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

\+ **ITA No.507 of 2008**
&
ITA No.160 of 2009

% Reserved On: November 10, 2010
Pronounced On: December 24, 2010

(1) **ITA No. 507 of 2008**

COMMISSIONER OF INCOME TAX . . . APPELLANT
Through : Mr. N.P. Sahni, Sr. Standing Counsel.

VERSUS

INTERRA SOFTWARE INDIA PVT. LTD. . . .RESPONDENT
Through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha, Advocate and Mr. Somnath Shukla, Advocate.

(2) **ITA No.160 of 2009**

COMMISSIONER OF INCOME TAX . . . APPELLANT
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CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. 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.

1. In these appeals preferred by the Revenue as many as six questions of law are proposed. However, it can be taken into

(1) Issue relating to permissibility of allowing deduction the assessee under Section 10A of the Act when in the previous years, the assessee had claimed deduction under Section 80HHE of the Income Tax Act.

To put it otherwise, the issue is as to whether sub-Section (5) of Section 80 HHE of the Act would bar the assessee from seeking benefit under Section 10A of the Act if the preceding year, benefit was claimed under Section 80HHE to Section 10A is not permissible?

(2) Whether finding recorded by the ITAT that the sale proceeds in convertible foreign exchange had been brought by the assessee in India within the extended time is based on correct facts and relevant material and thereby suffers from factual perversity?

(3) Whether ITAT was correct in law in allowing exemption under Section 10A of the Act to the assessee in respect of profit of Japan Branch?

2. Insofar as issue No.(1) is concerned, vide our orders passed in ITA 1233 of 2007, we have decided this issue in favour of the assessee. We may additionally mention that in the present case, the assessee had claimed deduction under Section 80HHE of the Act in the Assessment Year 1998-99 and thereafter in the assessment years 1999-2000, 2000-01 and 2001-02. He claimed exemption under Section 10A of the Act, which was duly allowed by the assessee. It is only in the succeeding assessment years i.e. 2002-03 with which we are concerned, the Assessing Officer disallowed the same. That

such deduction claimed by the assessee under Section 10A of t Act.

3. In so far as issue No. (2) is concerned, it is factual inasmuch as the assessee submitted documentary evidence before the CIT (A) to prove that it had brought in India the foreign exchange within the extended time.

4. Accordingly, the appeal was heard on 3rd question of law at length. The counsel for both the parties filed their written synopsis as well.

5. We now propose to decide this question of law. As is clear from the aforesaid question, it pertains to allowing the deduction under Section 10A of the Income-Tax Act (hereinafter referred to as 'the Act'), in respect of Japan Branch to the respondent assessee. The Assessing Officer had denied the exemption under Section 10A of the Act on the entire claim and, in particular, in respect of Japan Branch, on the ground that the said branch is not covered under Section 10A(2) of the Act. The assessee had relied upon many documents which were furnished before the Assessing Officer in the course of assessment proceedings vide letter dated 27th March, 2006 but the Assessing Officer did not accept the explanation of the assessee and denied the exemption on revenues of Japan Branch. The CIT (A) however allowed the expenses accepting the submissions of the assessee and observed "*there is no doubt the Japan Branch has been opened by the appellant as per the agreement with the Japanese*

of RBI and also noted by NSEZ that the appellant unit located NSEZ has opened a new trading branch at Tokyo" and directed the Assessing Officer to consider the same as exempt under Section 10A. The Revenue's appeal to ITAT against the order of CIT (A) was again dismissed.

6. The submission of Mr. Sahni, learned counsel appearing for the Revenue is that the ITAT and CIT (A) did not appreciate the document furnished before the Assessing Officer and relied only on explanation 3 to Section 10A of the Act which according to the ITAT 'permits exemption under Section 10A on profits derived by an assessee from a foreign branch with reference to onsite services for development of computer software provided by the said company". His argument was that the relevant documents would clearly demonstrate that the trading branch at Tokyo is an independent and separate branch office and, therefore, profits incurred in respect of that branch would not qualify for deduction under Section 10A of the Act. He drew distinction between a branch office and a liaison office submitting that a branch office is one which may meet all commercial requirements. A liaison office is only permitted to do what its name suggests - act as an intermediary between the foreign principal enterprise and the India customers and vice-versa. It may not engage in any other commercial activity with the objective to earn profit. The assessee has been carrying on full-fledged marketing operations in Tokyo, Japan, as per the approval of RBI. It has been incurring all sorts of expenses for maintaining its Branch Office. The assessee is thus not entitled to deduction u/s 10A on the revenues of

that the nature of the operations of the said branch office can gathered from various letters filed by the assessee to Development Commissioner, Noida Export Processing Zone, the General Manager, RBI, etc. In fact, the submission of the appellant becomes crystal clear by referring to the letter of the assessee addressed to the Manager, Bank of America which leads, "*...in view of the current slide down which has hit the US software market most, Japan is emerging as a critical market in the International software trade. With a view, therefore, to expanding our market in Japan, we have decided to have an effective presence in that country and establish a non-trading branch in Japan...".* From this, it is amply clear that the assessee wanted to enter and capture Japanese market by opening a branch office there and its revenues from the Branch Office are not covered under explanation 3 to Section 10A of the Act.

