

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, COCHIN**

Before Shri George George K, Judicial Member

ITA No.161/Coch/2020 : Asst.Year 2007-2008

ITA No.162/Coch/2020 : Asst.Year 2008-2009

ITA No.163/Coch/2020 : Asst.Year 2009-2010

ITA No.164/Coch/2020 : Asst.Year 2011-2012

M/s. Krythium Solutions Private Limited, C/o.Menon & Pai Advocates, I S. Press Road Ernakulam – 682 018. PAN : AACCK6349R.	Vs.	The Asst.Commissioner of Income-tax, Circle 1(2) Kochi.
(Appellant)		(Respondent)

Appellant by : Sri.Raja Kannan, Advocate
Respondent by : Sri.Mritunjaya Sharma, Sr.DR

Date of Hearing : 16.07.2020	Date of Pronouncement : 24.07.2020
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ORDER

These appeals at the instance of the assessee are directed against the consolidated order of the CIT(A) dated 18.11.2019. The relevant assessment years are 2007-2008, 2008-2009, 2009-2010 and 2011-2012.

2. Common issues are raised in these appeals, hence, they were heard together and are being disposed of by this consolidated order. For all the appeals, the common issue raised are whether the Income Tax Authorities are justified in not allowing the alternative claim of deduction u/s 10A of the I.T.Act. Insofar as the assessment years 2007-2008 to 2009-2010 are concerned, the assessee has also raised the issue of validity of reopening of assessments.

3. Brief facts of the case are as follow:

The assessee is a company. It is a 100% Export Oriented Unit (EOU) engaged in the business of software development and I.T. enabled services. For the assessment years 2007-2008, 2008-2009, 2009-2010, the assessments were completed u/s 143(3) of the I.T.Act, accepting the deduction claimed u/s 10B of the I.T.Act. For the above said assessment years, the assessments were reopened by issuance of notice u/s 148 of the I.T.Act. The A.O. held in the reassessment order that the assessee is not entitled to deduction u/s 109A of the I.T.Act. The A.O. relied on the judgment of the Hon'ble Delhi High Court in the case of CIT v. Regency Creations Ltd [(2013) 353 ITR 326 (Delhi)]. The assessee had made alternative claim u/s 10A of the I.T.Act before the A.O. when the assessments were reopened for assessment years 2007-2008 to 2009-2010. The alternative claim made by the assessee u/s 10A of the I.T.Act was rejected by the A.O. by observing as under:-

“As regards the alternative claim, the same cannot be examined in the reassessment proceedings, as the same are meant for bringing to tax income which has escaped assessment and cannot be basis for assessee to make claims which are barred by limitation.”

3.1 For the assessment year 2011-2012, the assessment was completed u/s 143(3) of the I.T.Act rejecting the claim of deduction u/s 10B of the I.T.Act. For rejecting the claim of deduction u/s 10B of the I.T.Act, the reliance was placed by

the Assessing Officer on the judgment of the Hon'ble Delhi High Court in the case of CIT v. Regency Creations Limited (supra).

4. Aggrieved by the orders passed by the Assessing Officer for assessment years 2007-2008 to 2009-2010 and 2011-2012, the assessee preferred appeals to the first appellate authority. The CIT(A) confirmed the view of the Assessing Officer in denying the claim of deduction u/s 10B of the I.T.Act. As regards the alternative plea of the assessee u/s 10A of the I.T.Act. The relevant finding of the CIT(A) reads as follow:-

“7. Alternate claim of deduction u/s. 10A

7.1. A. Y. 2011-12: The appellant has not made any claim u/s.10A during the course of assessment proceedings. The claim made now, though grounds of appeal cannot be entertained as the claim for a fresh deduction was neither made in the Return of Income filed, nor through a revised return of income. No claim was made during assessment proceedings. The power of CIT(A) is limited to the assessment order and issues contained therein. The CIT(A) does not possess the revisionary powers and, therefore, he cannot entertain any issue which does not emanate from the assessment. In view of this, these grounds of appeal of the appellant for A.Y. 2011-12 are dismissed.

