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

+ ITA 708 of 2008

% *Decision Delivered On: 21st October, 2010.*

COMMISSIONER OF INCOME TAX ..... Appellant

Through: Ms. Prem Lata Bansal, Advocate.

VERSUS

INFRA SOFT TECHNOLOGIES LTD. ..... Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha, Akansha Aggarwal and Mr. Somnath Shukla, Advocates.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers 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?

A.K. SIKRI, J. (*ORAL*)

1. The assessee herein had taken the benefit of provision of Section 80HHE of the Income Tax Act (hereinafter referred to as 'the Act') in the preceding Assessment Years. However, for the Assessment Year 2001-2002, the assessee claimed benefit under Section 10A of the Act instead of Section 80HHE of the Act. This was denied to the assessee on the ground that since the assessee had started claiming the benefit of Section 80HHE of the Act which was

allowed in the previous years, such a switch over was not permitted in view of sub Section (5) of Section 80HHE of the Act. The only course of action, which is permissible for the assessee is to continue to get the benefit under Section 80HHE of the Act alone.

2. This stand of the Assessing Officer (AO) was repelled by the CIT (A) holding that the purpose of Sub Section (5) of Section 80HHE was to avoid double benefit and that would not mean that if the assessee for a particular Assessment Year wanted relief only under Section 10A of the Act that would be denied to the assessee. The only embargo was not to give relief under both the provisions.

3. The Department filed appeal thereagainst before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal), which had been dismissed by the Tribunal confirming the order of the CIT(A). In its judgment, the Tribunal has relied upon its earlier decision in the case of Vs. ***Legato Systems India (P) Limited*** Vs. ***ITO*** **[93 TTJ 828]**, wherein the provisions of Section 80HHE and Section 10A of the Act are elaborately discussed and dealt with and the aforesaid interpretation is given to sub Section 5 of Section 80HHE of the Act. The Department had filed appeal against the judgment of the Tribunal in the case of ***Legato Systems India Pvt. Ltd. (supra)*** (in ITA No. 1400/2005). This

appeal was dismissed *in limine* by passing the following order on 12.07.2005:

> " The Tribunal has recorded a finding of fact that the respondent assessee was not an old unit already in existence so as to be disentitled to the benefit of exemption under S.10A of the IT Act, 1961. It has, on that finding, remitted the matter back to the AO with the following directions.
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> We, therefore, set aside the orders of the authorities below on this point and restore the matter back to the file of the AO with a direction to allow exemption under S.10A in both the years in case of the assessee is found to have satisfied all other requisites envisaged in the scheme of S.10A of the Act. In case the exemption under Section 10A cannot be allowed for the reasons of not satisfying the requisites, the claim of deduction under Se.80HHE shall be allowed after providing opportunity to meet the requisite.
> The above direction is, in our view, just and proper hence does not call for any interference especially when the question (whether the assessee) satisfies the prerequisites stipulated for the purpose of getting benefit under S.10A is a matter left to be determined by the AO. So also the entitlement of the assessee to seek deduction under S.80HHE having been left to be determined by the AO, subject to assessee's satisfying the pre-requisites stipulated for the grant of such a benefit under the said provision. No question of law much less a substantial question of law arises for our consideration in this appeal to warrant its admission.
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> The appeal is accordingly dismissed in limine."

4. It is thus clear that this Court has accepted the interpretation given by the Tribunal to the aforesaid provisions and held that the benefit on exemption under Section 10A of the Act would be admissible to the assessee in that particular year. Of course, at the same time, the Court made it clear that it would be permissible for the AO, before granting benefit under Section 10A of the Act, to determine as to whether the assessee is

fulfilling all the eligibilities/conditions prescribed for grant of benefit under Section 10A of the Act or not.

5. We may note that in the present case, the Income Tax Appellate Tribunal has observed that the CIT (A) has recorded its findings holding that the conditions prescribed under Section 10A of the Act have been duly complied with by the assessee and therefore, there was no reason for denying the directions given in the said case. These findings are affirmed by the Tribunal as well.

