IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "B", LUCKNOW

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI A.K. GARODIA, ACCOUNTANT MEMBER

ITA Nos.251 & 895/LKW/2014
A.Yrs.:2009-10 to 2010-11

Dy.C.I.T., Range-2, Lucknow.	Vs	M/s E-Soft Technologies Ltd., 7, Ram Mohan Rai Marg, Lucknow. PAN:AAACE7504J
(Appellant)		(Respondent)

Appellant by	Smt. Swati Ratna, D. R.
Respondent by	Shri S. C. Agarwal, Advocate
Date of hearing	01/07/2015
Date of pronouncement	14/08/2015

O R D E R

PER A. K. GARODIA, A.M.

Both these appeals are filed by the Revenue, which are directed against two separate orders of learned CIT(A)-II, Lucknow dated 05/02/2013 for the assessment year 2009-10 and dated 04/09/2014 for the assessment year 2010-11. Since common issue is involved in both the appeals, these appeals were heard together and are being disposed of by this common order for the sake of convenience.

2. The grounds raised by the Revenue in assessment year 2009-10 are as under:

> "1. The learned CIT (A) has erred in law and on facts of the case in allowing the deduction of Rs.59,44,003/- claimed u/s 10A without giving any opportunity to the Assessing Officer in accepting fresh evidence produced by the assessee and without appreciating the fact that the new unit was created by transferring more than 20% of plant

& machinery of its existing unit in violation of provisions of section 10A."

3. The grounds raised by the Revenue in assessment year 2010-11 are as under:

"1. The learned CIT(A) has erred in law and on facts of the case in allowing the deduction of Rs.95,14,127/- claimed u/s 10A without passing the speaking order and only relying solely on the appellate order of the earlier year (2009-10).

2. The learned CIT(A) has failed to appreciate that the basic conditions for claiming deduction u/s 10A were not complied with by the assessee and the claim has been made in violation of provisions of section 10A."

4. Learned D.R. of the Revenue supported the assessment order. He also submitted that on page No. 42 of the paper book submitted by the assessee, is a calculation chart of depreciation as per Income Tax Rules and from the same, it can be seen that even out of 10 computers installed by the assessee in the present year, 8 computers were to put to use by 27th September, 2008 and the assessee claimed depreciation on these 8 computers on the basis that these computers were used for more than 180 days in the present year whereas the STP unit was granted approval by Software Technology Park of India (STPI) vide letter dated 16/10/2008 and therefore, it is accepted position by the assessee also that out of total 10 new computers purchased and put to use in the present year, 8 were put to use before coming into existence of the STP unit and therefore, the claim of the assessee that more than 20% of total assets are not old assets, is not correct and as a consequence, the assessee is not eligible for deduction u/s 10A of the Act. He submitted that under these facts, the order of CIT(A) should be reversed and that of the Assessing Officer should be restored.

5. Learned A.R. of the assessee supported the order of learned CIT(A). He also placed reliance on the judgment of Hon'ble Karnataka High Court

rendered in the case of CIT vs. Expert Outsource (P) Ltd. [2013] 358 ITR 518 (Kar). He submitted that in this case, the STP unit was registered on 04/08/2004 and the assessee started business operations from 29/12/2003 and under these facts, the Assessing Officer disallowed the claim of the assessee for deduction u/s 10A on the basis that the assessee has used the machinery previously used, which is more than 20% of the total plant & machinery and under these facts, the claim of the assessee was allowed by CIT (A) in that case and the order of CIT(A) was approved by the Tribunal and when the Revenue carried the matter in appeal before Hon'ble Karnataka High Court, Hon'ble Karnataka High Court has upheld the Tribunal order. He also submitted that in the present case, the facts are similar and therefore, the issue is covered in favour of the assessee by this judgment of Hon'ble Karnataka High Court.