7.2. A.Ys. 2007-08, 2008-09 & 2009-10

These cases were reopened u/s. 147 for taxing the income escaping assessment. In the scheme of provisions u/s. 147 of the I. T. Act, the case is reopened for taxing the income escaping assessment. In the return of income filed in response to notice u/s. 148, the appellant is not eligible to claim any deduction, which was not claimed in the Return of Income originally filed. The case was reopened because of a decision of the Hon'ble Jurisdictional High Court, wherein it was held that the appellant did not fulfill the conditions to avail deduction u/s.10B. Claiming deduction without fulfilling the criteria and being eligible for a claim of the said deduction is clearly a mistake on part of the appellant and, therefore, there's no infirmity in reopening the case u/s. 147 of the Act, on part of the AO. In view of this fact and order passed by the Hon'ble Kerala High Court on the issue, in my opinion, the AO has

correctly reopened the case u/s.147 and completed reassessment proceedings. Grounds of appeal challenging the validity of reopening the case u/s.147, are, therefore, dismissed for all the three years.”

5. Aggrieved by the order of the CIT(A), the assessee has filed these appeals before the Tribunal. The learned Counsel for the assessee has filed a brief written submission. The gist of written submission reads as follow:-

Common point in all the Appeals- (I.T Appeal No.s 161, 162, 163, 164/Coch/2020 AYs 2007-08, 2008-09 & 2009-10 & 2011-12)

The appellant is entitled to be granted deduction under Section 10A of the Act, going by the decision of the jurisdictional High Court in CIT v. Flytxt Technology P. Ltd., reported in (2017) 398 ITR 717 (Kerala) & the order issued by this Hon'ble Tribunal following the said decision, in the case of Allianz Services Private Limited v. JCIT - (Refer: Paragraph NO.8 13 - 13.5 of the order dated 20.12.2019 in ITA No. 191/Coch/2015 for the A.Y.2010-2011)

The first appellate authority failed to consider and apply the ratio of the decisions in Goetze (India) Ltd., v. CIT; reported in (2006) 284 ITR 323 (SC), NTPC Ltd. v. CIT, reported in (1998) 229 ITR 383 (SC).

Additional points arising in I.T Appeal Nos. 161, 162, 163/Coch/2020 - AYs 2007- 08,2008-09 & 2009-10)

A subsequent decision cannot be a justifiable ground for re-opening of the assessment. (Refer: DCITv. Simplex Concrete Piles India, reported in (2013) 358 ITR 129 (C). The decision of the High Court of Delhi came subsequent to completion of scrutiny assessment under Section 143(3), and therefore cannot be the ground/reason for re-opening of the assessment.

The re-assessment made under Section 147 will be invalid, if the assessing authority allowed the claim after verification of the records, under the scrutiny assessment under Section 143(3) of the Act. (Refer; CIT v. Usha International Ltd.; reported in (2012) 348 ITR 485 (Del.).

During the scrutiny assessment under Section 143(3) of the Act, an opinion was formed qua the claim made under Section 10B, which was changed while initiating the re-assessment proceedings. It is well settled that a mere 'change of opinion' cannot be the basis of re-assessment. (Refer: CIT v. Kelvinator of India - (2010) 320 ITR 561 (SC).

Alternatively, it is submitted that when the approval under the STPI Scheme was never been disputed and the claim under Section 10B was

accepted in the initial years after completion of scrutiny assessment under Section 143(3) of the Act, the rejection of the entire claim in re-assessment proceeding becomes bad in law. (Refer: Hi-Tech Outsourcing Services v. CIT - Judgment dated 18.09.2018 by the High Court of Gujarat)”

6. The learned Departmental Representative, on the other hand, submitted that the alternative claim u/s 10A of the I.T.Act was not made before the A.O. for the assessment year 2011-2012. It was submitted that for assessment years 2007-2008 to 2009-2010 though the claim was made during the course of assessment proceedings, the deduction cannot be granted, since no such claim was made in the original return filed. As regards the validity of reopening of assessment, the learned DR submitted that the issue was not raised before the A.O. nor CIT(A).

