

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'B' KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri Wawseem Ahmed, AM]

ITA No.827/Kol/2015

Assessment Year : **2010-11**

D.C.I.T., Circle-2(1),
Kolkata

-versus-

M/s. Axsys Technologies Ltd.
Kolkata
(PAN:AAGCA 4666 F)
(Respondent)

(Appellant)

For the Appellant: Shri Saurabh Kumar, Addl. CIT(DR)

For the Respondent: Shri Subash Agarwal, Advocate

Date of Hearing : 21.08.2017.

Date of Pronouncement : 25.08.2017.

ORDER

PER N.V.VASUDEVAN, JM:

This is an appeal by the Revenue against the order dated 09.02.2015 of CIT(A)-1, Kolkata relating to A.Y.2010-11.

2. Ground No.1 raised by the revenue reads as follows :-

"1.On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in deleting the disallowance of Rs. 1,87,72,484/- claimed as exempt u/s. 10A on account of income from Export of Software & IT enabled service."

3. The Assessee is a company engaged in the business of software development and rendering other IT services. For A.Y.2010-11 the assessee claimed that a sum of Rs.1,87,72,484/- does not form part of the total income under the Act and exempt u/s 10A of the Income Tax Act, 1961 (Act). Under the provision of section 10A of the Act, profits and gains derived by an undertaking from the export of articles or things or computer software shall be allowed as a deduction while computing the total income of the assessee for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins manufacture or produce such articles or things or computer software. One of the conditions for making exemption u/s 10A of the Act as laid down in section 10A(2)(ii) of the Act is that the undertaking which claims exemption u/s 10A of the

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Act should not have been formed by splitting up or reconstruction of a business already in existence. According to the AO in A.Y.2009-10 the assessee had claimed exemption u/s 10A of the Act and in that year the exemption so claimed by the assessee was denied on the ground that the assessee was formed by splitting up or reconstruction of an existing business in the name and style of M/s Vision Comptech Integrators Ltd. Following the view taken in A.Y.2009-10 the AO denied the benefit of exemption u/s 10A of the Act to the assessee in the present assessment year also.

4. Before CIT(A), the assessee pointed out that its business was completely separate and distinct from the business of M/s Vision Comptech Integrators Ltd and brought the following facts to the notice of CIT(A):

i) It is carrying on its business from Ashram Building, 5th Floor, GN 34/2, Salt Lake, Sector-V, Kolkata - 700 091. Thus, it is a physically separate industrial undertaking.

While Vision Comptech Integrators Ltd. operates from Pekon Building, 4th Floor, Block EP, Plot Y-13, Salt Lake Sector - V, Kolkata - 700091.

ii) It is duly registered with STP authorities under the scheme of Govt. of India as an independent unit.

iii) It has purchased and installed new plant and machinery of substantial gross value of Rs. 310.98 lacs till 31.03.2011 comprising of :-

<u>Computer & Peripherals,'</u>	<u>Gross Value (Rs.)</u>
Computer Desktops	21,97,278
Computer Networking	17,05,024
Computer Software	1,38,82,260
Laptop	2,86,053
Printer	1,14,084
Projector	58,500
Scanner	12,87,426
Server	4,19,686
UPS	12,17,947

Besides to aforesaid it had acquired/installed substantial infrastructural facilities like furniture, fittings, electrical installation, office equipments etc to smoothly carry on the said business.

THUS, it was equipped with all basic infrastructure to carry on said business independently. There was no transfer of any fixed assets from Vision.

iv) It has its own bank financing arrangement in regard to term loan as well as packing credit. The closing balance of secured loans were as follows for the year under appeal and in immediately preceding year.

	<u>31.03.2011</u>	<u>31.03.2010</u>
Term Loan	73.84	96.35
Packing Credit	<u>273.69</u>	<u>297.15</u>
	<u>347.53</u>	<u>393.50</u>

v) It's business of export of Software and I. T. enabled services carried on during the year is eligible for deduction U/s 10A

5. As regard to the observation of Ld. AO. in Asst year 2009-10 for transferring of staff of Vision, it was pointed out that personnel may leave one unit and join another unit. Further, it was pointed out that it was judicially a settled proposition that even if some employees are common to the old and new unit, it will not be a bar on eligibility of deduction U/s 10A as that does not tantamount of splitting up or reconstruction of business. Employing of personnel is not the criterion or condition for allowing/not allowing deduction u/s 10A. It was reiterated that the Assessee was an independent establishment separate from Vision and is not the part of the Vision. It was reiterated that the Assessee was a completely new industrial undertaking after taking its office in Sector - V, Salt Lake on lease and acquiring its own plant & machineries, started its own business. It was emphasised that

No Plant & Machinery were transferred from Vision.

