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

Decided on : 15.04.2015

ITA 46/2015

HCL TECHNOLOGIES ……Appellant

Through: Sh. Ajay Vohra, Sr. Advocate with Sh. Neeraj Jain and Sh. Aditya Vohra, Advocates.

Versus

ASSISTANT COMMISSIONER OF INCOME TAX

……..Respondent

Through: Sh. N.P. Sahni and Sh. Nitin Gulati, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. This appeal under Section 260-A of the Income Tax Act by the assessee, questions an order dated 30.05.2014 of the Income Tax Appellate Tribunal (hereafter "ITAT") in ITA No.5623/Del/2010 for, the assessment year 2005-06 (AY). The ITAT by the impugned order disallowed the appellant's claim for certain deductions under Section 10A of the Income Tax Act, 1961 (hereafter referred to as the "Act"). The following substantial questions of law are urged for this Court's determination in this appeal:

> *(1) Whether an assessee is estopped under law from availing the benefits under Section 10A of the Act in respect of units for which it had not availed the said benefits previously, by treating such units as distinct*

undertakings as opposed to expanded units of a single undertaking (as was done earlier)?

(2) Whether, on facts, the appellant's contention that the new units claimed by it to be separate undertakings for the purposes for Section 10A of the Act is correct?

2. The appellant is a public limited company engaged in providing software development services through its software development undertakings set up in the Software Technology Park (STP) in NOIDA and Chennai. During the relevant assessment year, the assessee/appellant had 31 independent software development units or undertakings set up at distinct locations. These were registered under 13 licenses with STP authorities. The appellant filed its original return of income on 31.10.2005, where gross business income of ₹ 2,58,17,15,909/- was shown and deduction under section 10A of the Act was claimed at ₹ 2,57,24,87,070/-, considering 13 mother licenses issued by the STP authorities as 13 eligible undertakings or units. Net taxable business income was shown at ₹ 92,28,838/-.

3. Later, the appellant filed its revised return of income on 30.03.2007, where deduction under section 10A of the Act was enhanced to ₹ 2,75,57,24,990/-. The assessee now sought to treat 31 undertakings registered with STPI under 13 mother licenses as *independent undertakings* eligible for the said deduction, separately and individually. The return of income was accordingly, revised showing income from business or profession at ₹ 2,58,77,95,991/- and claiming deduction under section 10A of the Act at ₹ 2,75,57,24,990/-, resulting in loss from business or profession of ₹ 16,79,29,000/-. The assessee had filed certificates in Form 56F in support of its claim of deduction under Section 10A of the Act,

claimed in original as well as in the revised return. In the original return the assessee had claimed deduction under Section 10A only in respect of 13 units and in the revised return number of units eligible for the benefits under section 10A was increased from 13 to 31 and separate Form 56F was filed for each of these 31 units.

4. The Assessing officer ("AO") in the assessment order dated 26.12.2008 for the relevant assessment year, disallowed the aforesaid additional deduction claimed under section 10A of the Act by way of revised return, *inter alia*, on the grounds that the units set up in the earlier years were mere expansion of the existing units; there was no separate approval as a new unit by the STPI authorities; and that the claim that the units set up were independent and separate new units, was raised belatedly which could not be gone into at this late stage. The AO, therefore, restricted the assessee's claim of deduction under section 10A of the Act to 13 "mother" (original) licenses/ undertakings instead of 31 independent and eligible units.

5. The appellant challenged the AO's order before the Dispute Resolution Panel ("DRP"). The DRP, by its Order dated 30.09.2010, affirmed the AO's action and held that software development centres added under each license were only extensions of the original undertaking and they could not consequently be treated as separate undertakings for the purpose of claiming deduction under section 10A of the Act. On the basis of DRP's directions, the AO passed the final assessment order dated 28.10.2010,

wherein the additional deduction under section 10A of the Act claimed by the appellant in the revised return of income was not accepted.

6. The ITAT, by the impugned order, dismissed the appeal against the DRP's order and held that the appellant could not claim enhanced deduction under Section 10A by departing from its earlier position that the units in question were only extension or expansion of the pre-existing units and were not new units. The ITAT held that the fact that the STPI authorities endorsed on the existing licenses meant that the new and separate locations added were in the nature of expansion of the existing unit(s) / undertaking(s). Further, it held that the enhanced claim made through the revised return was clearly belated and could not be said to be in the nature of an inadvertent mistake. Thus, at this belated stage, it was not possible to verify satisfaction of the pre-requisite conditions attached to the formation of the eligible undertakings, which was necessary for allowing the claim of deduction under section 10A of the Act.

