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

% *Date of Decision: 27.02.2023*

\+ **W.P.(C) 13765/2022**

ARICENT TECHNOLOGIES (HOLDINGS) LTD. ..... Petitioner

Through: Mr Ajay Vohra, Senior Advocate with Mr Saksham Singhal, Advocate.

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ANR. ..... Respondents

Through: Mr Sanjay Kumar with Ms Hemlata Rawat, Advocates.

**CORAM:**
**HON'BLE MR. JUSTICE VIBHU BAKHRU**
**HON'BLE MR. JUSTICE AMIT MAHAJAN**

**VIBHU BAKHRU, J.(Oral)**

1. The petitioner has filed the present petition, *inter alia*, praying that directions be given to the respondents to refund the taxes paid/deposited/adjusted in the case of M/s Flextronics Software Systems Ltd. (hereafter '**FSSL**') for the assessment year 2007-08.

2. FSSL had filed its return of income for the Assessment Year 2007-08 on 26.10.2007 declaring a total income of ₹17,64,76,208/-. The said return was picked up for scrutiny under Section 143(3) of the Income Tax Act, 1961 (hereafter '**the Act**'). On 27.09.2010, the Transfer Pricing Officer passed an order proposing an addition of

₹8,96,40,636/- on account of corporate charges. Thereafter, on 24.12.2010, the Assessing Officer passed a Draft Assessment Order proposing to assess FSSL's income for the relevant assessment year at ₹2,43,55,56,670/- by disallowing the project expenses to the extent of ₹39,15,46,619/- and disallowing deduction under Section 10B of the Act quantified at ₹177,78,93,207/-.

3. The Dispute Resolution Panel upheld the Draft Assessment Order, by its order dated 02.08.2011. Pursuant to the said order, the Assessing Officer concluded the assessment and passed the Assessment Order dated 31.10.2011 under Section 143(3) of the Act read with Section 144C(13) of the Act, whereby the total income of FSSL was assessed at ₹243,55,56,670/-.

4. Pursuant to the said assessment, a demand of ₹117,22,62,912/- was raised. A refund of ₹26,01,53,355/- relating to assessment year 2006-07 was outstanding and payable to FSSL. The said refund was adjusted against the demand of ₹117,22,62,912/- raised in respect of the assessment year 2007-08.

5. Aggrieved by the Assessment Order dated 31.10.2011, the petitioner filed an appeal before the Income Tax Appellate Tribunal (hereafter '**the Tribunal**'). By an order dated 07.01.2016, the Tribunal partly allowed the appeal and deleted the disallowance of the project expenses to the extent of ₹39,15,46,619/-. However, in respect of the disallowance of deduction of ₹1,77,78,93,207/- claimed under Section 10B of the Act, and the transfer pricing adjustment of corporate

charges, the Tribunal set aside the Assessment Order and remanded the matter to the Transfer Pricing Officer/Assessing Officer. The question of the transfer pricing adjustment on account of corporate charges was remanded to the Transfer Pricing Officer for a *de novo* adjudication and the question regarding disallowance of deduction claimed under Section 10B of the Act, was remanded to the Assessing Officer to decide afresh in the light of the observations made in the order. The relevant extract of the Tribunal's order dated 07.01.2016 directing as above is reproduced below:

> "16. Accordingly we set aside the issue in respect of TP adjustment to the file of TPO for denovo adjudication. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such proceedings. Thus grounds raised are therefore allowed for statistical purposes.
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> xxxx xxxx xxxx
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> 22. Grounds 4 to 4.1 relate to disallowance of deduction of Rs.1,77,78,93,207/- under section 10B of the Act.
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> 23. The facts in brief as relevant to the instant year are that units of the assessee company are set up in Software Technology Park of India. These units have been claiming provision under section 80HHE of the Act and from assessment year 2002-03 under section 10B of the Act. The AO following the order passed for assessment year 2003-04 giving effect the order u/s 263 of the Act passed by the Commissioner of Income Tax in that year has denied deduction u/s 10B of the Act. In the said order under section 263 of the Act passed by the Commissioner of Income Tax in that

year has denied deduction u/s 10B of the Act. In the said order under section 263 of the Act for assessment year 2003-04, deduction under section 10B was denied on the basis that since the assessee had claimed deduction under section 80HHE for certain STPI units, the assessee was debarred from claiming exemption under section 10B of the Act in the assessment year 2003-04 or any other subsequent assessment year(s) for other STPI units by relying upon the provisions of sub-section (5) of section 80HHE of the Act.

24. Before DRP the appellant relied upon the judgment of jurisdictional High Court in the case of CIT vs. Legato Systems India (P) Ltd. vs. ITO 203 CTR 101 and, decision of Tribunal in the case of appellant for Assessment year 2003-04, 2004-05 and 2006-07. The DRP however rejected the objection on the ground that appeal before High Court has not acquired legal finality.