6. We have considered the rival submissions. We find that a very detailed order has been passed by learned CIT(A) after examining each and every aspect of the issue in dispute. The relevant Paras of the order of CIT(A) are Para No. 4(4)(i) to 4(12), which are reproduced below for the sake of ready reference:-

> "4(4)(i) I have examined the facts and circumstances of the case. I have considered the finding of the Assessing Officer in the assessment order and the submissions of the appellant. There is no dispute with regard to the basic fact that the assessee company is in existence since 1999 and during the year under consideration, it set up a unit for 100% export of computer software. For the said purpose approval was obtained by it from Software Technologies Park of India (hereinafter referred to as the STPI) and was allowed such approval with effect from 16.10.2008. The claim of the appellant to deduction was examined by the AO in light of provisions of section 10A(2)(ii) and 10A(2)(iii) read with explanation 2 to section 801 of the Act. The provisions lay down as under –

10A (2) This section applies to any undertaking which fulfils all the following conditions, namely : —

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of any undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertakings as is referred to in section 33B, in the circumstances and within the period specified in that section;

(iii) it Is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Explanation. —The provisions of Explanation 1 and Explanation 2 to subsection (2) of section 80-1 shall apply for the purposes of clause (Hi) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

Section 801
Explanation 2 : Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with.

4(4)(ii) The AO examined the claim of deduction under section 10A of the Act and found that-

- On reference to the application submitted to the STPI it was noticed that the assessee was using point to point leased lines and internet leased lines of the existing unit.
- Separate books of accounts were not maintained in respect of the new unit.
- The report of the Income Tax Inspectors who carried on spot inquiries reported that there was no demarcation to show that the new unit was separate from the existing unit.

- On examination of fixed assets schedule, the AO concluded that old assets were more than 20% of the total assets.

4(4)(iii) Based on above observations the AO concluded that the new unit was formed by splitting up and reconstruction of old unit and there was transfer from old unit to new unit. After examination the AO found the assessee in violation of above provisions and disallowed deduction of Rs. 59,44,003/- under section 10A of the Act. I proceed to examine the issue in light of the above observations of the AO and the submissions of the appellant.

4(5)(i) The first issue is the observations of the AO that separate books of accounts have not been maintained. A reference in this regard may be made to the paragraph (v) of the CBDT Circular No. 01/2013 dated 17.01.2013 issued vide F. No. 178/84/2012-ITA.I, which is as under –

Subject: Issues relating to export of computer software - Direct tax benefits - Clarification regarding -
(v) Whether it is necessary to maintain separate books of account for an assessee in respect of its eligible units claiming tax benefits under sections 10A and 10B.

Since there is no requirement in law to maintain separate books of account, the same cannot be insisted upon. However, since the deductions under these sections are available only to the eligible units, the Assessing Officer may call for such details or information pertaining to different units to verify the claim and quantum of exemption, if so required.
4(5)(ii) The relevant circular clearly draws out the conclusion that there is no requirement in Section 10A of the Act to maintain separate books of accounts. The issue was also examined by the Bangalore Bench of Hon'ble ITAT in I.T.A No.1151Bang/2009 in the case of IBM India P. Ltd. v. Deputy Commissioner of Income Tax. The observations of the Hon'ble Court are as under-

> "Considering the second objection of the AO, namely, that separate books of account have not been maintained for the STP Units, his observation was that the objection of the AO arose on the premise that part of

the expenditure which could be related to the exempted income which is not allowable to the assessee by virtue of the provisions contained in section 14A of the Act which could be disguised and allowed to be set off against taxable income and, thus, the assessee would be benefited by paying reduced tax which could have been avoided. On this issue, the objection of the AO as is seen from the remand report and as noted by the CIT (A) was with regard to allocation of the overhead expenses in the ratio of turnover. The reason given by the learned CIT (A) for not accepting the reasoning of the AO was as the assessee has three units at different place, the only plausible manner available for allocation of expenditure is in the ratio of turnover which is possibly the only indicator available and is a reasonable method of arriving at the expenses.

