
(2011) 02 KAR CK 0183
In the Karnataka High Court
Case No : Writ Petition No. 29389 of 2010

GE India Technology Centre (P) LTD.

APPELLANT

Vs

Dispute Resolution Panel and Another

RESPONDENT

Date of Decision : 08-02-2011

Acts Referred:

Income Tax Act, 1961 — Section, 10 A, 10 B, 143 (3), 144 C (8)

Citation : (2011) 242 CTR 462 : (2011) 338 ITR 411 : (2012) 20 TAXMAN 709

Hon'ble Judges : Huluvadi G. Ramesh, J

Bench : Single Bench

Advocate : C.A. Aryamasundaram with Anwadha Dutta, for the Appellant; M.V. Seshachala, for the Respondent

Judgement

Huluvadi G. Ramesh, J.—Petitioner is a company incorporated under the Companies Act, 1956. during January, 1999. According to them, Jon F. Technology Centre is a cent percent export oriented unit approved by the office of the Development Commr., Cochin Export Processing Zone and was granted exemption for a period of five years from 9th March, 2005.

2. Petitioner claimed deductions under s. 10B of the IT Act which was allowed by the 2nd respondent for the asst. yrs. 2000-01 and 2001-02. Petitioner also claimed deduction under s. 10A of the Act for the asst. yr. 2002-03 till 2005-06. which was allowed under s. 143(3) of the Act. During March, 2004. the petitioner obtained approval from the Ministry of Science and Technology for recognising it as a research and development company claiming tax holiday as per s. 80-IB(8) of the Act and the same was intimated to the 2nd respondent. However, the petitioner did not claim any such exemption. During April, 2004. a company-Engineering Analysis Centre of Excellence (P) Ltd. (EACoE) amalgamated with the petitioner as a going concern pursuant to the scheme of amalgamation being approved by this High Court.

3. According to the petitioner since there is no change in the activity of the petitioner despite amalgamation, returns were filed for the asst. yr. 2006-07

claiming deduction under s. 10A of the Act as was claimed for the previous years, and the same was allowed by the 2nd respondent. However, against the draft assessment order of the 2nd respondent, the TPO while determining the ALP under s. 92C of the Act, has determined the ALP at Rs. 406 crores during October, 2009 as against the draft assessment order made by the 2nd respondent at Rs. 30.5 crores. Against the said order, petitioner approached the Dispute Resolution Panel (DRP). However, the DRP having distinguished, opined that the ALP should have been Rs. 336 crores instead of Rs. 406 crores. It appears, the DRP has also made certain observation in para 21 of its order at Annex. A as regards the claim of the petitioner regarding deduction under s. 10A of the Act. According to the petitioner, the DRP ought not to have gone into the question of extension of s. 10A benefit, while revising the order of the TPO and that the AO alone should have calculated the exemption under s. 10A of the Act. Therefore, the petitioner is before this Court against the order of the DRP directing the AO for considering the claim of the petitioner for deduction under s. 10A of the Act, on the ground that the DRP has committed an error and accordingly, has sought for quashing para 21 of the order passed by the DRP.

4. It is the submission of the standing counsel for the Revenue, s. 144C(5) and (8) of the Act provides for such direction to be issued. There is no such error committed and it is for the petitioner to approach the AO and to explain the factual position, who shall consider the same before passing the final order of assessment since the proposal made by the DRP is only on the basis of draft assessment order and the DRP has revised the same as the TPO calculation of the ALP is on the higher side. Accordingly, it is contended, there is no error as such committed by the DRP and there is scope for the petitioner to approach the AO who shall hear the petitioner and pass appropriate orders.

5. Per contra, senior counsel representing the petitioner submitted, s. 144C(8) of the Act provides for to confirm or reduce the variations proposed in the draft and it shall not set aside any proposed variations or issue any direction. Accordingly, he submitted such direction issued by the DRP is bad in law. Learned counsel, referring to two decisions of the apex Court and one decision of the Delhi High Court, contended that despite alternate remedy available, he can move this Court under Art. 226 of the Constitution to set right the things i.e., there is lack of jurisdiction on the DRP in directing the AO and therefore, the impugned order at Annex. A, para 21 needs interference.

