

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

+ **ITA No.206/2008**

% **Reserved On:08.04.2010**
Date of Decision: 11.05.2011

Commissioner of Income Tax **APPELLANT**
Through: Mr.N.P. Sahni, Advocate

Versus

Modi Xerox **RESPONDENT**
*Through: Mr.Ajay Vohra with Ms.Kavita Jha and
Mr.Somnath Shukla, Advocates*

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

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|----|---|----|
| 1. | Whether reporters of Local papers be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

M.L. MEHTA, J.

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1. This appeal is under Section 260(A) of the Income Tax Act (hereinafter referred to as "the Act") and directed against the order of the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") dated 4th May, 2007. The assessee is a

company which is engaged in the business of manufacture and sale of Xerox machines related items. In the return filed for the assessment year 1997-98, the assessee had shown nil income whereas income under Section 115JA was shown at Rs.2,12,34,285/-. The assessment order was passed under Section 143(3) of the Act with the taxable income at Rs.29,61,56,079/-. While passing the assessment order, the Assessing Officer made several disallowance in respect of various claims raised as detailed in the assessment order. Amongst others, the assessee had claimed deduction on account of exemption under Section 10B of the Act and commission to the tune of 3.27% incurred on the sale of products under Section 37 of the Act. The Assessing officer disallowed the exemption under Section 10B. With regard to the commission on sale of products, the Assessing Officer allowed commission to the tune of 3% as being reasonable under Section 37 of the Act as against the demanded 3.27%. Aggrieved against this order, the assessee preferred appeal to the CIT(A). The CIT(A) disallowed the claim under Section 10B, but allowed the claim of commission of 3.27% under Section 37 of the Act. Consequently, the CIT(A) with regard to expenses towards commission under Section 37 allowed the claim of the assessee, whereas with regard to commission under Section 10B disallowed its claim.

Both assessee and the revenue preferred appeals against the order of the CIT(A), which came to be disposed of by the Tribunal vide its order dated 4th May, 2007. On the issue of commission, the appeal of the Revenue was dismissed thereby upholding the decision of CIT(A) on this ground. On the issue of exemption under Section 10B, the Tribunal while not agreeing with the AO and the CIT(A) held the assessee to be entitled to claim deduction under Section 10B of the Act. The Tribunal further remanded the matter back to the Assessing Officer for doing needful and recorded as under:-

“The AO has not pointed out any defects in this Profit and Loss a/c of the 100% EOU unit recorded on the basis of bifurcation of accounts. We however notice that the AO had not taken cognizance of the above facts. We therefore are of the view that denial u/s 1B of the Act was not justified. With regard to the quantum of income on which deduction u/s 10B has to be allowed we deem it fit and proper to restore the issue to the AO for fresh consideration. This is for the reason that the AO has complained that the assessee has not debited any expenses of 100% EOU while arriving at its profits. The AO will take into consideration the bifurcated accounts prepared by the assessee for the purposes of arriving at profit from 100% EOU and allow the deduction u/s 10B of the Act in accordance with law. The AO will afford the assessee the opportunity of being heard in this regard.”

2. It is against this impugned order on both these counts that the Revenue is in appeal before us.
3. With regard to the decision of the authorities below on various other claims and allowances of the assessee, it was an accepted position that those stood covered by a judgment of the Allahabad High Court in ITAs No.30/2001 and 31/2001. Therefore, the appeal was admitted only on the aforesaid two grounds, which are as under:-
 - c) Whether the ITAT was correct in law in allowing the exemption u/s 10B of the Income Tax Act, 1961 amounting to Rs.2,08,11,212/ in respect of profits of 100% EOU setup under software technology park scheme which was disallowed by the Assessing Officer and confirmed by the CIT(Appeals)?
 - f) Whether the ITAT was correct in law in deleting the disallowance of Rs.1,29,74,000/- made by the Assessing Officer by restricting the claim of commission to 3% of the total turnover?
4. We have heard the learned counsel for the Revenue as also for the assessee. The relevant facts for dealing with the claim on exemption under Section 10B are like this. The assessee company had claimed an amount of Rs.2,08,11,212/- as exempted under Section 10B being the profit on export oriented unit (EOU). In support of this claim it filed copy of P&L Account

and balance sheet as on 31st March, 1997. An application dated 29th November, 1994 was moved by the assessee to the Director, STP (Software Technology Park), NOIDA for setting up EOU under STP Scheme in NOIDA. As mentioned in the Annexure of application, lots of softwares were to be imported for making exports. A letter dated 2nd December, 1994 was issued by Director, STP, NOIDA to the assessee conveying their willingness to provide facilities under the STP scheme provided certain conditions are satisfied. As per clause (2)(i) of this letter the entire 100% production was to be exported against hard currency. In addition to this, there were various other terms and conditions, which were to be confirmed by the assessee. Thereafter, in agreement dated 5th January, 2009 between the assessee and the Government of India, the conditions laid down by the Director, STP, were more or less accepted by the assessee. The assessee filed profit and loss account and the balance sheet of the software division as under:-

P and L Account:

Various expenses claimed	18185143	Income from sale of software RX	15413500
Net profit	20811212	Income from sale of software XC	23582855
	38996355		38996355

- a) In the profit and loss account, the expenses of various softwares imported as per annexure C of application dated 29.11.94 have not been debited.
- b) No interest/finance charges have been debited in the P&L Account.

Balance sheet

Liabilities not invoiced	23056212	Inter Unit STP A/c	23056212

	23056212		23056212

5. Vide communication dated 10th December, 1992, the AO asked the assessee to explain the bifurcation of expenses/income which was done in respect of three units only by its Chartered Accountant, M/s.Vaish and Co.:

(i) Xerox; (ii) Toner and (iii) Service and others;

whereas during the year four units had been shown, namely:

(a) Xerox (b) toner (c) service and trading and (d) 100% software.