Further, we venture to quote the ruling of the Hon'ble Supreme Court in the case of Smt. Tarulata Shyam and others v. CIT reported in 108 ITR 345 (SC) wherein it has been made implicitly clear that –

"To us, there appears no justification to depart from the normal rule of construction according to which the intention of the Legislature is primarily to be gathered from the words used in the statute. It will be well to recall the words of Rowlatt J. in Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64 (KB) at page 71, that:

"..... In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There, is no equity about a tax: There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

In view of the fact that the maintenance of separate books of account for STP Units is not a condition laid down in the provisions of s. 10A of the Act and also in conformity with the rulings of the Hon'ble Supreme Court referred supra and the finding of the Hon'ble Bench in the assessee's own case for the immediately preceding AY cited above, we are of the considered view

that the Ld. CIT(A) was not justified in denying the legitimate claim of the assessee u/s 10A of the Act. It is ordered accordingly.

4(5)(iii) Respectfully following the observation of the Hon'ble Court supra and the circular of CBDT on the subject it can be said that there is no requirement for maintenance of separate books of accounts under section 10A of the Act. Non-maintenance of separate books of accounts could not therefore be a condition for disallowing the claim of deduction under section 10A of the Act.

4(6) The AO referred to the application made by the appellant to STPI to conclude from the submissions made in the column relating to communication requirements that the new unit was using the point to point leased lines and internet leased lines of the existing unit. I find that the conclusion has been drawn by the AO without providing opportunity to the appellant to explain the issue. I find that the application for the approval of STPI was made on 25.07.2008 and application for installation of leased lines and internet leased circuits was made to Sify Technologies Limited on 24.07.2008. The bills of Sify Technologies Limited show the customers reference date as 24.07.2008. Moreover payment of internet charges of Rs.3,12,876/- has been shown to have been made by the appellant vide bank payment voucher numbers 199 and 205. The facts show that the new unit is using separate communication lines for internet usage.

4(7)(i) I find that the reliance of the AO on the report of the Income Tax Inspectors (hereinafter referred to as the ITI) is not justifiable as the report was not confronted to the appellant. Moreover, the Ill's conducted their spot inquiries on 26.12.2011 whereas the unit claiming deduction under section 10A of the Act was functional only till 31.03.2011. In other words on the date on which the inquiries were conducted, the unit in respect of which the inquiries were conducted was not in operation. Nevertheless, the report of the ITI outlines that the new unit was operating at the same place and there was no demarcation between the old unit and new unit. In this connection the issue which needs examination is whether there is any requirement that the new unit be set up at a new place or whether there is any requirement of physical separation

between units for claiming deduction under section 10A of the Act.

4(7)(ii) A reference in this regard may be made to the paragraph (vii) of the CBDT Circular No. 01/2013 dated 17.01,2013 issued vide F. No. 178/84/2012-ITA.I, which is as under-

> (vii) WHETHER NEW UNITS/UNDERTAKINGS SET UP IN THE SAME LOCATION WHERE THERE IS AN EXISTING ELIGIBLE UNIT/UNDERTAKING WOULD AMOUNT TO EXPANSION OTTHE EXISTING UNIT/UNDERTAKING.
>
> Whether setting up of new unit/undertaking in a location (covered by sections 10A, 10AA or 10B), where an eligible unit is already existing, would amount to expansion of such already existing unit is a matter of fact requiring examination and verification. However, it is clarified that setting up of such a fresh unit in itself would not make the unit ineligible for tax benefits, as long as the unit is setup after obtaining necessary approvals from the competent authorities; has not been formed by splitting or reconstruction of an existing business; and fulfils all other conditions prescribed in the relevant provisions of law.

4(7)(iii) A similar issue was examined by Hon'ble ITAT, Pune in the case of ACIT Vs Symantec Software India P. Ltd [ITA No 787/PN/09 (AY 2004-05), dated 30th November 2011]. In that case the first unit had ceased to be eligible for exemption and a new unit was set up as an extension of the first unit after seeking necessary approvals. The Hon'ble Court held that deduction is available to an independent unit which is an expansion of the existing unit.

4(7)(iii) In view of the above I am of the considered view that physical demarcation is not a criterion to decide the eligibility of deduction under section 10A of the Act so long as the new unit is independent of the old existing unit. Physical independence of the two units is not envisaged in section 10A(2)(ii) and 10A(2)(iii) read with explanation 2 to section 801 of the Act.