It has separate Board of Directors.

It has procured its registration from STP authorities Govt. of India.

Place of business of appellant and that of Vision are altogether different.

It was thus argued that the business of the Assessee cannot be termed as "formed by splitting up or reconstruction of business already in existence". Since **it is a new physically identifiable undertaking exist on its own as a viable unit separate and distinct from the Vision Comptech Integrators Ltd.** The Assessee also brought to the notice of the CIT(A) that in A.Y.2009-10 CIT(A)-I, Kolkata in his order dated ITA No.827/Kol/2015 M/s. Axsys Technologies Ltd. A.Y. 2010-11

09.08.2012 for A.Y.2009-10 held that the assessee's claim for exemption u/s 10A of the Act was to be allowed.

6. The CIT(A) on a consideration of the above submissions found that CIT(A)-I, Kolkata in assessee's own case in his order dated 09.08.2012 for A.2009-10 gave the following findings :-

“After careful consideration of the assessment order and the written submission filed by the Assessee, it is noticed that the Assessing Officer, disallowed the claim of Assessee company amounting to Rs. 74,16,576/- u/s 10A of the Act, since the Appellant company was formed by splitting up or by reconstruction of business already in existence in the name of Vision Comptech Integrators Ltd.(VCIL) and' some software personnel were shifted from VCIL to Assessee company and accordingly it did not fulfil the conditions laid down in Section 10A(2)(II) of the I. T. Act. Assessee is a registered unit under Software Technology Park Scheme of Govt. of India as per Certificate issued on 05.12.2007 and acquired fixed assets to the tune of Rs.2.57 crores including computer hardware in the 1st year of operation ending on 31.03.2008 and in the financial year under consideration further acquired fixed assets of Rs.31,08,215/- and total exports from sale of software and IT enabled services in the year were Rs. 11.56 crores and it claimed deduction u/s 10A as per Audit Report in Form No. 56 Assessing Officer did not dispute the fact that no plant & Machinery were transferred to Assessee company from VCIL and the physical place of business and the Board of Directors in the two companies were different. These two companies were completely separate and distinct. There is no restriction in Section 10A(2)(II) regarding use of human resources. Such use of human resources by this Appellant of the employees who are working earlier with VCIL does not amount to splitting up or reconstruction of a business already in existence as per Section 10A(2)(II). Hence, ground Nos, 1,2, and 3 are allowed.”

7. Following the view taken buy CIT(A) in assessee's own case for A.Y.2009-10 the CIT(A) directed the AO to allow the claim of exemption u/s 10A of the Act to the assessee.

8. Aggrieved by the order of CIT(A) the revenue has raised ground no.1 before the Tribunal.

9. At the time of hearing the Id. Counsel for the assessee brought to our notice that as against the order of CIT(A) for A.Y.2009-10 dated 09.08.2012, the revenue preferred an appeal before Hon'ble ITAT in ITA No.1639/Kol/2012 and the Tribunal by its

order dated 11.05.2016 was pleased to confirm the decision of CIT(A). The following were the relevant observations of CIT(A) :-

“4.1 We have heard the rival contentions of both the parties and perused the material available on records. The issue before us is that whether the Axsys Technologies Pvt. Ltd has been formed by reconstruction or not. This is because some employees were transferred from VCIL to the assessee along with some liability which was shared by the assessee company together. The AO accordingly treated that the assessee company was reconstructed after splitting the VCIL. However in many cases the courts have held the transfer of employees and sharing the liability of one company does not amount to reconstruction. Here we are reproducing the citation of some case laws dealing with similar issues as under:-

i) Textile Machinery Corp. Ltd. Vs. CIT (1977)107 ITR 173 (SC) it was held that new undertaking may manufacture the same articles as manufactured by the existing unit. So contention of DR that both the companies having same nature of business and so the assessee company has been formed by reconstruction does not hold good.

ii) CIT Vs. Modi Spinning and Manufacturing 125 ITR 361 (All) it was held that every creation in business is some kind of expansion and advancement. If the undertaking is new and identifiable undertaking, separate and distinct, from the existing business then it will not be reconstruction of business already in existence.