Submissions made on behalf of the Assessee

7. Mr. Ajay Vohra, learned senior counsel appearing for the assessee, contended that the ITAT failed to appreciate that the mere fact that in the earlier years the appellant did not compute the deduction under section 10A of the Act by considering these 31 units as separate undertakings and instead computed deduction under that section on the basis of 13 STPI licenses, does not, in law, operate as an estoppel. It could not, said counsel prevent the appellant from correctly computing and claiming deduction under the said section in the relevant previous year by treating each of 31 units as a

separate and independent undertaking. Reliance is placed on this Court's decision in *CIT v. Bharat General Reinsurance*, 81 ITR 303 for the proposition that an assessee can anytime resile from an incorrect position already taken in return of income. Further, the appellant has cited *CIT vs Natraj Stationery Products (P) Ltd*, 312 ITR 22 (Delhi HC), *CIT v. Laxmi Metal Industries*, 236 ITR 130 (Allahabad HC), *CIT v. Seeyan Plywoods*, 190 ITR 564 (Kerala HC), *CIT v. Satellite Engineering Ltd*, 113 ITR 208 (Gujarat HC) to contend that even if the assessee was to make a claim of deduction for the first time in a year subsequent to the initial assessment year, the claim could not be dismissed as a belated one.

8. Learned senior counsel submits that deduction under section 10A of the Act is available for a period of 10 assessment years following the initial assessment year in which the undertaking begins to produce computer software. Even though deduction may not be claimed in the initial year(s) for variety of reasons, the assessee is, in law not estopped from claiming deduction under the said section in any of the subsequent assessment years falling within the ten year period. Reliance is placed on the decisions of the Supreme Court in *Commissioner of Income Tax v. C. Parakh & Co (India) Ltd*, 29 ITR 661 and *Commissioner of Income Tax v. VMRP Firm*, 56 ITR 67 to contend that estoppel does not apply against a statute and that the assessee's entitlement to a deduction depends upon the statutory provision and not the assessee's view regarding the same.

9. Mr. Vohra submitted that to claim deduction in terms of clause (i)(b) of sub-section (2) of section 10A of the Act, the undertaking should have begun manufacture of the article or things or production of computer

software in a Software Technology Park. The provision does not specify the manner in which the approval/ registration is to be issued by the STPI authorities. Further, the provision does not require a separate license as a condition precedent for holding a unit operating in Software Technology Park as eligible for deduction under that section. Once it is not disputed that each of the 31 undertakings of the appellant are set up for production of computer software in a Software Technology Park and are registered with STPI Authority, the manner of approval/ registration with STPI authorities would not determine whether each of the 31 units qualify as an undertaking eligible for deduction under section 10A of the Act.

10. The assessee submits that the ITAT did not apply the ratio of the Supreme Court's decision in *Textile Machinery Corporation Ltd. v. CIT*, 107 ITR 195, which settled the principles regarding setting up of a new unit. Further, the ITAT did not deal with the various decisions of the co-ordinate benches of the ITAT which were relied upon during the hearing (one of which is approved by the Bombay High Court) and which, relying on *Textile Machinery Corporation Ltd.* (supra), had laid down that the manner of seeking approval from the STPI was irrelevant. The assessee contends that these units were set up as independent viable units with investment of fresh capital, having separate identifiable work force, etc., and fully satisfied the tests laid down in *Textile Machinery Corporation Ltd.* (supra).

11. It is highlighted by the assessee that to demonstrate that requisite conditions to claim deduction under section 10A of the Act are satisfied by each of the 31 undertakings, it (the appellant) had placed on record evidence, *inter alia*, in the form of application to the STPI authority, approval of the STPI authority, lease deed for new premises, list of additions

of plant and machinery and list of imported plant and equipment made available by the customer(s) supported with necessary evidence, custom bond register, number of employees, organizational hierarchy chart, audited profit and loss account and Form 56F, etc., for each of the 31 undertakings which clearly demonstrated that each of the units were set up independently in their own right.

12. It is submitted that each software development center which the assessee owns is and has always been treated as a separate undertaking. Reference was made to the assessment order issued for assessment year 1999-2000, wherein reference to each of the fifteen (15) undertakings (which were existing as on 31/03/2001) had been made by the assessing officer. Therefore, the appellant prays that the impugned judgment be set aside and the appellant's claim for deduction of 31 units under Section 10A be allowed.