7. I have heard the rival submissions and perused the material on record. For the assessment years 2008-2009 to 2009-2010, the assessee had claimed deduction u/s 10B of the I.T.Act in the original return of income and same was allowed. The claim of deduction u/s 10B of the I.T.Act was denied in the reassessment orders passed for the assessment years concerned by following the dictum laid down by the Hon'ble Delhi High Court in the case of CIT v. Regency Creations Limited (supra). For the assessment year 2011-2012, the original assessment was completed u/s 143(3) of the I.T.Act and the claim of deduction u/s 10B of the I.T.Act was denied. The CIT(A) for the assessment years 2007-2008 to 2009-2010 and 2011-2012 confirmed the action of the A.O. in making the disallowance of deduction u/s 10B of the

I.T.Act based on the judgment of the Hon'ble Delhi High Court in the case of CIT v. Regency Creations Limited (supra). The alternative claim of deduction u/s 10A of the I.T.Act was not entertained by the CIT(A) primarily for the reason that the assessee had not claimed the same in original returns filed.

7.1 The claim of deduction u/s 10A and 10B of the I.T.Act is para materia except that the registration u/s 10B and 10A of the I.T.Act are done by different authorities. Further, the claim u/s 10B and 10A of the I.T.Act are to be made in Form No.56G and 56F respectively. The basis of denying the claim of deduction u/s 10B of the I.T.Act is on account of the dictum laid down by the Hon'ble Delhi High Court in the case of CIT v. Regency Creations Limited (supra), wherein it was held that the assessee not having got the necessary approval from the appropriate authority under the statute, was not entitled to deduction u/s 10B of the I.T.Act. However, the above said judgment of the Hon'ble Delhi High Court was modified in the Review Petition in the case of CIT v. Valiant Communications Ltd. in ITA No.2002 of 2010 (judgment dated 04.01.2013), wherein the matter was remitted to the Tribunal to consider the assessee's alternative claim u/s 10A of the I.T.Act.

7.2 In the instant case, the registration obtained by the assessee from the Director, STPI, Thiruvananthapuram constitutes as a valid approval for the purpose of deduction u/s 10A of the I.T.Act. The Delhi High Court in the case of CIT v. Technovate E Solutions P.Ltd. [(2013) 354 ITR 110 (Del.)]

after considering the CBDT Instruction No.1 of 2006 dated 13.03.2006 and the letter issued by the Board dated 06.05.2009, held that when the EOU has obtained registration from the Director of STPI, the same is entitled to deduction u/s 10A of the I.T.Act. Therefore, the registration dated 23.03.2006 obtained by the assessee from the Director of STPI, Thiruvananthapuram is sufficient compliance for the purpose of claiming deduction u/s 10A of the I.T.Act.

7.3 In the instant case, the assessee during the course of reassessment proceedings for assessment years 2007-2008 to 2009-2010 had filed revised returns and furnished Form No.56F for claiming deduction u/s 10A of the I.T.Act. Similarly, for assessment year 2011-2012, the claim u/s 10A of the I.T.Act was made before the first appellate authority and Form No.56F was submitted. The CIT(A) concluded that he cannot entertain the claim u/s 10A of the I.T.Act, which was not raised before the Assessing Authority. The basis of the conclusion of the first appellate authority was that the said claim was not emanating from the assessment. The finding of the first appellate authority is erroneous as restriction to entertain an alternate new claim except through filing a revised return is applicable only to the assessing authority and not to the appellate authorities. (In the instant case claim u/s 10A of the I.T.Act was made before the A.O. for assessment years 2007-2008 to 2009-2010). The division Bench of the Hon'ble jurisdictional High Court in the case of CIT v. Flytxt Technology P. Ltd. [(2017) 398 ITR 717 (Ker.)]

while considering the validity of rejection of claim of deduction u/s 10B of the I.T.Act as directed by the CIT(A) u/s 263 of the I.T.Act, confirmed the view taken by the ITAT wherein it had directed the Assessing Officer to consider the alternative claim u/s 10A of the I.T.Act. In this context, the Hon'ble jurisdictional High Court placed reliance on the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT [(1998) 229 ITR 383 (SC)]. The Hon'ble High Court further held that even though the powers conferred on the Commissioner u/s 263 of the I.T.Act is limited to examine the orders passed by the Assessing Officer whether it is erroneous and prejudicial to the interests of the revenue, that restriction of power could not affect powers of Tribunal which was bound to exercise u/s 254 of the I.T.Act.

