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IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD "A " BENCH, HYDERABAD

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER & SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.577/Hyd/2012
Assessment Year: 2008-09

VNS Makro Technologies P.Ltd.,Hyderabad. **PAN:AABCV 4969 M**	-v-	DCIT, Cir-3(3), Hyderabad.
(Appellant)		(Respondent)

Appellant by	Sri D.V. Anjaneyulu
Respondent by	Shri K. Viswanatham

Date of hearing : 28-05-2012
Date of Pronouncement : 08-06-2012.

ORDER

PER SAKTIJIT DEY, JM:

This appeal by the assessee is directed against the order dated 22-3-2012 passed in ITA No.432/DCIT-3(3)/CIT(A)-IV/10-11 pertaining to the assessment year 2008-09.

2. The assessee has raised the following grounds before us:-

"i. **The order of the CIT (A) treating the revised return filed u/s 139(5) as that of sec. 139(4), rejecting the claim on the ground, as no such**

claim was made u/s 139(1), which is not a prerequisite for sec. 139(5), is erroneous in law, contrary to the facts, probabilities of the case and against the principles of equity and natural justice.

ii. **The CIT (A) relying on the irrelevant case law, also alleging that there is an amendment to section 139(4) w.e.f. 1-4-2006 ignoring the fact that the return filed u/s 139(5) i.e., revised return within due date claiming relief u/s 10A which was wrongly claimed u/s 10B in the return filed u/s 139(1), which is totally unjustified and unwarranted both in law and facts.**

iii. **Subject to the above, the appellant submits that for other issues, relied by the AO, furnished substantial material documentary evidence in support, that no relationship whatsoever nature and manner exist between the appellant and the exporter in considering the relief u/s 10A.**

iv. **The appellant crave to submit that all the contentions, facts and case laws mentioned in the statement of facts, shall be treated as part and parcel of these grounds and shall be dealt with."**

3. Facts of the case, in brief, are that the assessee is engaged in Software export and is a 100% EOU registered with STP. For the assessment year under dispute i.e. 2008-09 the assessee

filed its return within the due date declaring a total income of Rs.62,40,790/- after claiming deduction of Rs.2,18,19,831 u/s 10B of the Act. Subsequently, the assessee finding that it has wrongly claimed deduction/s 10B instead of u/s 10A of the Act, filed a revised return u/s 139(5) on 19-2-2010 declaring an income of Rs.38,16,365/- after claiming exemption u/s 10A of the IT Act. In course of assessment proceedings u/s 143(3) the assessee explained before the AO that in the original return, the assessee has wrongly claimed deduction u/s 10B because of the fact that the assessee's claim of deduction u/s 10B had been accepted by the department up to the assessment year 2006-07. Subsequently when the assessee became aware of the fact that it is entitled for exemption u/s 10A and not u/s 10B, revised return has been filed within due date claiming exemption u/s 10A. The AO while completing the assessment, disallowed the claim u/s 10A on the ground that the proviso to section 10A of the Act requires a deduction u/s 10A to be claimed in the return filed u/s 139(1), the assessee having not claimed the deduction u/s 10A in the return filed u/s 139(1) of the IT Act the claim made in the revised return cannot be accepted. The AO had further observed that the assessee company has received technical know from its associated enterprise without any payment resulting in high exempted income, the assessee has failed to make the transaction at arms length price, the assessee failed to prove any services exported or rendered, the assessee has shown abnormally high profit.

4. Being aggrieved by the assessment order, the assessee filed an appeal before the CIT (A). Before the CIT (A), the assessee reiterated its stand taken before the AO and contended that the assessee having filed the revised return within the due date claiming deduction u/s 10A, it should have been allowed.