Revenue's contentions

13. Mr. O.P. Sahni, learned counsel for the revenue, defends the impugned judgment and submits that given that the appellant resiled from its own assessment of the facts and its earlier position of availing the benefit under Section 10A only with respect to 13 units, the ITAT's finding cannot be faulted with. On behalf of the Respondent/Revenue, it is submitted that the decisions on estoppel cited by the appellant would not apply in the peculiar facts and circumstances of the case.

14. The revenue argued that the observations in the AO's order dated 28.10.2010 had comprehensively dealt with the relevant facts, to determine if the appellant's claim of the 31 units being distinct undertakings was correct, and the AO had correctly concluded against the appellant. The

ITAT's order elaborately discussed the AO's findings; the ITAT also noted the contents of the order for the assessment year 1999-2000, -relied upon by the appellant to say that the 31 units were always treated as distinct undertakings. Mr. Sahni submitted that the ITAT had duly considered the relevant precedent on the submissions made by the appellant, including the decision in *Textile Machinery Corporation Ltd.*, and rightly held that the said ruling does not assist the appellant in any manner whatsoever.

Analysis and Conclusion

15. The first issue that this Court has to determine is whether in the event of an assessee's failure to avail the benefits of a statutory provision, such as Section 10A of the Act, creates an estoppel precluding it from availing such benefits in future. The AO, DRP as well as the ITAT concurrently have rejected the appellant's claims under its revised return primarily on the ground that the appellant itself did not treat all 31 units as separate undertakings previously, and in fact, for the subject assessment year as well, it originally adopted its earlier approach. On an examination of the authorities relied upon by the appellant, this Court notices that they are overwhelmingly in its favour and therefore, this Court answers the first question in favour of the appellant.

16. The starting point for the discussion is the Supreme Court's decision in *CIT v. C.Parakh & Co.* (supra), where the Court held that the assessee's treatment of a claim would not be determinative of the treatment that it ought to be given under the provisions of the statute. The Court noted:

> *"On the question of the admissibility of the deduction of Rs. 1,23,719 the contention of the appellant is that as the respondent had itself split up the commission of Rs. 3,12,699 paid to the managing agents, and the appropriated Rs. 1,23,719 thereof to the profits earned at Karachi and had debited the same with it, it was not entitled to go back upon it. and claim the amount as a deduction against the Indian profits. We do not see any force in this contention.Whether the respondent is entitled to a particular deduction or not will depend on the provision of law relating thereto, and not on the view which it might take of its rights, and consequently, if the whole of the commission is under the law liable to be deducted against the Indian profits, the respondent cannot be estopped from claiming the benefit of such deduction, by reason of the fact that it erroneously allocated a part of it towards the profits earned in Karachi. What has therefore to be determined is whether, notwithstanding the apportionment made by the respondent in the profit and loss statements, the deduction is admissible under the law."*

17. Courts in subsequent rulings have held that an assessee can even resile from its earlier position in order to claim benefits available to it under the Income Tax Act. For instance, a Division Bench of this Court in *Bharat General Insurance* (supra) noted:

> *"It is true that the assessee itself had included that dividend income in its return for the year in question but there is no estoppel in the Income tax Act and the assessee having itself challenged the validity of taxing the dividend during the year of assessment in question, it must be taken that it had resiled from the position which it had wrongly taken while filing the return. Quite apart from it, it is incumbent on the income-tax department to find out whether a particular income was assessable in the particular year or not. Merely because the assessee wrongly included the income in its return for a particular year, it cannot confer jurisdiction on the department to tax that income in that year even though legally such income did not pertain to that year."*

18. This Court in its recent decision in *CIT v. Nalwa Investment Ltd.*, 322 ITR 233, has approved the consequences of the ITAT's decision allowing the assessee's claim made under a revised return, whereunder the asseessee had put forward a more favourable claim before the tax authorities. The Court also relied upon the Apex Court's decision in *C. Parakh* (supra) in this regard.