6. So far, so good. However, Ms. Prem Lata Bansal, learned counsel appearing for the appellant/Revenue submits that in the present case, it was not even permissible for the assessee to claim the benefit of exemption under Section 10A of the Act. She states that there is impediment in the way of the assessee to take benefit of the aforesaid provision, as by sheer lapse of time it had missed the bus. In this behalf, she points out that the assessee had filed the original return under Section 139(4) of the Act, which means that the return was not filed within the time stipulated, but within the extended time. In this return, the assessee had claimed the benefit of Section 80HHE of the Act. It is only thereafter by filing the revised return that the assessee wanted exemption under Section 10A of the Act in substitution of claim made under Section 80HHE of the Act.

Such a course of action, according to her, was not permissible in view of the provision of sub-section (5) of Section 139 of the Act, as the return filed belatedly and governed by Section 139(4) cannot be revised as stipulated in Section 139(5) of the Act.

7. The order of the AO reveals that on this ground, the claim of the assessee was rejected. Notwithstanding, the same AO proceeded further to decide as to whether the assessee was entitled to claim the benefit under Section 10A of the Act or not. He discussed this issue and decided against the assessee holding that switching over the claim from Section 80HHE to that of Section 10A of the Act is not permissible having regard to the provision of sub-section (5) of Section 80HHE of the Act.

8. Taking note of these facts, the Tribunal in its impugned judgment stated that it would be permissible in law for the assessee to claim deduction under Section 10A of the Act. It is the opinion of the Tribunal that even if it was not permissible for the AO to entertain the claim, the Tribunal in exercise of its power under Section 254 of the Act can still entertain a point of law for the first time provided the fact on the basis of which the issue of law raised is a pure question of law and is based on the facts already on record. The reasons given by the Tribunal in support are following:

(a) The AO had entertained the claim under Section 10A on merits, though it would be a different matter that according to the AO, it was not permissible for the assessee to make this claim when in the preceding Assessment Year claimed under Section 80HHE was made.

(b) Even if it is presumed that the AO could not consider the claim raised in the revised return, there is ample power with the Appellate Tribunal to consider the claim under Section 254 of the Act. In support of this proposition, the Tribunal relied upon the Judgment of the Supreme Court in the case of ***Goetza (India) Ltd.*** Vs. ***Commissioner of Income Tax*** **[284 ITR 323 (SC)]** holding as under:

> "4. The decision in question is that the power of the Tribunal under Section 254 of the Income Tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the A.O. to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in the case is limited to the power of the assessing authority and does not impinge on the power of the Tribunal under Section 254 of the IT Act, 1961. There shall be not order as to costs."

(c) The Tribunal also, it its aforesaid approach drew sustenance of Circular NO.14(IX-35) of 1955 dated 11th April, 1955, which reads as under:

> "Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist tax payer in every reasonable way particularly in the matter of claiming and securing reliefs and in this regard the officers should take in the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department; for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessee on whom it is imposed by the law, officers should:
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> (a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled, but which they have omitted to claim for some reason or other;
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> (b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs."

9. Challenging the aforesaid approach of the Tribunal, submission of Ms. Bansal is that the issue raised was not pure question of law inasmuch as necessary facts to establish that the conditions contained in Section 10A of the Act are fulfilled were not before the AO or the Tribunal. She submits that it is because of this reason that the Tribunal could not decide the issue of

admissibility of claim under Section 10A of the Act itself and matter was restored to the AO for decision on this issue. She further submits that in view of sub-section (8) of Section 10A of the Act, the assessee was precluded from shifting the claim from Section 80HHE to that of Section 10A of the Act in the facts of this case. She has also challenged the approach of the Tribunal in entertaining the claim that the original return was filed under Section 139(4) of the Act and on that basis submitted that the revised return was invalid in law and could not be taken into consideration. For this purpose, she has placed strong reliance on the observations from the judgment of the Supreme Court in case of ***Kumar Jagdish Chandra Sinha*** Vs. ***Commissioner of Income Tax*** **[220 ITR 67]** in which the Court held that no revised return can be filed under sub-section (5) of Section 139 in a case where the return is filed under Section 139(4) of the Act. Once this is so, the revised returns filed by the assessee for both the said assessment years were invalid in law and could not have been treated and acted upon as revised returns contemplated by sub-section (5) of section 139 of the Act. Consequently, Section 153 (1) (c) was not attracted.

