

(2011) 11 DEL CK 0086

In the Delhi High Court

Case No : ITA 1519 of 2010 and 1076 of 2011

CIT

APPELLANT

Vs

Genpact India

RESPONDENT

Date of Decision : 16-11-2011

Acts Referred:

Income Tax Act, 1961 — Section 10A, 10A(2), 10A(3), 10A(4), 260A

Citation : (2012) 186 DLT 299 : (2011) 203 TAXMAN 632

Hon'ble Judges : Veena Birbal, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Sanjeev Sabharwal, for the Appellant; S. Ganesh and Mr. Vibhu Bakhru with Mr. Pawan Sharma and Mr. Vinayak Srivastava, for the Respondent

Judgement

Badar Durrez Ahmed, J.—These appeals u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as the said Act) have been preferred by the Revenue in respect of the Income Tax Appellate Tribunal's orders dated 13.10.2009 and 04.03.2011 in ITA Nos 2170/DEL/2009 and 5556/DEL/2010, respectively. Both these appeals have been admitted and the common question arising in these appeals is as under:

Whether ITAT erred in directing that assessing officer to exclude communication expenses out of Total Turnover for computing eligible deduction u/s 10A of the Income Tax Act, 1961?

2. ITA No.1519/2010 as well as ITA No.1076/2011, are both in respect of the assessment year 2004-05. ITA No.1519/2010 arises out of the order passed by the Commissioner of Income Tax in exercise of his powers u/s 263 of the said Act. The assessing officer in the original assessment had not included the communication expenses in the figure of total turnover for computing the eligible deduction u/s 10A of the said Act nor any inquiry to that effect had been made by the assessing officer. Consequently, the Commissioner of Income Tax, in exercise of his powers u/s 263 of the said Act directed the assessing officer to re-assess the income of the assessee after making the adjustments, as directed, by

including the communication expenses in the figure of total turnover for the purposes of computing the eligible deduction u/s 10A of the said Act. The assessee had filed the appeal being ITA No.2170/DEL/2009 before the Income Tax Appellate Tribunal in respect of the said order passed by the Commissioner of Income Tax dated 12.03.2009 u/s 263 of the said Act.

3. In the meanwhile, the assessing officer, following the directions given by the Commissioner of Income Tax in his order u/s 263 of the said Act had completed the assessment giving the consequential effect as directed by the Commissioner of Income Tax by including the communication expenses in the figure of total turnover for the purposes of computing the deduction u/s 10A of the said Act. Being aggrieved by the said assessment order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

4. By that time, the Income Tax Appellate Tribunal had disposed of the assessee's appeal (ITA 2170/DEL/2009) by virtue of its order dated 13.10.2009. The Income Tax Appellate Tribunal, while it upheld the exercise of power u/s 263 of the said Act by the Commissioner of Income Tax, decided that the communication expenses had to be excluded from the total turnover for the purposes of computing the deduction u/s 10-A of the said Act.

5. As such, the Commissioner of Income Tax (Appeals), in the consequential proceedings, following the decision of the Income Tax Appellate Tribunal, allowed the assessee's appeal.

6. Being aggrieved thereby, the Revenue preferred an appeal (ITA 5556/DEL/2010) before the Income Tax Appellate Tribunal which was also dismissed by the said Tribunal by virtue of its order dated 04.03.2011, following its earlier decision dated 13.10.2009. It is against these decisions of the Income Tax Appeal Tribunal that the present appeals have been preferred.

7. It has been contended by Mr. Sabharwal, the Learned Counsel appearing on behalf of the Revenue, that Section 10A which provides for a deduction of profits and gains which are derived by an undertaking from the export of articles or things or computer software as specified therein has to be computed in terms of Section 10A(4). The said sub-section (4) specifically stipulates that profits derived from the export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking. He further submitted that while Explanation 2(iv) defines "export turnover", there is no definition of total turnover. According to Mr. Sabharwal, the definition of "export turnover" indicates that it does not include, inter alia, telecommunication charges. This expression is defined to mean the consideration in respect of export of articles, things or computer software received in, or brought into India by the assessee in convertible foreign exchange but so as not to include, inter alia, freight, telecommunication charges or insurance

attributable to the delivery of the articles, things or software outside India. Therefore, in computing the "export turnover" the Legislature has made a specific exclusion of freight, telecommunication charges and insurance charges.