6. The assessee was also asked to show the basis of Quadruplication of expenses in the above four units. Not getting any response to this, AO proceeded to make assessment noting that the balance sheet clearly suggested that the sales of

Rs.2,30,56,212/- were made to Inter Units only and that there were no direct exports of software. He noted that both these invoices were raised by the assessee only and not by any separate 100% export oriented unit. In addition to this, he also noted some more facts to form a view regarding the assessee being not entitled to commission of 100%. Some of these were like this.

- (i) No separate bank account of software division is reflected in the balance sheet.
- (ii) All remittances against exports have come to Modi Xerox Ltd. (assessee) only.
- (iii) No separate fixed assets are reflected in the balance sheet (assets side) of the software division.

7. For all these reasons, the AO recorded finding of fact that there were no direct export of software by any separate 100% EOU setup in the STP area, NOIDA. No new units were setup but the profit in this alleged unit has been generated by inter unit transfers only as is clear from the balance sheet wherein inter unit STP account of Rs.2.30 crore is shown on the asset side. The export of software, if any, were done by Modi Xerox Limited only as is clear from the invoice and not by any new internal undertaking. Since there was no separate independent unit

established which could be called EOU under clause (2) of Section 10B, the assessee is not entitled to claim any deduction therein.

8. The CIT(A) also examined the entire record and returned a finding of fact in agreement with the Assessing Officer. Interestingly, the Tribunal reversed the finding of fact of the AO and the CIT(A) relying upon some documents lying in the assessee's paper book as produced before it. The Tribunal proceeded to record that the monthly reports with regard to the proceeds realized are lying in the assessee's paper books, that the assessee was maintaining separate books of accounts for 100% export oriented units; the copy of the balance sheet and profit and loss account are placed in the assessee's paper book; foreign remittances for export of software were received by the head office on behalf of 100% EOU; that there was no inter unit sale as alleged by the AO; that AO has not pointed out any defects in the profits and loss account of 100% EOU etc.
9. From the findings as recorded by the Tribunal, as noted above, we may surprisingly note that all the documents which have been sought to be relied upon by the Tribunal were not before the Assessing Officer. The AO has pointed out and rightly so the

defects in the profits and loss account and the balance sheet and no clarification was furnished by the assessee. The way the Tribunal proceeded to rely upon the documents presented before it by the assessee, without even caring for seeking their verification either at his level or that of AO, it apparently appears, the Tribunal acted to arrive at such a conclusion without any application of mind. Based on those documents lying in the paper book of the assessee, the Tribunal seems to have jumped over the conclusion of the assessee having established a 100% EOU. It may be noted that merely because the assessee had been permitted to establish a new industrial undertaking for the manufacture of computer software as 100% EOU under the STP scheme was itself not enough to record a finding that the said unit had in fact been established and was entitled to claim the exemption as applicable under Section 10B of the Act. We are of the view that the matter needs to be examined by the Assessing Officer afresh in this regard. The Assessing Officer will not be influenced by any finding recorded by the Tribunal or by this Court. AO will proceed with an objective view of the factual position regarding the claim made by the assessee under Section 10B. Therefore, the matter is being remitted to the AO in this regard.

10. With regard to the claim of commission paid by the assessee to the consumers, dealers and others by way of various schemes to promote the sale of products, the assessee has debited commission under the head “selling and distribution, administrative and other expenses” to the tune of 15,20,21,000/- for the relevant assessment year. On calculation, this came to be 3.27% of the total sales of Rs.353.64 crores as against 2.90% of the total sales of the previous assessment year. The AO being not satisfied with the increase in the commission asked the assessee to give the details of the commission paid dealer-wise with addresses etc. The AO recorded that the assessee failed to give details of dealer-wise commission with their addresses and proceeded to make assessment by adopting a method of reasonable commission at 3% on the sale of products and consequently disallowed the claim to the extent of 1,29,72,000/- on this account under Section 37. The CIT(A) took note of the fact that the dealers commission was being allowed by the Revenue to the assessee in the past in full and it was only for the first time that the disallowance of the dealers commission had been made. The CIT(A) went through the details of the dealers commission in respect of Lucknow and Jangpura region for verification on test-check basis. The CIT(A) recorded that the assessee had given full details of dealers commission in respect

of Lucknow and Jungpura region for verification on test-check basis but no verification was done by the AO and AO did not find any dealer commission or any portion thereof to be bogus or excessive. Regarding restricting the said commission at 3% without any reason was an arbitrary decision of the Assessing Officer. The Tribunal though agreed with the findings recorded by the CIT(A) in this regard but referred to some of the pages lying in the assessee's paper book. It also found that the commission had been paid to outside parties who are not in any manner related to assessee and are not persons referred to under Section 40A(2)(b) of the Act. This part of the finding was not disputed by the Revenue before us. This being a pure question of fact and particularly in view of the fact that the similar expenses had already been allowed deduction in the previous years, we do not see any reason to interfere in the finding of the CIT(A) or the Tribunal in this regard.

11. In view of the above discussions, the matter is remitted back to the AO to examine the claim of the assessee under Section 10B of the Act afresh as per law. Consequently, we answer question No.(c) in negative, i.e., in favour of the Revenue and question (f) in affirmative, i.e., in favour of the assessee and against the Revenue. The appeal is disposed of accordingly.

**M.L.MEHTA
(JUDGE)**

MAY 11, 2011
'Dev'

**A.K. SIKRI
(JUDGE)**