IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH : 'A' BANGALORE

ITA No.399/Bang/2012
Assessment year : 2007-08

M/s SAMSUNG INDIA SOFTWARE OPERATIONS PVT LTD

Vs

ADDITIONAL COMMISSIONER OF INCOME TAX
RANGE 12, BANGALORE

N K Saini, AM And P Madhavi Devi, JM

Per: N K Saini:

This appeal is by the assessee against the order dated 14.3.2012 of the CIT(Appeals)-III, Bangalore.

2. The following grounds have been raised in this appeal:

"1. That the order of the authorities below in so far as it is against the appellant is against the law, facts, circumstances, natural justice, equity and all other known principles of law.

2. That the total income computed and the total tax computed is hereby disputed.

3. That the Learned CIT-A /AO erred in denying the claim for deduction u/s 10A of the I T Act of Rs. 23,17,32,627/-.

4. That the Learned CIT-A /AO erred in holding the transfer of undertaking as reconstruction within the meaning of section 10A(2) of the Act and thereby denying the claim for deduction u/s 10A of the Act.

5. That the Learned CIT-A / AO erred in not appreciating that the appellant is not engaged in the business of rendering technical services outside India.

6. That the Learned CIT-A /AO having excluded expenditure incurred in foreign currency amounting to Rs. 47,89,64,483/- from the export turnover ought to have excluded similar amount from the Total Turnover.

7. The appellant denies the liabilities for interest u/s 234B & D. Further prays that interest if any should be levied only on returned income.

8. No opportunity has been given before levy of interest u/s 234B & D of the Act.

9. Without prejudice to the appellant's right of seeking waiver before appropriate authorities the appellant begs for consequential relief in the levy of interest u/s 234B and D.

10. For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered."

3. Ground Nos. 1, 2 & 10 are general in nature, so do not require any comment on our part.

4. Vide ground Nos.3 to 5, the grievance of the assessee relates to claim of deduction of Rs.23,17,32,627 u/s. 10A of the Income-tax Act, 1961 [hereinafter referred to as “the Act” in short”].

5. The facts of the case in brief are that the assessee filed return of income electronically declaring Nil income on 29.10.2007. The return was processed u/s. 143(1) of the Income-tax Act, 1961 [hereinafter referred to as “the Act” in short”] on 27.08.2008, later on the case was selected for scrutiny. The assessee company is entirely held by M/s. Samsung Electronics Company Ltd., South Korea (SECL) and was engaged in the business of software development for its parent company. During the course of assessment proceedings, the Assessing Officer noticed that the assessee claimed a deduction of Rs.23,17,32,627 u/s. 10A of the Act stating that it was profit of STPI undertaking of the assessee, to substantiate the said claim the assessee had filed report of the auditor in Form 56F which revealed that the undertaking was situated at Bagmane Lake View, Block B, Bagmane Tech Park, Bangalore, the date of initial registration as STPI undertaking was mentioned as 01.09.97 and this was the second year of assessee’s claim. It was also mentioned in the auditor’s report that SECL being the sole owner of its branch office entered into a business transfer agreement with the assessee company on 5.9.05 for transfer of business of the branch office by way of slump sale as a going concern together with all its rights, properties and assets of the business. It was also stated that deduction u/s. 10A had been claimed by the branch office for the A.Ys. 1999-2000 to 2006-07 (upto Nov. 2005) and after its transfer, the STPI had given its no objection for the transfer of the unit from the branch office to the assessee company w.e.f. 1.12.2005. In view of the slump sale, the STPI unit now transferred to the assessee is claimed to be eligible for benefit of deduction u/s. 10A of the Act.

6. The AO asked the assessee to explain specific provisions in section 10A of the Act under which it was eligible for deduction in respect of an undertaking stated to be purchased on a slump sale basis. The assessee furnished copy of business transfer agreement and explained as to how it was eligible for deduction u/s. 10A of the Act. The assessee also furnished RBI’s permission for transfer of assets of Indian branch office of SECL to the assessee which was the Indian subsidiary of SECL and STPI’s permission letter dated 5.12.2005 for transfer of STPI activities. It was contended that section 10A is specific to an undertaking registered under STPI Scheme engaged in export of software and an undertaking otherwise eligible for deduction should not be denied the same under the contention that the undertaking has a new owner. Reliance was placed on the following decisions of ITAT:

(i) *DCIT v. LG Soft India Pvt. Ltd. (ITA Nos. 623 & 847/Bang/2010)*

(ii) ITO v. GXS Technology Center Pvt. Ltd. (ITA No.616/Bang/2009

It was also contended that restrictive provision in the form of sub-section (9) which provided for discontinuance of benefit of tax holiday in case of transfer of an undertaking enjoying tax holiday had been withdrawn from the F.Y. 2003-04 and a new provision under sub-section (7A) had been simultaneously introduced, therefore the omission of sub-section (9) was to be read to mean removal of restriction for all modes of transfer of an eligible undertaking and not restricted to amalgamations and demergers only. A reference was also made to Circular No.7 of 2003 issued by the Central Board of Direct Taxes wherein a clarification with regard to subsection (7A) of section 10A of the Act was made stating that this subsection has been inserted with a view to give boost to the export led growth and to eliminate the hurdles in mergers and acquisitions and other modes of business restructuring.