19. This Court notices that the approach of other High Courts on this issue is in consonance with the appellant's contention. For instance, the Allahabad High Court in *Laxmi Metal Industries* (supra) in the context of Section 80J of the Act held that the assessee's failure to claim benefit under the said provision initially would not constitute a bar from the grant of such benefit, if claimed subsequently. The Court noted:

> *"Learned standing counsel could not bring to our notice any statutory compulsion or a provision which may go to show that if the claim under section 80J is not made in any one or more of the assessment years comprising the period of five years, then the relief will not be admissible during the balance of the exemption period notwithstanding that all other conditions of section 80J stand satisfied. It has to be borne in mind that the provisions under consideration are relating to exemption and are, therefore, to be construed liberally. It is the settled rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute and which effectuates the object of the legislation…At the cost of repetition it may be observed that according to the scheme of section 80J, the benefit contemplated under section 80J is permissible independently for each year of exemption, whether or not the exemption was availed of in the preceding or the succeeding assessment year falling within the period of exemption."*

Similarly, the Uttarakhand High Court in *CIT v. Enron Expat Services*, 327 ITR 626, relied upon this Court's decision in *Bharat General Insurance* (supra) and ruled that the fact that the assessee had offered to pay tax in previous years under Section 44BB of the Act cannot operate as an estoppel against it.

20. The impugned judgment erred in holding that the assessment would be guided by the appellant's treatment of its 'internal affairs' and that the assessee's claim must fail because it has *"consistently taken a decision as per facts exclusively available to it in its personal domain on the basis of which the assessee has chosen to treat the expanded units as part of the 13 units"*. The authorities quoted above unequivocally establish that an assessee's treatment of facts in any given manner is not relevant for the purposes of determining liability under the Act. If, on an application of the statutory provision, the party is entitled to the benefits under the Act, the mere circumstance that for the past 5 to 7 years, or even 10 years, it did not claim such benefit would not preclude it from availing it in the assessment year in question. What the appellant cannot resile from is the existence of a given set of facts which it has not challenged earlier. However, if, based on the same set of facts, it now seeks to claim deduction under Section 10A which it had foregone earlier, the appellant's claim must be allowed, provided, of course, the requirements of Section 10A are satisfied. Therefore, in the instant case, in the event that the appellant establishes that the 31 units constitute separate undertakings for the purposes of Section 10A, it would be entitled to the claims made in the revised return.

Accordingly, the first question is answered in favour of the appellant and against the revenue.

21. On the second issue, this Court affirms that the concurrent findings approved by the ITAT as justified in the facts and circumstances of the case. As noted by the AO and the ITAT, the pre-requisites for availing the benefit under Section 10A(2) of the Act are as follows:

> a) The unit must begin manufacture or production of computer software in STP in the previous year relevant to AY 1994-95 or thereafter and should be set up in a STP.
> b) The unit should not be formed by splitting up/reconstruction of a business already in existence.
> c) The unit should not be formed by transfer to a new business of machinery or plant previously used for any purpose.
> d) The assessee must furnish a report of an accountant in the prescribed format certifying that the exemption has been properly claimed. This report should be submitted alongwith the return of income.

22. The appellant, as proof of the fact that each and every location with a single license is a separate undertaking and that there 31 distinct undertakings, has submitted that there are separate lease deeds for each premise, separate STPI approval documents, and separate Customs Bond certificates, and has relied upon application to the STPI authority and approval of the STPI authority. Further, the appellant has contended that it has maintained separate books of accounts. However, the AO and the ITAT rejected the appellant's contentions and held that there was no material on record to establish that the appellant had treated the 31 units as distinct

undertakings. The AO, in this regard, noted in its draft assessment order dated 26.12.2008 as follows:

> *"As mentioned in the STPI regulations above, a unit to be registered under an approved STPI has to be granted a license by the respective STPL After having granted a license, the unit gets registered and is permitted to commence operations, Thereafter, the unit is permitted to expand its area of operation by seeking permission for expansion, At the time of seeking the permission for expansion, it is logical that the assessee will have to execute lease deeds for separate premises and will also have to approach the customs authorities for bonding certificate. Hence the mere existence of these documents does not establish that each expansion is a new undertaking.*
>
> *12.3. The assessee, as an example has furnished a letter from STP Chennai authorities dated 24th October 2008 in respect of the Chennai I STP wherein it has been stated that the company is eligible to expand its operations by setting up new undertakings. However, it is surprising that the same STPI authorities have actually not issued separate licenses but have merely treated the new premises as mere extensions. Hence it is not possible to treat the letter of the STPI Chennai I authorities as conclusive evidence that the assessee has set up new undertakings. The only inference which can be drawn from this letter is that the assessee is operating in multiple locations under a single license. Hence it is a single undertaking with multiple locations.*
>
> *12.4. This fact is reinforced by letter written by STPI Chennai dated 28th January 2005 produced by the assessee in Volume I of the detailed submission referred to above. In this letter, the STPI has mentioned that the assessee has three STP units in Chennai with multiple locations."*

