specified :

Inter-Ministerial Standing Committee for units in the Electronic Hardware Technology Parks (EHTP) and Software Technology Parks (STP)

Chairman

- 1. Secretary, Department of Electronics, or his nominee*
- 2. Secretary, Department of Industrial Development, or his nominee*
- 3. Secretary, Department of Science and Technology, or his nominee*

4. *Secretary, Ministry of Commerce, or his nominee*
5. *Chairman, Central Board of Excise and Customs, or his nominee*
6. *Secretary, Deptt. of Economic Affairs, Ministry of Finance, or his nominee*
7. *Secretary, Planning Commission, or his nominee*
8. *Economic Adviser, Department of Electronics*
9. *Secretary, Department of Small Scale Industries and Agro and Rural Industries or his nominee*
10. *Joint Secretary, Department of Electronics, Member-Secretary.*

Functions of the Inter-Ministerial Standing Committee :

(i) The Committee shall consider all applications for setting up of units in the Electronic Hardware Technology Parks (EHTP) under the scheme of special facility (hereinafter referred to as the said scheme framed under the Government of India, Ministry of Commerce, Notification No. 42 (N-8)/1992-97 dt. the 14th Sept., 1992). The Committee shall also consider all applications for setting up of units under Software Technology Park scheme operated under Customs Notification Nos. 138 and 140 dt. 22nd Oct., 1991. The Committee shall consider proposals for industrial licence, foreign technical collaboration agreements and import of capital goods. The Committee shall not consider applications involving foreign equity with or without any other industrial approvals.

(ii) The Committee shall review the progress of implementation of letters of intent and industrial licences granted under the said scheme upto the stage of actual commissioning of capacity.

(iii) The Committee shall consider and make a report on policy questions arising from applications received under the said scheme or from the implementation of individual proposals thereunder in accordance with the policy laid down by the Central Government from time to time.

(iv) The Committee may refer any matter in its discretion for the consideration and decision of the Central Government in respect of matters falling within its competence".

Analysis

13. There is no dispute about the essential facts. Both assesses had received approval to start 100 per cent EOU under STP scheme. The question is whether this approval can be deemed one under Section 10-B of the Act. For that purpose a 100 per cent EOU is only that which is so approved by the Board appointed by Central Government in exercise of powers conferred under Section 14 of IDAR Act, 1951. The pre-conditions that govern units set up under STP scheme are different from those that govern the units set up as 100 per cent EOUs and so approved by the Board. Some conditions may undoubtedly overlap yet, criteria, such as fulfilment of the employment criteria, foreign exchange, etc., are not common.

14. The Inter-Ministerial Standing Committee set up for granting licences under STP scheme is also appointed by the Central Government in exercise of powers conferred under, Section 14 of IDAR Act. However, the question is whether that part of the Board's function (under Section 14 IDR Act) – to grant approval under

Section 10-B also stands delegated. The assesses submit that the Inter-Ministerial Standing Committee has been replaced by the Board on the basis of the contents of para 2 of the notification of the Ministry of Commerce dt. 22nd March, 1994, is unpersuasive. That notification states that for the purpose of paras 111 to 117 of Chapter IX of the Export and Import Policy (1992-97), Board of Approval shall be substituted by the Inter-Ministerial Standing Committee. Paras 111 to 117 of Chapter-DC of Export and Import Policy (1992-97) do not deal with that aspect, but other questions such as subcontracting by EOU/EPZ, Sale of imported materials, Disposal of scrap, Private bonded warehouses, period of bonding, and de-bonding. The notification therefore extended incentives to EOUs to set up units under the STP scheme. However, for the Court to conclude that the Interministerial Committee was authorized to issue approval under Section 10-B and that its imprimatur or approval under Section 10-A ought to be deemed as an approval under Section 10-B, there ought to be more direct, or express authorization.

15. Section 10A extends the exemption to the units set up under STP scheme which start production of goods during the previous year relevant to the assessment year commencing on or after 1st April, 1994. The assessee's plea about eligibility of a 100% EOU STP eligible for exemption would render the amendment brought about by the Finance Act, 1993 (extending the benefit under Section 10A of the

Act to the STPs from 1st April, 1994) superfluous. There is no reason for Parliament to amend the law, and extend benefits of Section 10A to units under STP scheme and, restrict the benefits to those commencing their operations in the year of account relevant to the Assessment year 1994-95, if a STP unit is otherwise eligible for exemption under Section 10B of the Act on the ground of its being 100 per cent EOU.

16. It is a settled principle of law that unless there is express authorization, in terms of a statute, and an actual delegation of power, a statutory authority in whom jurisdiction or power is reposed, is alone vested with it, to the exclusion of others (Ref. *Hari Chand Agarwal v Batala Engineering Co. Ltd* AIR 1969 SC 483; and *Ajaib Singh vs. State Of Punjab* AIR 1965 SC 1619). In the absence of a statutory power to delegate, and further to that power, an actual delegation in accordance with law, such functions cannot be performed or deemed to have been performed by a third agency or authority. Another cardinal rule which binds the court to interpret statutes is that “*where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all, and other methods of performance are necessarily forbidden...*” (See *Nazir Ahmed v King Emperor* (1936) I. L. R. 17 Lah 629).

17. In the present case, there is no notification or official document suggesting that either the Inter Ministerial Committee, or any other

officer or agency was nominated to perform the duties of the Board (constituted under Section 14 of the IDR Act), for purposes of approvals under Section 10-B. Though the considerations which apply for granting approval under Sections 10-A and 10-B may to an extent, overlap, yet the deliberate segregation of these two benefits by the statute reflects Parliamentary intention that to qualify for benefit under either, the specific procedure enacted for that purpose has to be followed. There is nothing in any of the Circulars or instructions relied on by the Tribunal in all the orders, implying that approval for purposes of an STP also entitled the unit to a benefit under Section 10-B. The orders of the Tribunal are consequently erroneous, and its reasoning, unsupportable.

18. In the light of the above discussion, the question of law framed is answered in favour of the revenue, and against the assessee; the appeals are therefore allowed.

(S.RAVINDRA BHAT)
JUDGE

(R.V. EASWAR)
JUDGE

17th September, 2012