7. The AO did not find merit in the submissions of the assessee by observing that one of the condition for claiming deduction u/s. 10A of the Act was that the undertaking was not formed by the transfer to a new business of machinery or plant previously used for any purpose and that the provisions of Explanation 1 & 2 to sub-section (2) of section 80 I of the Act shall also apply for this purpose. The AO pointed out that the undertaking of the assessee was formed by transfer of same plant & machinery which were earlier used by branch office of holding company and in the slump sale situation, the assets earlier used by a particular owner identifiable to a unit are transferred to the buyer with the only difference that the liabilities relatable to that unit are also transferred along with and the essence of the transaction is transfer of assets including plant & machinery along with liabilities, but such plant & machinery were certainly second hand assets insofar as the buyer is concerned. The AO also observed that the assessee had been enabled to run a new business under STPI scheme only by way of transfer of plant & machinery earlier used by the branch office, therefore the condition of forming a unit by way of acquired plant & machinery other than that of previously used had not been satisfied.

8. The AO also pointed out that sub-clause (7A) of section 10A which provides for eligibility of claim to the amalgamated company or the resulting company in the situations of transfer of eligible undertakings by amalgamating or demerged company in a scheme of amalgamation or demerger, but the situation of transfer of old plant & machinery through slump sale had not been provided in the section. He therefore did not accept this plea of the assessee that change in ownership would not take away the benefit of section 10A of the Act attached to an undertaking. As regards to the decisions of the ITAT relied by the assessee, the AO stated that those decisions had not been accepted by the department and the appeal u/s. 260A of the Act had been filed. He accordingly rejected the claim of the assessee amounting to Rs.23,17,32,627 u/s. 10A of the Act.

9. The assessee carried the matter to the ld. CIT(Appeals) and submitted that there was no transfer of assets individually, rather the entire business undertaking comprising of assets, liabilities, contracts, employees, licences etc. was taken over by the subsidiary company. It was further submitted that STPI had endorsed the transfer by substituting the name of operating agency in their report and it was not a case of surrender of licence and issue of a new licence to the assessee, it was the case of the assessee that since the existing business undertaking continued in the same shape and style without any change or disruption and the deduction u/s. 10A being undertaking specific, there was no question of applying any of the qualifying conditions laid down in section 10A(2) of the Act to the assessee. It was also submitted that the transaction was a mere conversion and could not be qualified as a transfer.

10. The ld. CIT(Appeals) after considering the submissions of the assessee observed that a new company had come into existence and taken over the assets of branch pursuant to a slump sale, by virtue of its incorporation and by taking over these assets, a new business entity had undeniably come into existence, though it might have been involved in exactly the same business run with the same machinery & assets, and located within the very same premises. According to the ld. CIT(A), the legal existence of a new company incorporating within itself its own assets and liabilities was a factual certainty and the fact that major part of the assets had been taken over from the parent company through slump sale was not of particular relevance. The ld. CIT(A) observed that the so-called conversion in the assessee's case involved the transformation of a branch office into a company which was essentially a legal process, on the other hand the transfer of infrastructure, machinery or plant assets involved a physical and accounting process which was a consequence of the legal conversion. He further observed that though the assets might not have been physically moved, but the very fact that their ownership had changed entailed the fact of their transfer from one owner to another. He therefore did not accept this contention of the assessee that

there had been no transfer of plant & machinery assets from the hands of the parent company to the hands of the subsidiary.

11. As regards to the recognition given by the STPI authority to the assessee, the ld. CIT(A) observed that the authority had transferred its STP operations themselves i.e., business of the assessee from one entity to the other and that both operations did not continue to exist simultaneously. He therefore did not accept this claim of the assessee that the STPI authority merely endorsed the transfer by changing the name of the operating agency. He further observed that new sub-section (7A) was inserted w.e.f. 1.4.2004 in section 10A of the Act and sub-sections (9) & (9A) to the said section were deleted, the new sub-section (7A) allowed for the benefit to be continued specifically for the amalgamated entity in case of operation of a scheme of amalgamation or demerger. The ld. CIT(A) agreed with the view taken by the AO that the law as it stands at present does not differentiate a so-called slump sale from the transfer of assets & machinery from an existing business and that the intention of the law is that apart from cases of amalgamation and demerger, any transfer of existing business, assets and infrastructure is not accorded exemption from the rigour of section 10A of the Act. He accordingly upheld the view taken by the AO. Now the assessee is in appeal.