The CIT (A) rejected the assessee's contention on the ground that the assessee having not made a claim of deduction u/s 10A in the return filed u/s 139(1), the claim of deduction in the revised return cannot be allowed in view of the proviso to section 10A of the Act. As the CIT (A) held against the assessee, this issue only be did not adjudicate the other grounds raised on the merits of disallowance. For the sake of convenience, the relevant portion from the order of the CIT (A) is extracted hereunder:-

"6.1 **So far the claim of deduction u/s 10A is concerned, it is seen that as per the proviso below sec. 10A(1A), no deduction u/s 10A shall be allowed to an assessee who does not furnish a return of income on or before the due date specified under sub sec.(1) of section 139. In the case of the present appellant, however, o deduction at all was claimed u/s 10A in the return filed u/s 139(1). It was only in the revised return filed in terms of the provisions of sec. 139(4) that the appellant filed such claim. Accordingly, it cannot be said that the appellant's claim in accordance with the proviso stated above, which was inserted w.e.f. 1-4-2006. It is also clear that a return filed u/s 139(4) does not stand on the same footing, as that of a return filed u/s 139(1). Even though in the decisions like that of the Hon'ble Guwahati High Court in the case of CIT vs. Rajesh Kumar Jalan (286 ITR 274) or that of the Hon'ble High Court in the case of CIT vs. Jagruti Agarwal (203 Taxman 203), it has been held that for the purpose of sec. 54, the due date for finishing of return of income u/s 139 automatically gets extended by the period prescribed u/s 139(4), it is clear that the said view has been taken only in respect of sec. 54. On the other hand, it is seen that the Honble Amritsar Bench of ITAT in the case of Bal**

> **Kishan Dhawan, HUF vs. ITO (2011 TMI 211498-ITAT-Amritsar) in ITA No.235-236 (ASWR) of 2011 dtd. 16-12-2011, making such distinction, have held that having not claimed deduction u/s 80IB in the return filed u/s 139(1) in view of the provisions of sec. 80 IB in the return filed u/s 139(1) in view of the provisions of sec. 80AC, an assessee would not be entitled to claim such deduction in the return filed u/s 139(4). It is seen that the proviso to sec. 10A mentioned above is similar to the provisions of sec. 80AC. Accordingly, it is clear that the appellant cannot be allowed deduction u/s 10A on the basis of the claim made in the revised return filed u/s 139(4) of the Act.**

5. The learned AR contended before us that up to the assessment year 2006-07, the assessee was all along claiming deduction u/s 10B and the department was also allowing the assessee's claim of deduction u/s 10B only. For the assessment year 2006-07, the order passed u/s 143(3) allowing exemption u/s 10B was set aside by the CIT (A) by invoking his jurisdiction u/s 263 of the IT Act and directing the assessee to disallow the claim of deduction u/s 10B as the assessee is not entitled to such claim. The assessee being aggrieved by the order passed under section 263, filed an appeal before the ITAT. The ITAT, Hyderabad Bench disposed of the appeal by an order dated 5-8-2001 in ITA No. 870/Hyd/11 directing the assessing officer to consider the assessee's claim of deduction u/s 10A. Identical issue again cropped up for assessment year 2007-08 and the dispute again came before the ITAT, Hyderabad Bench. The ITAT, Hyderabad Bench in ITA No.1057/Hyd/10 directed the AO to consider the assessee's claim of deduction u/s 10A of the Act.

6. The learned DR, on the contrary, referring to the reasoning given by the CIT (A) in para 6.1 of his order justified the disallowance of claim made by the assessee in the revised return.

7. We have heard rival contentions of the parties and perused the materials available on record. It is apparent from the order of the CIT (A) that the reason behind disallowance of claim made by the assessee since the assessee has not claimed deduction u/s 10A in the return filed u/s 139(1), the proviso to section 10A debars him from making any such claim in revised return. At this stage, it will be relevant to take note of the proviso under section 10A which is extracted hereunder:-

> **"Provided that no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sub-section (1) of section 139."**

8. A reading of the aforesaid proviso makes it clear that requirement for claiming deduction u/s 10A of the Act, filing of a return of income on or before the due date specified under sub-section (1) of section 139. In the present case, there is no dispute to the fact that the assessee has filed a return of income u/s 139(1) within the due date claiming deduction u/s 10B. Therefore, the reasoning of the CIT (A) that the proviso to section 10A operates as a Bar in allowing deduction claimed in the revised return is not a correct interpretation. It is a fact on record that the assessee up to the assessment year 2006-07 was claiming deduction u/s 10B and the department was allowing the same even under scrutiny assessments. It was only in the

assessment year 2006-07 after the CIT set aside the order passed u/s 143(3) directing the AO to disallow the claim of deduction u/s 10B that the assessee is claiming deduction u/s 10A of the Act. It is also a fact that the ITAT in assessee's own case for assessment year 2006-07 directed the AO to consider the assessee's claim for deduction u/s 10A by observing in following manner:-