10. We would consider the last submission made by Ms. Bansal. In ***Kumar Jagdish Chandra Sinha (supra)***, the assessee had filed return for two assessment years under Section 139(4) of the

Act. Thereafter, he filed revised return in respect of these assessment years on two different dates declaring the total figure lower than the declared in the original return. The Income Tax Officers completed the assessments of the two assessment years on the basis of revised return and also initiated penalty proceedings under Section 271(1)(c) of the Act. The question of limitation arose for completion of assessment in terms of Section 153 of the Act. From the date of filing the original return, the assessment proceedings were completed beyond the period prescribed under Section 153 of the Act. However, from the date of filing of the revised return, the assessment was within time. It is in this context that the question arose as to whether filing of revised return was permissible under the law. The Supreme Court decided the issue in negative holding that once the return is filed under sub-section (4) of Section 139 of the Act, then no revised return under sub-section (5) of Section 139 is to be filed. Therefore, there is no quarrel about the proposition that when a return is filed under Section 139 (4), revised return under Section 139(5) is not permissible under the Act. The Tribunal was conscious of this fact. It is for this reason the Tribunal treated it differently altogether. The line of action, which is taken by the Tribunal was that even if such a claim was not made in the revised return, but when pressed by the assessee during the

assessment proceedings, the same could be considered by the AO. For this, the Tribunal referred to the aforesaid Circular dated 11.04.1955, which states that if tax payer is entitled to any claim or relief under the law, it should not be denied to him only because he was ignorant about the same. No doubt, in the original return filed by the assessee under Section 139(4) of the Act, the assessee had claimed the benefit of deduction under Section 80HHE. However, if the assessee realized during the assessment proceedings that he could get better relief to which he was entitled under Section 10A of the Act and wanted to substitute the same, it was entertainable. Knowing the limitation of the AO in this behalf, the Tribunal further observed that at least the Tribunal was not restricted by those shackles or limitation about its power inasmuch as the Tribunal was clothed with sufficient jurisdiction to entertain such a claim under Section 254 of the Act having regard to the pronouncement of law by the Supreme Court in ***Goetza (India) Ltd. (supra)***. It is in this perspective that the entire matter is to be seen n its entirety.

11. The reason because of which, the Tribunal has remanded the case back to the AO to decide admissibility of claim under Section 10A of the Act is not far to see. It is not that the material was not before the AO. In fact, the assessee had specifically made claim for exemption under Section 10A of the Act. The AO

did not go into the issue as to whether the assessee was fulfilling the condition laid down under the said provision because of the reason that the AO held that it was not permissible for the assessee to make claim for exemption under Section 10A of the Act, as in the preceding years, the assessee had claimed the benefit under Section 80HHE of the Act and sub-section (5) thereof precluded the assessee from switching over to Section 10A of the Act. Therefore, as far as the Tribunal is concerned, there was a pure question of law about the interpretation before it. No doubt, after deciding the issue in favour of the assessee and holding that such a switch over between Section 10A and Section 80HHE of the Act was permissible, the Tribunal could have itself decided whether the conditions laid down in Section 10A of the Act are fulfilled or not. However, having regard to the fact that the AO has not bestowed any consideration to this aspect, it was but natural on the part of the Tribunal to remit the case back to the AO for this purpose. From this, one cannot jump to the conclusion that the necessary facts for claiming the benefit under Section 10A of the Act were not before the Tribunal. In the case of ***National Thermal Power Co. Ltd.*** Vs. ***Commissioner of Income Tax*** **[229 ITR 383]**, the Supreme Court has categorically held that such a question can be raised

before the Tribunal even for the first time, which is in the following words:

> "5. Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

12. We, therefore, do not find any merit in this appeal and dismiss the same.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

OCTOBER 21, 2010/*pmc*