7. Mr. Vohra, learned counsel appearing for the assessee, on the other hand, argued that a pure finding of fact was arrived at by the two authorities below that the Japan Branch was an onsite office. There was no development of computers software provided by the assessee company and, therefore, profits derived from the said unit were entitled to exemption under Section 10A of the Act. He submitted that it was clear from the facts that the assessee had sought permission from the Reserve Bank of India to open non-trading branch in Tokyo, Japan to facilitate communication between NEPZ unit and the company in Japan, assist in marketing efforts, help procure orders, render assistance to professionals deputed there on off-shore assignments, attend to validation and testing of the

customers. He also argued that the Revenue was trying to make c a totally new case before this Court and that too on presumptions, namely, the assessee may have engaged in other activities contrary to permission granted by the RBI which was not backed by any evidence.

8. In order to appreciate the rival contentions, it is necessary to note of the provisions contained in Section 10A of the Act. This Section carves out special provision in respect of newly established 100% export oriented undertakings. It, *inter alia,* stipulates that deduction of such profits and gains as are derived by an undertaking for export of articles or computer software shall be allowed from the total income of the assessee for a period of ten consecutive assessment years.

9. The assessee is dealing with the export of computer software, it is 100% export oriented unit. There is no dispute that the assessee is engaged in the business of development or development of software through its unit located in NEPZ. It is also not in dispute that for this reason, the NEPZ is entitled to deduction under Section 10A/10B of the Act in respect of profits derived from the said unit. The question relates to the profits derived by the assessee's branch in Japan. Answer to that would depend on Explanation 3 of Section 10A which reads as under:-

> "Explanation 3.-For the removal of doubts, it is hereby declared that the profits and gains derived from on site development of computer software (including services for development

> be the profits and gains derived from the export of computer software outside India."

10. As per this Explanation, even if the profits and gains derived from **on site development** of computer software outside India, they are also treated as profits and gains from the export of computer software outside India. In the backdrop of this provision, what is to be examined is as to whether Japan Office of the assessee would be treated as an onsite development of computer software or it is to be treated as separate branch functioning independently.

11. As noted above, the submission of learned counsel for the Revenue is that to qualify the "on site development", it should be only a Liaison Office acting as an intermediary between the foreign principal enterprise and the India customers and vice-versa. Wherever, such foreign office is working as a separate branch carrying on full-fledged marketing operations, that would not be treated as on site development.

12. We are in agreement with this interpretation suggested by learned counsel for the Revenue. However, what we find from the record that matter is not examined in this perspective by the authorities below. The Assessing officer while rejecting the claim of the assessee observed as under:-

> "It may further be mentioned that the assessee has claimed 10A in respect from its branch at Japan for an amount of ₹ 1851545/-. The provisions of Section 10A are only applicable in case of an industrial undertaking manufacturing or producing articles as approved in the sub Section

certain due dates. The export from Japan branch of the assessee is clearly not covered u/s 10A (2) of the Act."

13. The CIT (A) while reversing the aforesaid view of the assessee gave the following reasons:-

"6.3 there is no doubt as per Explanation 3 to Section 10A as noted above the profits and gains derived from outside development of computer software including services of development of software outside India is deemed to be profit and gains derived from the export of computers software outside India w.e.f. 1-4-2001. There is no doubt the Japan Branch has been opened by the appellant as per the agreement with the Japanese company to also provide onside development service with approval of RBI and also noted by Noida Special Economic Zone that the appellant unit located at NSEZ has opened a new trading branch at Tokyo. Therefore that profit derived by the appellant company from its Japan Branch in reference to the onsite service provided quality for exemption u/s 10A of the IT act and the AO is directed to consider the same as exempt u/s 10A of the Act."

14. The ITAT simply reproduced the above quoted order of the CIT (A) and affirmed the same without viewing this issue on right perspective.

15. Before us an attempt was made by counsel for both the sides to interpret the documents filed by the assessee including RBI permission in their favour, that is, on the basis of some documents the assessee claims that Explanation 3 of Section 10A of the Act is satisfied whereas the Revenue feels otherwise. However, since proper exercise is not done by any of the authority below, we set aside the orders and remit the case back to the Assessing Officer to decide the issue afresh in the light of documents produced and

16. These appeals are disposed of in the aforesaid terms.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

DECEMBER 24, 2010
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