4(8)(i) The fixed assets schedule examined by the AO in the assessment order at page 4 is as under:

S.No.	Particulars	Fixed assets as on 1/4/08	Fixed assets purchased for old unit	Fixed assets purchased for new unit	Fixed assets as on 31/3/2009 before claiming depreciation	Percentage of old assets
1.	Furniture fixture	7,81,336/-	36,800/-	2,38,585/-	10,56,721/-	73.93%
2.	Office equipments	11,17,272/-	1,51,115/-	5,55,480/-	18,23,867/-	61.25%
3.	Computers	44,16,979/-	6,42,263/-	12,25,258/-	62,84,500/-	70.28%
Total assets purchased for new unit				20,19,323/-		

4(8)(ii) On the basis of above schedule the AO concluded that the percentage of old plant and machinery was more than 20% of the total plant and machinery. I find that the AO has not correctly appreciated the facts. The provisions of explanation 2 to section 80I of the Act prohibit transfer of more than 20% of the old plant and machinery to the new unit. In the instant case there is no transfer as such of any plant and machinery from old unit to the new unit. The total assets purchased for new unit is separately shown at Rs.20,19,323/-. This is the investment made by the appellant of assets in new unit. These assets do not refer to assets transferred to new unit from the old unit. The conclusion of transfer of assets from old unit to the new unit has not been correctly drawn by the AO.

4(9) The provisions of section 10A(2)(ii) and 10A(2)(iii) read with explanation 2 to section 80I of the Act prohibit splitting up or reconstruction of an existing business or transfer of old plant and machinery of more than 20% to the new unit for claiming deduction under section 10A of the Act. In the instant case the appellant has made substantial investment of Rs. 20,19,323/- in assets for the new business for which approval was granted by the STPI. In order to hold that a business was formed by splitting up of a business already in existence, there must be some material to hold that either some assets of the existing business are diverted and another, new business is set up from such splitting up of assets or that the two businesses were same and the one formed was an integral part of the earlier one. However, if the alterations or changes are substantial, there would be little scope of describing what emerges as a reconstruction of business. Hence, in these

matters, one has to look at the substance of a transaction and not the form."

4(10) In the instant case, there is substantial investment made in assets of new unit after seeking approval of the STPI. The business of the two units is distinct and separate as can be easily deciphered from the turnover of the two periods as under as mentioned by the AO at page 2 of the assessment order-

Turnover up to 15.10.2008		
Domestic	25,66,596/-	
Export	1,49,52,581/-	1,75,19,177/-
Turnover after 16.10.2008		
Domestic turnover of existing business	17,21,408/-	
Export turnover of new unit	4,27,05,973/-	4,44,27,381/-
		6,19,46,558/-

4(11) Now as regards the principles laid down by Courts in relation to the claim of deduction under section 10A of the Act, it has been laid down that a new unit should be set up from new investments. The new unit must be set up for producing either the same commodities or some distinct commodities (Supreme Court in the case of Textile Machinery Corporation Vs CIT (107 ITR 195). Further, Even if some employees are common to the old and the new unit, it will not be a bar on eligibility or deduction (Madras High court in the case of Metropolitan springs (P) Ltd Vs CIT (191 ITR 288). Again, even if the new unit manufactures the same commodity as the old unit, it will be an eligible undertaking (Supreme Court in the case of Indian Aluminum Company Ltd Vs CIT (108 ITR 367). Finally, while deciding whether there is splitting up or reconstruction of an undertaking, it is not necessary to see whether the new undertaking has produced a different article than that produced by the Old undertaking (Madras High court in the case of Premier Cotton Mills Ltd Vs CIT (240 ITR 434)

4(12) On the basis of my examination I find that there is nothing to prove that the new unit was formed by splitting up or reconstruction of an existing business or transfer of old plant and machinery of more than 20% to the new unit. There

> is no violation as such of the provisions contained in section 10A(2)(ii) and 10A(2)(iii) read with explanation 2 to section 80I of the Act. The AO is therefore not justified in disallowing the deduction claimed by the appellant under section 10A of the Act. The AO is therefore directed to allow deduction of Rs.59,44,003/- claimed under section 10A of the Act. The appellant gets consequential relief. The grounds of appeal numbers 2 to 10 are allowed."