6. See. 144C of the Act does provide for reference to DRP. In the ease on hand, at the first instance, the draft assessment has been made and thereafter, at the instance of the TPO, the ALP was calculated at Rs. 406 crores and as such variation was on the higher side, petitioner approached the DRP and the DRP arrived at a conclusion that it is not Rs. 406 crores rather, it is Rs. 336 crores.

7. It appears according to the learned senior counsel, as regards the difference of Rs. 29 crores arrived at the time of resolution of dispute by the DRP, it is open to be challenged before the Tribunal and the petitioner will have recourse at a

later stage. But, according to him, the DRP ought not to have gone into the question of exemption available under s. 10A of the Act insofar as the entire amount of Rs. 305 crores which was originally assessed at the time of draft assessment. According to the learned counsel, the AO has already considered the aspect of exemption under s. 10A in the draft assessment order and that could not have been either disallowed or reconsidered at the hands of the DRP.

8. Sec. 144C(4) of the Act provides, the AO shall, notwithstanding anything contained in s. 153, pass the assessment order under sub-s. (3) within one month from the end of the month in which (a) the acceptance is received; or (b) the period of filing of objections under subs. (2) expires.

9. Sec. 144D(6) of the Act reads, the DRP shall issue directions referred to in subs. (5) after considering the draft order, objection filed by the assessee, evidence furnished by the assessee and the report of the AO. Valuation Officer or the TPO. Sub-s. (7) provides that the DRP before issuing any direction as per sub-s. (5), make such further inquiry as it thinks fit, or cause any further inquiry to be made by any IT authority and report the result of the same to it.

10. In the case on hand, the DRP has taken into consideration the aspect of exemption under s. 10A of the Act as not available insofar as Rs. 305 crores which was arrived at by the AO in the draft assessment and also issued a direction referring to cl. (5) of s. 144C of the Act. According to the petitioner, apart from several other aspects i.e., computer software which carries exemption under s. 10A of the Act. On the ground that design and engineering does not fall within the definition of "computer software" and also on the ground that no details have been given regarding the income earned if any, from this segment, the DRP has opined that the AO may consider this claim if the assessee submits necessary information showing that it has earned income from engineering and design services and the same qualified for deduction under s. 10A of the Act or not and the AO) shall decide the claim of the assessee on merits. So, the main thrust of the observation of the DRP is, since the petitioner was also involved in engineering and design services, it may not come under s. 10A to claim exemption, by classifying it as computer software. However, liberty is kept open to the AO to decide, after hearing the petitioner, as to what is the earnings from engineering and design services and whether it falls within the definition of "computer software" so as to extend the benefit under s. 10A, as per the notification of the Government.

11. The notification dt. 26th Sept., 2000 [(2000) 163 CTR (St) 25] is issued in exercise of powers under the Explanation to s. 80HHE and the Explanation to ss. 10A and 10B of the IT Act and the CBDT specifies such exemption to information technology enabled products or services. However, by the impugned order, the DRP either without taking note of the notification or having expressed a doubt, has directed the AO to consider whether engineering and design comes within the purview of s. 10A of the Act for exemption or how much income has been derived from this so as to seek exemption or whether it is exempted or not.

12. It appears, it is not as if the matter has been concluded by the DRP. Rather, it has kept open the issue whether engineering and design services fall within the definition of "computer software or not for the purpose of extending the benefit of exemption, to be decided by the AO, after hearing the petitioner. As submitted by the learned senior counsel representing the petitioner, the order of the DRP is binding on the AO as to the quantum to be arrived at. Of course, but since the DRP itself has given liberty to the AO to take further action before finalising the assessment order, in my opinion, it is still open to the AO to decide, after hearing the petitioner and based on the objections if any filed, pursuant to the directions issued. Thus, in my view, the direction issued by the DRP is not in violation of s. 144C(5) or (8) of the Act.

13. Accordingly, petitions are disposed of. Petitioner to approach the AO within one month from the date of receipt of a copy of this order, who in turn, shall take further action in accordance with law within two months thereafter.