7.5 The Tribunal in the case of M/s.Allianz Services Private Limited v. JCIT [ITA No.191/Coch/2015 – order dated 20th December, 2019] had also considered an identical issue and held that the alternative claim of deduction u/s 10A of the I.T.Act is necessarily to be considered when the assessee's claim of deduction u/s 10B of the I.T.Act was denied. The relevant finding of the Tribunal which followed the judgment of the Hon'ble jurisdictional High Court in the case of CIT v. Flytxt Technology P. Ltd. (supra) reads as follow:-

“13.1 The facts of the issue are that the Assessing Officer rejected the alternate claim of granting deduction u/s. 10A of the I.T. Act by relying on the judgment of the Supreme Court in the case of Goetze (India) Limited (284 ITR 323). The Assessing Officer further held that the alternate claim is only possible through filing of return and not in the course of assessment proceedings. The Assessing Officer rejected the alternate

claim on the ground that the assessee was claiming exemption under a different section of the Act.

13.2 On appeal, the DRP relied on the judgment of the Delhi High Court in the case of Regency Creations Ltd. (255 CTR 63) wherein it was held that for the purpose of section 10B of the I.T. Act, 100% EOU is only the undertaking which is so approved by the Board appointed by the Central Government in exercise of powers conferred u/s. 40 of Industries (Development & Regulation) Act, 1951 and not the undertaking having approved by Director STPI. The DRP stated that the issue was considered by it for the assessment year 2009-10 and the disallowance of deduction u/s. 10B was upheld. Regarding alternate claim of deduction u/s. 10A, the DRP confirmed the findings of the Assessing Officer.

13.3 Against this, the assessee is in appeal before us. The Ld. AR submitted that the DRP and the A.O. was bound to examine and grant the alternative claim u/s. 10A of the Act to the assessee as per the CBDT Circular No. 14(XL-35) dated 11 April 1955 and the judgment of the Bombay High Court in the case of Vodafone India Services Pvt. Ltd. WP 1877 of 2013. The Ld. AR relied on the judgment of the Apex Court in the case of National Thermal Power Co. Ltd. (229 ITR 383) wherein it was held that the Tribunal is also vested with jurisdiction to grant alternate claim available for the company u/s. 10A. It was also submitted that section 10A of the Act is pari material with section 10B of the Act. For this purpose, the ld. AR relied on the following case laws:

- 1. M/s. US Technology International Pvt. Ltd. vs. JCIT in ITA No. 133/Coch/2016 dated 19/04/2018.*
- 2. ACIT vs. M/s. QBurst Technologies P. Ltd. (ITA Nos. 172&173/Coch/2015 dated 17/11/2015.*
- 3. Cronos Consulting India (P) ltd. (ITA No. 105/Coch/2014 dated 06/06/2014) 4. ITO vs. Device Driven (India) Pvt. Ltd (ITA No. 282/Coch/2013 dated 29/11/2013).*

13.4 Further, the Ld. AR relied on the judgment of the Jurisdictional High Court in the case of CIT vs. Flytxt Technology (P) Ltd. in ITA Nos. 47 & 77 of 2015 wherein the alternate claim for exemption u/s. 10A of the Act granted by the Tribunal was upheld. 13.4 We have heard the rival submissions and perused the record. A similar issue was considered by the Jurisdictional High Court in the case of CIT vs. Flytxt Technology (P) Ltd. 87 taxmann.com 77 where it was held as follows:

“6. We have considered the submissions made. Admittedly, the assessee initially claimed the benefit of Section 10B which was allowed by the Assessing Officer. Only when the Commissioner was seized of the proceedings under Section 263, the assessee raised an alternative claim for the benefit of Section 10A. The Commissioner did not examine that plea and on the other hand,

directed the Assessing Officer to withdraw the exemption under Section 10B. It was this order which was challenged by the assessee in the appeals filed by them before the Tribunal. Such an appeal filed by the assessee is liable to be considered by the Tribunal exercising its power under Section 254 of the Act which obliged the Tribunal to consider appeal and pass such orders thereon as it thinks fit. It was this power of the Tribunal which was considered by the Apex Court in National Thermal Power Co. Ltd.'s case (supra) which held that the Tribunal is only required to consider the questions of law arising from the facts which are on record, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. Even if the contention raised by the learned Senior Counsel for the revenue that the power conferred on the appellants under Section 263 only authorised him to examine whether the order passed by the Assessing Officer is erroneous and prejudicial to the interests of the revenue, that restriction of power cannot affect the powers of the Tribunal which is bound to exercise under Section 254 of the Act. In such a situation, having regard to the language of Section 254 and as interpreted by the Apex Court in National Thermal Power Co. Ltd.'s case (supra), we do not see any reason to think that the Tribunal has committed an illegality by directing the Assessing Officer to decide the matter afresh duly adverting to the claim of the assessee for the benefit of Section 10A.

7. Though the learned Senior Counsel for the revenue relied on the judgment of a Delhi High Court in Regency Creations Ltd.'s case (supra), a reading of the judgment shows that the Delhi High Court set aside the order of the Tribunal granting the benefit of Section 10B to the assessee therein. However, the subsequent order passed by the Delhi High Court, a copy of which has been made available by the learned senior counsel appearing for the assessee, shows that the High Court itself directed that when the matter is reconsidered by the Tribunal as directed in the judgment above, the Tribunal shall examine the claim of the assessee for the benefit of Section 10A. Therefore, in fact, this order of the Delhi High Court supports the claim of the assessee.

In the aforesaid circumstances, we do not find any illegality in the order passed by the Tribunal. Therefore, the questions of law framed have to be answered in favour of the assessee and against revenue. Accordingly, the appeals are dismissed.”

13.5 In view of the above judgment of the Jurisdictional High Court in the case of CIT vs. Flytxt Technology (P) Ltd. supra, this ground of appeal of the assessee is allowed.”

7.6 The CBDT Circular No.14 (XL-35) dated 11.04.1955 has clarified that the revenue shall not take advantage of ignorance of the assessee and the A.O. shall assist the tax payer for claiming of his legitimate allowance / disallowance. As mentioned earlier, deduction u/s 10B and 10A of the I.T.Act is pari materia. When claim u/s 10B of the I.T.Act was denied, the assessee made alternative claim u/s 10A of the I.T.Act. The alternative claim of deduction u/s 10A of the I.T.Act was not considered by the A.O. nor the CIT(A). In the interest of justice and equity, the issue of claim of deduction u/s 10A of the I.T.Act is restored to the A.O. The A.O. shall examine whether the assessee has satisfied the conditions mentioned for claiming deduction u/s 10A of the I.T.Act and accordingly grant deduction. The assessee had filed audit report in Form No.56F for claiming alternative claim of deduction u/s 10A of the I.T.Act. The provision regarding the filing of audit report along with the return of income is only directory and not mandatory. The audit report can be filed either during the course of assessment proceedings or during the appellate proceedings. In this context, I rely on the judgment of the Hon'ble Delhi High Court in the case of CIT v. Web Commerce (India) Private Limited reported in (2009) 318 ITR 135 (Del.) Therefore, even if the audit report is not filed in Form No.56F along with the original return, it is not fatal, provided the assessee subsequently files the same and satisfy all other conditions mentioned for claiming deduction u/s 10A of the I.T.Act. It is ordered accordingly.

7.7 Since I have remitted the claim of alternative deduction u/s 10A of the I.T.Act, to the Assessing Officer, the grounds regarding the validity of reopening of assessments concerning assessment years 2007-2008 to 2009-2010 are not adjudicated.

8. In the result, the appeals filed by the assessee are partly allowed for statistical purposes.

Order pronounced on this 24th day of July, 2020.

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin, dated 24th July, 2020
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent
3. The CIT(A)-I, Kochi.
4. The Pr.CIT, Kochi.
5. The DR, ITAT, Kochi
6. Guard File.

BY ORDER

Asst.Registrar / ITAT / Kochi