8. In this background, it was contended by Mr. Sabharwal that wherever the exclusion was to be made, it has been done specifically by legislation. Since the telecommunication charges were not to be included in "export turnover", it has been specifically indicated in explanation 2(iv) of Section 10A. He also drew our attention to the provisions of Section 80HHC and in particular to the Explanation (b) and (ba) after Section 80HHC(4)(c). He pointed out that in the said Explanation (b) "export turnover" has been defined and that "total turnover" has also been defined in Explanation (ba). In both the definitions, the items excluded are specifically mentioned and it is for that reason that in computing the deduction u/s 80HHC, the exclusion is made both from numerator and the denominator. It was his contention that since "total turnover" has not been specifically defined in Section 10A, therefore, no exclusion with regard to telecommunication charges can be made from "total turnover" while computing the deduction u/s 10A of the said Act.

9. Mr. Sabharwal further submitted that the legislative intent is clear inasmuch as while export turnover has been specifically defined, total turnover has not been defined in respect of Section 10A of the said Act. So, according to him, while there is a specific exclusion of, inter alia, telecommunication charges from export turnover, there is no such specific exclusion from "total turnover" for the purposes of Section 10A. This is all the more stark, according to Mr. Sabharwal, when compared to the provisions of Section 80HHC. He further submitted that Section 10A has been subjected to several amendments from time to time but the legislature has not, in its wisdom, thought it fit to introduce any such exclusion by defining "total turnover" in the manner in which the export turnover is defined.

10. Mr. Ganesh, the learned senior counsel appearing on behalf of the assessee, submitted that the question at hand has been answered in favour of the assessee by the Bombay High Court in the case of *The Commissioner of Income Tax Vs. Gem Plus Jewellery India Ltd.*, . He submitted that the Bombay High Court's decision in *Gem Plus Jewellery* (supra) has been followed by the Karnataka High Court in *CIT v. TATA ELXSI Ltd.*, ITA No.70/2009 decided on 30.08.2011.

11. It was Mr. Ganesh's contention that export turnover as defined in Section 10A specifically excludes telecommunication charges. He further submitted that export turnover was a component of total turnover. Consequently, when telecommunication charges have been specifically excluded from export turnover, it being a component of total turnover, it stands to reason that telecommunication charges have also to be excluded from total turnover.

12. He has also submitted that when something is excluded from the numerator, then logically it ought to be excluded from the denominator also, particularly, in

the type of fraction one is considering in Section 10A or Section 80HHC.

13. It would be necessary to set out the relevant portion of Section 10A as under:

10A. Special provision in respect of newly established undertaking in free trade zone, etc. - (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee

Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to deduction referred to in this sub-section only for the unexpired period of the aforesaid ten consecutive assessment years

Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment years referred to in this sub-section shall be reckoned from the assessment year relevant to the previous year in which the undertaking began to manufacture or produce such articles or things or computer software in such free trade zone or export processing zone

Provided also that for the assessment year beginning on the 1st day of April, 2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, 2012 and subsequent years.

(4) For the purposes of sub-sections (1) and (1A), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking

Explanation 2: For the purposes of this section-

(i) ***

(ii) ***

(iii) ***

(iv) "export turnover" means the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into India by the assessee in convertible foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India.

14. Having considered the arguments advanced by the counsel for the parties, we are in complete agreement with the decision of the Bombay High Court in the case of Gem Plus Jewellery (supra). In order to avoid prolixity, we set out the relevant portion of the decision of the Bombay High Court in Gem Plus Jewellery and endorse the same. The relevant portion of the said decision is as under:

6. The total turnover of the business carried on by the undertaking would consist of the turnover from export and the turnover from local sales. The export turnover constitutes the numerator in the formula prescribed by sub-section (4). Export turnover also forms a constituent element of the denominator inasmuch as the export turnover is a part of the total turnover.