12. The ld. counsel for the assessee reiterated the submissions made before the authorities below and further submitted that this issue stands covered in favour of the assessee by the decisions of the ITAT Bangalore, in the following cases:-

(i) DCIT v. LG Soft India Pvt Ltd (ITA No 623 & 847/Bang/2010)

(ii) ITO v. GXS Technology Centre Pvt. Ltd (ITA No 616/Bang/2009)

13. In his rival submissions, the ld. CIT(DR) strongly supported the orders of the authorities below.

14. We have considered the submissions of both the parties and carefully gone through the material available on record. It is noticed that a similar issue having identical facts has been decided by the ITAT Bench 'B' Bangalore in *ITA No.623 & 847/Bang/2010* for the assessment years 2004- 05 & 2005-06 respectively in the case of *DCIT v. M/s. LG Soft India Pvt. Ltd.*, order dated 19.05.2010 wherein vide para 10 it has been held as under:-

"10. We considered the rival contentions and the facts of the case reflected in the orders passed by the lower authorities. As rightly pointed out by the CIT(A), the assessee's undertaking existed in the same place, form and substance and did carry on the same business before and after the change in the legal character of the form of organization. Formerly, it was a branch establishment of non-resident company/foreign company but later on, it was converted into a subsidiary company. But for the above change of the organizational status, the same unit continued to function throughout the time. Therefore, it is quite fruitless to argue that the organizational change has caused conversion of the existing unit to a new unit. There is no such splitting up or reconstruction of an existing business in the case of a branch establishment becoming a subsidiary establishment. The assessee's unit satisfied all the conditions stipulated in the Act and was entitled for the benefit. Therefore, as rightly held by the CIT(A), a mere organizational change is not a ground to hold that the assessee has violated the conditions stated in 10A(2)(ii). It is a case of only change in the name and style. It is clearly possible to state that there was no violation of the conditions laid down in sec. 10A(2)(iii) as well."

15. In the present case also, the assessee undertaking existed in the same place, form and substance and did carry on the same business before and after the change in the legal character of the form of the organization. Formerly it was a branch establishment of a non-resident company/foreign company, but later on it was converted into a subsidiary company.

However, for the above change of organization status, same unit continued to function throughout the time and even Software Technology Parks of India (STPI) authority vide letter dated 05.12.2005 gave the approval for transfer of STP activities of M/s. SECL to the assessee w.e.f. 01.12.2005. Therefore a mere organizational change was not a ground for the AO to hold that the assessee was not entitled for deduction u/s. 10A of the Act within the meaning of section 10A(2) of the Act. Thus, in view of the above and respectfully following the aforesaid referred to earlier order of the coordinate Bench, we set aside the impugned order passed by the ld. CIT(A) and direct the AO to allow the claim of the assessee for deduction u/s. 10A of the Act.

16. For the aforesaid view, we are also fortified by the decision of this Bench of the Tribunal in the case of *ITO v. M/s. GXS Technology Centre (Pvt.) Ltd. in ITA No.616/Bang/2009 for the A.Y. 2004-05, order dated 10.08.2010* reported in wherein the relevant finding is given in para 4 & 5 which read as under:-

"4. The learned departmental representative strongly supported the order of the AO while the learned counsel for assessee supported the order of the CIT(A) and also placed reliance upon the decision of the 'B' Bench of this Tribunal in the case of Dy.CIT v. M/s. L.G. Soft India Pvt. Ltd. in ITA Nos.623 & 847/Bang/2010 dated 19-5-2010 wherein it has been held that where an undertaking existed in the same place, form and substance and did carry on the same business before and after the change in the legal character of the form of organization, the assessee is eligible for deduction u/s. 10A of the Act. He also placed reliance upon the decision of the Calcutta High Court in the case of CIT vs. P.K. Engg. & Forging (P) Ltd., reported in 87 Taxman 101 wherein, while considering the assessee's claim for deduction u/s. 80J, it was held that where the industrial undertaking run by a firm which had been allowed deduction u/s 80-J for a period of 5 years, it would be entitled to benefit of residuary period. He also placed reliance upon the decision of the Delhi Bench of the Tribunal in the case of Tech Books Electronics Services (P) Ltd. vs. Addl. CIT wherein it was held that merely because of change in ownership the exemption cannot be denied. Another decision relied upon by him is in the case of Kumaran Systems (P) Ltd. vs. ACIT wherein it was held that where a firm is converted into a company and there was change only in the composition of ownership and not the undertaking and business, the exemption allowed to the firm u/s 10A of the Act could not be denied to the company merely because it had been separately granted recognition.