> **"We have considered the rival submissions and have perused the order of the CIT passed u/s 263 of the Act. We find that the assessee has claimed deduction u/s 10B of the Act, which was allowed by the assessing officer without making further enquiries with regard to allowability thereof. Accordingly, the order of the assessing officer could be interfered with by the CIT u/s 263 of the Act. However, the CIT should have remanded the matter to the file of the assessing officer with a direction to consider the claim of the assessee that there was no difference between s. 10A and S.10B and the deduction u/s 10A was allowable to the assessee on the basis of the material available on record. In these facts of t he case we hold that it be justified to modify the order of the CIT passed u/s 263 to the effect that the assessment is set aside to the file of the assessing officer with a direction to reframe the assessment de novo in accordance with t law and to adjudicate the issue of deduction allowable to the assessee, after providing reasonable opportunity of hearing to the assessee and the assessee shall be at liberty to claim deduction under some other provision of law, which shall be decided by the assessing officer on merits thereof. We direct accordingly."**

For the assessment years 2007-08 also the ITAT directed the AO to consider the assessee's claim u/s 10A by observing in the following manner:-

> "**10. We have heard both the parties and perused the materials available on record. The contention of the assessee's counsel is that the assessee is 100% EOU entitled for exemption u/s 10A and wrongly claimed the deduction u/s 10B and it was a technical mistake in claiming deduction u/s 10B. The assessee's counsel further argued that the assessee has fulfilled all the requirements of provisions of section 10A. However, this claim of the assessee not examined by the lower authorities and they stick to one contention that the assessee claim u/s 10B is not allowable. We are agreeing with the department that thd condition for allowance of deduction u/s 10A and 10B are stood on different footing. However, the department cannot thrust upon the assessee to avail deduction u/s 10B only. If the assessee entitled for deduction u/s 10A instead of 10B, that claim required to be examined by the assessing officer in all fairness. The issue of allowance of deduction u/s 10A though assessee made a claim before the lower authorities has not examined by the assessing officer. In the facts and circumstances of the case, we are of the considered opinion that it shall be in the interest of justice to set aside the issue in the grounds of appeal of the assessee to the file of assessing officer with a direction to decide the issue in accordance with law after providing reasonable opportunity to the assessee, and also to give a specific finding whether the assessee is entitled to deduction u/s 10A of the Act or not. The assessee may file any evidence in support of its claim for deduction before the assessing officer. We make it clear that our observations herein above shall not have any bearing on the**

decision of the assessing officer with regard to the merits of the claim of the assessee for deduction u/s 10A of the Act. We direct accordingly."

Therefore, keeping in view the orders of the ITAT for the earlier assessment years 2006-07 and 2007-08, directing the AO to consider assessee's claim for deduction u/s 10A we think it proper to restore the matter back to the file of the AO directing him to consider assessee's claim of deduction u/s 10A after examining the materials available before him and allow such deduction if the assessee is legally entitled to. The AO shall afford a reasonable opportunity of being heard to the assessee before assessment order is passed.

9. In the result, the appeal filed by the assessee is treated as allowed for statistical purpose.

Order was pronounced in the Court on 08-6-2012.

Sd/-	**sd/-**
(CHANDRA POOJARI)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 8th June, 2012

Copy forwarded to:

1. M/s Anjaneyulu & Co., CAs, 30, Bhagyalakshmi Nagar, Gandhi Nagar,Hyderabad.
2. DCIT, Cir-3(3), Hyderabad.
3. The CIT(A)-IV, Hyderabad.
4. The CIT, Hyderabad
5. The DR, ITAT, Hyderabad

Jmr*