6.1 From the above paras from the order of learned CIT(A), we find that regarding this objection of the Assessing Officer that the assessee has not maintained separate books of account, CIT(A) has referred to a Tribunal order of Bangalore Bench of I.T.A.T. in the case of IBM India P. Ltd. v. Deputy Commissioner of Income Tax (supra) along with CBDT Circular No. 01 of 2013 dated 17/01/2013 and held that there is no requirement of maintaining separate books of account u/s 10A and non maintenance of separate books of account cannot be basis for disallowing the claim of deduction u/s 10A of the Act. On this aspect, we do not find any infirmity in the order of learned CIT(A) because his decision is in line with the Tribunal decision being Tribunal order in the case of IBM India P. Ltd. v. Deputy Commissioner of Income Tax (supra).

6.2 Regarding the second objection of the Assessing Officer that the new unit was using the point to point leased lines and the internet leased lines of the existing unit, it is held by learned CIT(A) that the confusion has been drawn by the Assessing Officer without providing opportunity to the assessee to explain the issue. He has also given a finding that the application for approval of STPI was made on 27/05/2008 and application for installation of leased line and internet line was made on 24/07/2008 and as per the bill of SIFY Technologies Ltd., the date mentioned is 24/07/2008. He has also given a finding that the payment of internet charges of Rs.3,12,876/- has been shown to have been made by the assessee and

therefore, it is seen that the new unit is using separate communication line for internet usage. He has also noted that the Assessing Officer has relied upon the report of Income Tax Inspector but it is not justifiable because the report was not confronted to the assessee. He has also noted that the Income Tax Inspector has conducted enquiry on 26/06/2011 whereas the unit is claiming deduction u/s 10A only till 31/03/2011 and therefore, on the date on which the enquiry was conducted, the unit in respect of which the enquiry was conducted, was not in operation. He has also observed that the report of the Income Tax Inspector outlines that the new unit was operated on the same place and there was no demarcation between new unit and old unit but as per the CBDT Circular No. 01 of 2013 and as per the Tribunal decision of the Pune Bench in the case of ACIT Vs Symantec Software India P. Ltd in ITA No. 787/PN/09 for assessment year 2004-05), dated 30th November 2011, it was held that physical demarcation is not a criteria to decide the eligibility of deduction under section 10A of the Act so long as the new unit is independent of the old existing unit. Hence, in our considered opinion, on this aspect also, there is no infirmity in the order of CIT (A).

6.3 Regarding this objection of the Assessing Officer that the percentage of old plant & machinery used by new unit was more than 20%, a clear finding is given by the learned CIT(A) that the Assessing Officer has not correctly appreciated the facts. He has also given a finding that the provision of explanation 2 to section 80I of the Act prohibits transfer of more than 20% of old total plant & machinery to new unit but in the present case, there is no transfer of plant & machinery from old unit to new unit. He has also given a finding that the total assets purchased is separately shown at Rs.29,20,233/- and therefore, this confusion of the

Assessing Officer regarding transfer of more than 20% of the total plant & machinery of old unit to new unit is not correct.

6.4 Regarding this objection of Learned D.R. of the Revenue that even out of new computers installed in the present year, 8 computers out of 10 computers were put to use on or before 27/09/2008 whereas the STPI approval has been granted on 16/10/2008, we are of the considered opinion that on this aspect, the judgment of Hon'ble Karnataka High Court in the case of CIT vs. Expert Outsource (P) Ltd. (supra), supports the case of the assessee. In that case, the assessee was carrying on the business of consultancy software from 29/12/2003 and the STPI approval was obtained by the assessee with effect from 04/08/2004. It is also noted by Hon'ble High Court that the assessee did not choose the available option of conversion of the DTA unit into STP unit and this was the basis of the objection of the Assessing Officer that when the assessee has used the machinery for DTA Unit and also for STP unit, such user of old plant & machinery is more than 20% and therefore, the assessee is not eligible for deduction. Under these facts, the issue was decided by Hon'ble High Court in favour of the assessee by observing as under:

> "4. In the instant case, the assessee began operations on December 17, 2003, whereas the STPI was registered on August 4, 2004. The STP authorities could also permit the conversion of an existing unit into a STPI unit. The purpose of the STP scheme is to encourage exports and gain valuable foreign exchange for the country. The STP scheme provides the benefit of converting a DTA unit into a STPI unit and the same should also hold good for tax purposes. CBDT Circular No. 1 of 2005, dated January 6, 2005, grants certain benefits under section 10B. Though the circular is in the context of section 10B, the ratio of the circular equally applies to section 10A also. In fact, the Commissioner of Income-tax (Appeals) has referred to various judgments on the point and had come to the conclusion that the benefit of section 10A would also be available even when an existing unit gets converted into a

> STPI unit. In fact, the material on record discloses that no export of computer software was made before August 4, 2004. The export commenced only after August 4, 2004. The invoices produced in the case clearly establish the said fact. In these circumstances, the appellate authority as well as the Tribunal were justified in extending the benefit of section 10A to the unit in question."

6.4.1 As per the judgment of Hon'ble Karnataka High Court, the relevant Para of which is reproduced above, it is seen that a DTA unit can be converted into STP unit but even if the assessee did not choose to get its DTA unit converted into STP unit, the deduction is allowable to the assessee. In the present case also, the assessee has not chosen to convert its STP unit to DTA unit and some of the machinery were put to use before the registration granted by STPI, but this factor alone cannot be a basis to deny the assessee deduction u/s 10A of the Act.

7. We also find that it is also noted by CIT(A) in Para 4(10) and 4(11) of his order that the assessee was having export turnover of Rs.149.52 lac for the period upto 15/10/2008 and the export turnover after 16/10/2008 was Rs.427.05 lac and as per the certificate of the Chartered Accountant in Form No. 56 as required u/s 10A, the calculation for deduction allowable to the assessee u/s 10A has been computed by adopting export turnover for the period 16/10/2008 to 31/10/2009 of Rs.427.05 lac on proportionate basis by considering the total turnover of the whole year including domestic and export turnover at Rs.469.46 lac. The CIT(A) has referred to various judgments, such as in the case of Textile Machinery Corporation Ltd. vs. CIT [1977] 107 ITR 195 (SC), CIT vs. Metropolitan Springs (P.) Ltd. [1991] 191 ITR 288 (Bom) and CIT vs. Indian Aluminium Co. Ltd. [1977] 108 ITR 367 (SC) wherein it was held that even if some employees are common in old and new unit, there is no bar on allowability of deduction u/s 10A of the Act. Finally, in Para 4(12) of his order, a categorical finding has been given

by learned CIT(A) that there is no material brought on record by the Assessing Officer to prove that the new unit was formed by splitting up or reconstruction of an existing business or transfer of old plant and machinery of more than 20% to the new unit and therefore, there is no violation of the provisions contained in section 10A(2)(ii) and 10A(2)(iii) read with explanation 2 to section 80I of the Act and therefore, the assessee is eligible for deduction u/s 10A of the Act. These categorical findings of learned CIT (A) could not be controverted by Learned D.R. of the Revenue and hence, we do not find any reason to interfere in the order of learned CIT(A) in both the years because in assessment year 2010 – 11, the order of Assessing Officer and CIT(A) are in line with the respective orders in earlier year. Hence, we decline to interfere in the orders of CIT(A) in both the years.

8. In the result, both the appeals of the Revenue stand dismissed.

(Order was pronounced in the open court on the date mentioned on the caption page)

Sd/.	Sd/.
(SUNIL KUMAR YADAV)	(A. K. GARODIA)
Judicial Member	Accountant Member

Dated:14/08/2015
*C.L.Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow

Asstt. Registrar