5. Having heard both the sides and having considered the rival submissions, we find that the issue is squarely covered by the decisions relied upon by the learned counsel for assessee. The distinctions sought to be brought out by the learned Departmental Representative, in our opinion, are not relevant to the facts of the case before us. In view of the same, the appeal of the revenue is dismissed."

17. In view of the above, this issue is decided in favour of the assessee.

18. Vide ground No.6, the grievance of the assessee relates to the expenditure incurred in foreign currency amounting to Rs.47,89,64,483 which had been excluded from the export turnover and not from the total turnover.

19. The facts leading to this issue in brief are that the AO during the course of assessment proceedings noticed that the assessee had incurred following expenses in foreign currency in connection with computer software development:

Salaries, wages and bonus	Rs. 2,67,70,432
Travel & Conveyance	Rs.22,67,56,748

Sub contracting – Software Development	Rs.22,54,37,303
Communication	Rs. 1,62,64,726
Others	Rs. 2,65,860

The AO was of the view that exclusion of those expenses incurred in foreign currency from export turnover was called for in computation of deduction u/s. 10A, however he did not make any adjustment since the claim of the assessee for deduction u/s. 10A was rejected.

20. The assessee carried the matter to the ld. CIT(A), who confirmed the action of the AO by observing that when the assessee's very eligibility for deduction u/s. 10A is denied, no revised computation was called for. Now the assessee is in appeal.

21. The ld. counsel for the assessee at the very outset stated that this issue is squarely covered in favour of the assessee by the decision of Hon'ble jurisdictional High Court in the case of *CIT v. Tata Elxsi Ltd. & Ors. in ITA No.70 of 2009* order dated 30.8.2011

22. In his rival submissions, the ld. CIT(DR) although supported the orders of authorities below, but could not controvert the above contention of the ld. counsel for the assessee.

23. We have considered the submissions of both the parties and carefully gone through the material available on record. It is noticed that an identical issue has been decided in favour of the assessee by the Special Bench of ITAT Chennai in the case of *ITO v. Sak Soft Ltd. 313 ITR (AT) 353 (Chennai)(SB* wherein it has been held as under:

"To say that in the absence of any definition of "total turnover" for the purpose of section 10B, there is no authority to exclude anything from the expression as understood in general parlance would be wrong, as there has to be an element of turnover in the receipt if it has to be included in the total turnover. That element is missing in the case of freight, telecom charges or insurance attributable to the delivery of the goods outside India and expenses incurred in foreign exchange in connection with the providing of technical services outside India. These receipts can only be received by the assessee as reimbursement of such expenses incurred by him. Mere reimbursement of expenses cannot have an element of turnover. It is only in recognition of this position that in the definition of "export turnover" in section 10B, the aforesaid two items have been directed to be excluded. Secondly, the definition of export turnover contemplates that the amount received by the assessee in convertible foreign exchange should represent "consideration" in respect of the export. Any reimbursement of the two items of expenses mentioned in the definition can under no circumstances be considered to represent "consideration" for the export of the computer software or articles or things. Thus, the expression "total turnover" which is not defined in section 10B should also be interpreted in the same manner. Thus, the two items of expenses referred to in the definition of "export turnover" cannot form part of the total turnover since the receipts by way of recovery of such expenses cannot be said to represent consideration for the goods exported since total turnover is nothing but the aggregate of the domestic turnover and the export turnover. In the formula prescribed by section 10B(4) the figure of export turnover has to be the same both in the numerator and in the denominator of the formula. It follows that the total turnover cannot include the two items of expenses recovered by the assessee and referred to in the definition of "export turnover"."

24. The aforesaid decision had been considered and affirmed by the Hon'ble jurisdictional High Court in the case of *CIT vs. Tata Elxsi Ltd. & Ors.* wherein it has been held that for the purpose of computation of deduction u/s. 10A of the Act, if any expenditure is excluded from the export turnover, the same has to be excluded from the total turnover also. A similar view

has also been taken by the Hon'ble Bombay High Court in the case of *Gem Plus Jewellery India Ltd*.

25. We, therefore, by considering the totality of the facts as discussed hereinabove, are of the view that the ld. CIT(Appeals) was not justified in confirming the action of the Assessing Officer. In that view of the matter, we set aside the impugned order on this issue and the Assessing Officer is directed to exclude expenses in foreign currency in connection with computer software development from the export turnover as well as total turnover while working out the deduction u/s. 10A.

26. Ground Nos. 7, 8 & 9 relate to charging of interest u/s. 234B & 234D of the Act. Regarding this issue it was the common contention of both the parties that it is consequential in nature. We order accordingly.

27. In the result, the appeal of the assessee is allowed.

(Pronounced in the open court on this 13.4.2012)