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* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 84/2009

August 19, 2009

COMMISSIONER OF INCOME TAX,
DELHI-VI, NEW DELHI ...Appellant

Through: Ms. Prem Lata Bansal, Mr. Paras Chaudhary, Ms. Anshul Sharma, Advocates.

VERSUS

TEEHDRIVE (INDIA) PVT. LTD. ....Respondent

Through: Mr. Sulaiman Mohd. Khan, Advocate

CORAM:
HON'BLE MR. JUSTICE A. K. SIKRI
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

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A.K. SIKRI, J(Oral)

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1. The assessee herein is registered with Software Technology Parks of India (STPI) and is an exporter of computer software in computer

services. STPI registration was given to the assessee vide registration certificate dated 29th March, 2000. The company was originally registered in March, 1994 in the name and style of M/s. Next Overseas Private Limited. The issue relates to the claim of the assessee, in the assessment year 2002-03, made under Section 10B of the Income Tax Act against the export of software developed by the assessee. The Assessing Officer disallowed the claim i.e. deduction under Section 10B of the Act amounting to Rs.1,56,70,680/- on the ground that the assessee was not having its own infrastructure and was using old plant and machinery/infrastructure of another concern namely, M/s. Seacom Solutions Private Limited to develop its software. In the appeal preferred by the assessee, CIT(A) allowed the appeal holding that to satisfy the conditions contained in Section 10B of the Act, it was not mandatory to use its own infrastructure by the assessee and so long as the software was developed by the assessee's own personnel/employees and said software belong to the assessee, conditions contained in Section 10B were satisfied. The CIT(A), in this behalf, returned the following findings:

(a) Even the Assessing Officer had accepted that software was developed by the assessee. Assessee also accepted that this

software was exported to U.S.A. and foreign exchange remittance was received by the assessee.

(b) The primary inputs for software development was the expertise of the software developers namely, manpower at the disposal of the assessee.

(C) The CIT(A) also referred to circular No.694 dated 22.11.1994 issued by the CBDT which inter alia clarifies that even when the personnel of the assessee visit foreign party and develop the software at the premises of the foreign party that would qualify for deduction under Section 10A or 10B of the Act. In that very circular it is emphasized by the CBDT itself that computer programmes are not physical goods but are developed as a result of an intellectual analysis of the system and methods followed by the purchaser of the programme. These are often prepared on site, with the software personnel going to the client's premises. Therefore, it is not important whether premises where the software is developed or use of computers at the said premises belong to the client or not. The clarification given was that where a unit develops software even at the client's site abroad, such unit should

not be denied the 'tax holiday' under Section 10A and 10B on the ground that it was prepared on the site as long as the software is the product of the unit i.e. it is produced by the unit.

The underlying guidance for allowing the deduction, as per the said circular, is that the software must be developed/produced by the assessee and it should belong to the assessee. Naturally, the use of computers whether at premises or at other premises is of secondary importance which is not given any significance.

(d) The CIT(A) also referred to provision of Section 10B(2) of the Income Tax Act, 1961 and therefrom the CIT(A) observed that the crucial pre-condition is that assessee must manufacture or produce any article or things or computer software. The issue would turn on whether Section 10B(2)(i) presupposes that manufacture or production of article or computer software is to take place on the computers owned by the assessee and placed within the business premises of the assessee. For answering this question, in favour of the assessee and against the revenue, CIT referred to various judgments including the following:

(i) *Additional CIT Vs. A. Mukherjee and Company 113 ITR 718.* This was the judgment of Calcutta High Court. In this case, the assessee was a publisher of books. It did not own a printing press. It received manuscripts for publication, got them printed in a book form and sold the books. The Calcutta High Court held that the assessee was carrying on the manufacturing or the processing activity of publication of a book. This decision was rendered on the premise that the publisher of the book was the assessee in whom the copyright vests and whether he was or not the owner of printing press was immaterial.

(ii) *CIT Bombay II Vs. Neo Pharma Pvt. Ltd. 137 ITR 879(Bom.).* In this case also the plant and machinery installed by the assessee for the purpose of manufacture belonged to another company, services of certain employees of the said company were used by the assessee in the process of manufacturing. In spite thereof, Bombay High Court took the view that the

manufacturing activity was really that of the assessee as it was the assessee which paid the hire charges for the plant and machinery.

2. We find that the present case is not a case of manufacture of any article but development and creation of intellectual property, namely, software programme. The essential and main inputs for such developments are that of the personnel belonging to the assessee, their intellect and create the aforesaid property. Therefore, use of computers would not be of much significance. The Income Tax Appellate Tribunal has also considered this aspect in greater detail. In this behalf, we would like to reproduce the following discussion contained in order of the I.T.A.T.:

> *"All the above facts, which have not been disputed by the Assessing Officer, show that thought the assessee was using the infrastructure and facilities available with Seacom for producing the computers software, it was being done under the supervision and control of the personnel of the assessee. The assessee company also had its own computers and its personnel also had their Laptop computers for doing the integration of the component programmes produced at Seacom, Pune. This aspect has been brought to the notice of the Assessing Officer in the assessee's note dated 06.09.2004. The software development charges paid by the assessee were partly for the work stations provided by Seacom (Rs.27,95,000/-) and the balance of Rs.12,43,577/- represented reimbursement of salaries paid by Seacom to the assessee's employees (Rs.7,51,800/-) and expenses on travelling, boarding and lodging for them reimbursed*

(Rs.4,91,777/-). Apparently, the assessee's employees were required to stay in Pune for sometime to carry out the work of developing the software and they have to be paid salaries and the expenses on their boarding and lodging had to be taken care of. The salaries and expenses were paid by Seacom and the assessee reimbursed Seacom the same. The Software developed by the assessee with the help of the infrastructure and equipment provided by Seacom were exported by the assessee and for the year under appeal such exports amounted to Rs.2,04,82,556/-. The other conditions of the section, such as, receipt of the sale proceeds into India in convertible foreign exchange within the prescribed period, have been satisfied. In these circumstances, we are of the view that the CIT (Appeals) has rightly accepted the assessee's claim for exemption under Section 10B of the Act. We affirm his order and dismiss the appeal filed by the department with no order as to costs."

3. Ms. Prem Lata Bansal wanted us to take different view as according to her, in this case there were some sales by M/s. Seacom to the assessee which were termed as "Domestic Software Sale" and assessee had even made some payment against those sales. On that basis it was contended that assessee was only purchasing the software from M/s. Seacom and exporting it and assessee was not developing the said software of its own.

4. First of all, this submission is in the teeth of the findings arrived at both by CIT(A) as well as by the I.T.A.T. and seems contrary to those findings. Secondly, we also find even from the orders of the Assessing

Officer, on this aspect, that the said sale is some other transactions unrelated to development of software. Learned counsel for the assessee clarified during the arguments that the aforesaid payments were paid on account of leasing/use of the computers i.e. work stations provided by Seacom @ Rs.75,000/- per work station as noted by the I.T.A.T. itself in the aforesaid para extracted by us.

5. We are, therefore, of the opinion that no substantial question of law arises in this appeal and it is accordingly dismissed.

A.K.SIKRI, J

VALMIKI J.MEHTA, J

August 19, 2009
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