25. Having considered the submission, we take note that in the case of appellant for assessment year 2006-07, identical issue was remitted to the filed AO by observing in order dated 21.1.2011 as under:

> "8. It was submitted by the learned counsel for the assessee that the issue is squarely covered in favour of the assessee by the decision of Hon'ble jurisdictional High Court in the case of CIT vs. Legato Systems India Pvt. Limited, 203 CTR 101 (Del.). The order of Hon'ble High Court in this regard is as under :-
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> > "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. It has, on that finding, remitted the matter

> back to the AO with the following directions : "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 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 s. 10A cannot be allowed for the reasons of not satisfying the requisites, the claim of deduction under s. 80HHE shall be allowed after providing opportunity to meet the requisites." 2. 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 pre-requisites 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. The appeal is accordingly dismissed in limine."

9. Respectfully following the precedent as above, we set aside the order of Assessing Officer and remit the issue back to his file to consider the issue afresh in light of the above

> discussion. Needless to add assessee should be granted adequate opportunity of being hearing."
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> 26. Further appeal filed by revenue in ITA No. 1071/2011 for assessment year 2006-07 stands dismissed by Hon'ble High Court in an order dated 20.12.2011. Accordingly, we set aside the assessment order and restore the issue to the file of Assessing officer to consider the issue afresh in light of the above discussion. The AO should provide adequate proper adequate opportunity to the appellant company. Grounds raised are accordingly allowed for statistical purposes."

6. Concededly, the Assessing Officer has not passed any order pursuant to the order dated 07.01.2016 passed by the Tribunal.

7. In the aforesaid context, the petitioner prays that the refund due to FSSL (which is now amalgamated with the petitioner company) amounting to ₹26,01,53,355/-, be refunded to the petitioner along with applicable interest. The said claim is founded on the basis that the assessment for the Assessment Year 2007-08 is now barred by limitation.

8. Mr. Vohra, learned senior counsel appearing for the petitioner referred to Section 153(2A) of the Act as in force at the material time. The said provision reads as under:

> "Time limit for completion of assessments and reassessments:
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> 153……
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> (2A) Notwithstanding anything contained in sub-sections (1), (1A), (1B) and (2), in relation to the

> assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order under section 250 or section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order under section 250 or section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner:
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> … … …
> (3) The provisions of sub-sections (1), (1A), (1B) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of subsection (2A), be completed at any time—
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> (i) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263, or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act; …"

9. Section 153 of the Act was amended by the Finance Act, 2017 with retrospective effect from 01.06.2016 and the provision regarding limitation for framing an assessment pursuant to any order passed *inter alia* under Section 254 of the Act was included under sub-section (3) of Section 153 of the Act. Sub-sections (3) and (4) of the Section

153 of the Act as applicable for framing the assessment pursuant to the order dated 07.01.2016 passed by the Tribunal read as under:

> "153. (3) Notwithstanding anything contained in sub-sections (1) and (2), an order of fresh assessment in pursuance of an order under section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of nine months from the end of the financial year in which the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner.
> …… ……..
> (4) Notwithstanding anything contained in sub-sections (1), (2) and (3), where a reference under sub-section (1) of section 92CA is made during the course of the proceeding for the assessment or reassessment, the period available for completion of assessment or reassessment, as the case may be, under the said sub-sections (1), (2) and (3) shall be extended by twelve months."

10. Pursuant to the order dated 07.01.2016 passed by the Tribunal, the Transfer Pricing Officer passed an order dated 24.01.2017. However, concededly, the Assessing Officer has not passed any final order.

11. Mr. Sanjay Kumar, learned counsel appearing for the respondents states that he has confirmed with the department that the assessment order has not been passed pursuant to the order passed by the Tribunal. He also states that there is no information forthcoming as to when that order of the Tribunal was received.

12. It is material to note that despite sufficient opportunities, the respondents have not filed the counter affidavit. Mr. Sanjay Kumar states that in view of his instructions that the assessment order has not been passed, there is no requirement to file any counter affidavit.

13. In view of the above, the contention that passing fresh assessment order pursuant to the Tribunal's order dated 07.01.2016, is barred under the provisions to Section 153(3) and 153(4) of the Act, is merited. We also find merit in the contention that the income as returned by FSSL for the Assessment Year 2007-08 would stand accepted. Consequently, any adjustment made for the refund due to FSSL for the assessment year 2006-07 is not sustainable. It is, accordingly, directed that the said amount, which was due as a refund for the assessment year 2006-07 be refunded to the petitioner along with interest as applicable within a period of eight weeks from today.

14. We also express our displeasure in the manner the present matter has been dealt with by the concerned officer. Despite clear directions from the Tribunal, the Assessing Officer has failed to pass the assessment order within the prescribed time.

15. The petition is allowed in the aforesaid terms.

**VIBHU BAKHRU, J**

**AMIT MAHAJAN, J**

**FEBRUARY 27, 2023/RK**