Besides, the AO noted that the appellant placed no evidence on record to establish that each and every unit had a separate bank account and held that the appellant had not been maintaining separate books of accounts for the 31

units. Further, the AO while looking at the concept of expansion of an undertaking under the relevant regulations, held that:

> "*the mere expansion of the undertaking does not lead to the formation of a new undertaking. In fact the term used in the STPI Regulations is the extension of the premises. Hence an undertaking established in a STPI is permitted to seek new premises for carrying out its operation i.e. a single undertaking can have multiple locations within the STPI. This is termed as expansion of an undertaking and hence is not issued a separate license but merely an extension certificate*".

The AO, in his conclusions, held as follows:

> *"• There has been no emergence of a fresh new undertaking and no fresh investments have been made. The profits and capital of the 31 units have been carved out from the original 13 units.*
>
> *• The assessee has not been able to produce any documentary evidence to show that in the years in which the units were formed, there was a separate capital investment:*
>
> *• No record of profits has been shown by the assessee from the year of inception thus clearly showing that the so called separate units did not exist prior to the current Assessment Year.*
>
> *• No evidence has been provided that the new units were engaged in executing jobs which were distinct from the original units. Hence it is reasonable to assume that the so called new units were carrying out the same jobs as the original units."*

23. These observations of the AO were upheld by the ITAT and based on the material available on record, it did not find any infirmity in the AO's finding. The appellant had urged before the ITAT that each software

development Centre owned by it is and always had been treated as a separate undertaking. For this, it relied upon the assessment order for 1999-2000, where reference to the 15 undertakings was been made by the AO. The ITAT rejected this contention after having examined the contents of the assessment order. Facially, the assessment order for the assessment year 1999-00, as extracted by the ITAT in the impugned judgment, indicates that contrary to the assessee's submission, unit-wise break-up of profits was not provided by it. The assessee contended that a complete copy of the assessment order was provided to the ITAT during the course of the hearing. However, this Court is inclined to reject this contention in light of the following pointed observations of the ITAT on this issue:

> *"7.6. Before parting we deem it appropriate to record that there is no document available on record on the basis of which an inference can be drawn that the assessee's application before the STPI Authorities was for setting up a new undertaking and not for expanding an existing undertaking. The reliance placed on the Certificate of STPI, Chennai is of no help as it is ambiguously worded. The record shows that assessee has never placed on record the document seeking STPI permission either before the AO nor before the DRP and as observed has also not even been placed before us. In fact the assessee has never even pleaded that any such document was available with it despite the pointed arguments of the Revenue. It is curious to note that no attempt in the course of the hearings has been made on behalf of the assessee to either seek permission to place any such evidence on record or seek permission to file the same before the AO. Considering the entirety of the facts, circumstances, decisions, findings and pleadings of the parties, we are inclined to agree with the departmental stand that had any such document been available with the assessee then attempt to bring the same on record*

would have been done." (emphasis supplied)

24. The appellant places great reliance on the Supreme Court's decision in *Textile Machinery Corporation Ltd. (supra)* to contend that the 31 units were separate undertakings for the purposes of Section 10A. While the said decision did deal with the issue of determining the existence of a new undertaking (albeit under Section 15C of the Income Tax Act, 1922), the Supreme Court itself held that the answer (as to whether a unit is a separate undertaking) depends upon the peculiar facts and circumstances of each case and no hard and fast rule can be laid down to determine the issue. Indeed, the answer to such a query, ultimately, ought to be fact specific, and the lower authorities have arrived at their conclusion based on an adequate examination of facts.

25. The appellant had urged that only the basis of the claim of deduction under Section 10A of the Act was sought to be altered in the revised return by treating each of the 31 undertakings created under the umbrella of 13 licences as separate undertakings. However, since the deduction under Section 10A is available to each undertaking, and given the concurrent finding of fact of lower authorities wherein they have held the material on record to be insufficient to treat each of the 31 units as separate undertakings, this Court holds that no interference on this issue is warranted. Consequently, it is held that the 31 units cannot be treated as separate undertakings for the purposes of availing benefit under Section 10A of the Act.

26. Thus, the second question on the merits of the rejection of the claim for deduction under Section 10-A is answered in favour of the revenue and against the assessee. As a result, its appeal fails and is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

APRIL 15, 2015