7. The export turnover, in the numerator must have the same meaning as the export turnover which is a constituent element of the total turnover in the denominator. The Legislature has provided a definition of the expression "export turnover" in Explanation 2 to Section 10A by which the expression is defined to mean the consideration in respect of export by the undertaking of articles, things or computer software received in, or brought into India by the assessee in convertible foreign exchange but so as not to include inter alia freight, telecommunication charges or insurance attributable to the delivery of the articles, things or software outside India. Therefore, in computing the export turnover the Legislature has made a specific exclusion of freight and insurance charges.

8. The submission which has been urged on behalf of the Revenue is that while freight and insurance charges are liable to be excluded in computing export turnover, a similar exclusion has not been provided in regard to total turnover. The submission of the Revenue, however, misses the point that the expression "total turnover" has not been defined at all by Parliament for the purposes of section 10A. However, the expression "export turnover" has been defined. The definition of "Export turnover" excludes freight and insurance. Since export turnover has been defined by Parliament and there is a specific exclusion of freight and insurance, the expression "export turnover" cannot have a different

meaning when it forms a constituent part of the total turnover for the purposes of the application of the formula. Undoubtedly, it was open to Parliament to make a provision to the contrary. However, no such provision having been made, the principle which has been enunciated earlier must prevail as a matter of correct statutory interpretation. Any other interpretation would lead to an absurdity. If the contention of the Revenue were to be accepted, the same expression viz. "export turnover" would have a different connotation in the application of the same formula. The submission of the Revenue would lead to a situation where freight and insurance, though it has been specifically excluded from "export turnover" for the purposes of the numerator would be brought in as part of the "export turnover" when it forms an element of the total turnover as a denominator in the formula. A construction of a statutory provision which would lead to an absurdity must be avoided.

(underlining added)

15. The Karnataka High Court has also followed the view taken by the Bombay High Court in *Gem Plus Jewellery* (supra). The relevant extract from the Karnataka High Court's decision is as under:

From the aforesaid judgments, what emerges is that, there should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Section 10-A is a beneficial section. It is intended to provide incentives to promote exports. The incentive is to exempt profits relatable to exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of Section 80HHC, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. The export turnover would be a component or part of a denominator, the other component being the domestic turnover. In other words, to the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. In view of the commonality the understanding should also be the same. In other words, if the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. The reason being the total turnover includes export turnover. The components of the export turnover in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term "total turnover" in Section 10-A, there is nothing in the said Section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. Though when a particular word is not defined by the legislature and

an ordinary meaning is to be attributed to the same, the said ordinary meaning to be attributed to such word is to be in conformity with the context in which it is used. When the statute prescribes a formula and in the said formula, "export turnover" is defined, and when the "total turnover" includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total turnover, when the total turnover includes export turnover. If what is excluded in computing the export turnover is included while arriving at the total turnover, when the export turnover is a component of total turnover, such an interpretation would run counter to the legislative intent and impermissible. If that were the intention of the legislature, they would have expressly stated so. If they have not chosen to expressly define what the total turnover means, then when the total turnover includes export turnover, the meaning assigned by the legislature to the export turnover is to be respected and given effect to, while interpreting the total turnover which is inclusive of the export turnover. Therefore, the formula for computation of the deduction u/s 10-A, would be as under:

Profits of the business of the undertaking

X

Export turn over

(Export turn over + domestic turn over) Total Turn Over

(underlining added)

16. All the points raised by Mr. Sabharwal stand answered in the reasoning given by the Bombay High Court and Karnataka High Court in the said decisions with which we are in complete agreement.

17. In view of above, the question is answered in favour of the assessee and against the Revenue.

18. The appeals are dismissed