iii) CIT vs. Quality Steel Tubes (P) LTD. (2006) 280 ITR 254 (All), where head note as under:-

Deduction under ss. 80HH and 80J—Reconstruction of old business—Manufacture of new product partly using existing infrastructure—Tribunal has found that the assessee has set up a new project for manufacturing 4 inch diameter black pipe which is different from 2 inch diameter pipe which was already being manufactured by it—Merely because some of the manufacturing facilities are common, it does not mean that the new project is set up by reconstruction or splitting up of the existing business—Deduction under ss. 80HH and 80J admissible in respect of the new project—Textile Machinery Corporation Ltd. vs. CIT 1977 CTR (SC) 151 : (1977) 107 ITR 195 (SC) applied.

In the case of Quality Steel Tube Ltd. (supra), it was held that even if substantial persons have started the unit then it cannot be considered as reconstruction of the company. There is substantial investment in the Plant & Machinery in the company. We also find from the records that VCIL was still functioning and in support of it the ld. AR has submitted the copies of the financial statements and copies of ITR which are placed on record. We are relying on the above judgments of Hon'ble Supreme Court and Hon'ble Allahabad High Court and accordingly conclude that even though employees were transferred from VCIL to assessee were sharing some common liabilities and the shareholders of both the

companies are same, it cannot be taken as a ground for denying the benefit u/s 10A of the Act by holding the assessee as reconstruction company. The assessee i.e. Asxys Technologies Pvt. Ltd. is a separate legal entity which is newly formed and having its own plant & machinery. Hence, we uphold the order of Ld. CIT(A) and this ground of Revenue is dismissed. “

10. Following the conclusion of the Tribunal for A.Y.2009-10, we uphold the order of CIT(A). We may also clarify the basis of disallowance in the present assessment year is the same as in A.Y.2009-10 and therefore the conclusion arrived at by the Tribunal in A.Y.2009-10 will equally apply in the present assessment year. With these observations, we dismiss ground no.1 raised by the revenue.

11. Ground No.2 raised by the revenue reads as follows :-

“2. On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in deleting the addition of Rs.10,60,282/- u/s. 36(1)(iii) of Income Tax Act, 1961.”

12. The AO disallowed a sum of Rs.10,60,282/- out of the interest expenses claimed as deduction by the assessee while computing income from business. The addition was made by the AO on the ground that loans on which interest was paid by the assessee and claimed as a deduction have not been used for the purpose of business but had been given as interest free loans to the assessee's holding companies namely M/s Vision Comptech Integrators Ltd., M/s. Euolix Shipbuilders Ltd. M/s. Wellman Wacoma Ltd and M/s. Mirador Commercial Pvt. Ltd.

13. Before CIT(A) the assessee pointed out the following details with regard to the interest free advances given to the holding companies :-

<u>Name</u>	<u>Opening balance As on 01.04.2009</u>	<u>Closing Balance as on 31.03.2010</u>
Vision Comptech Integrators Ltd.	58,75,910.31	74,00,000.81
Euolix Ship Builders Ltd.	--	96,050.00
Mirador Commercial Pvt. Ltd.	---	42,00,000.00
Wellman Wacoma Ltd.	15,26,517.00	15,43,564.00”

14. It was contended that the Assessee had sufficient interest free funds which were sufficient and were used to give interest free advances to holding companies. The CIT(A) found that the net profit after tax including depreciation of the assessee during the relevant previous year was a sum of Rs.2,27,81,969/-. The total amount of interest free advances given to the holding company was a sum of Rs.1,32,39,615/-. The CIT(A) on a consideration of the above figures was of the view that the interest free loans were given by the Assessee not out of borrowed funds out of own funds that no disallowance can be made u/s 36(1)(ii) of the Act. The CIT(A) also made a reference to the decision of the Hon'ble ITAT, Kolkata 3rd Member decision in the case of S.P.Jaiswal Estates (P)Ltd vs ACIT 140 ITD 19 (Kol) and the decision of Hon'ble Bombay High Court in the case of CIT vs Reliance Utilities & Power Ltd. 313 ITR 340 (Bom).

15. Aggrieved by the order of CIT(A) the revenue has preferred ground no.2 before the Tribunal.

16. At the time of hearing it was brought to our notice that identical issue was considered by this Tribunal in assessee's own case in A.Y.2009-10 in ITA NO.1639/Kol/2012 order dated 11.05.2016. The ld. DR relied on the order of AO. The ld. Counsel for the assessee placed reliance on the order of CIT(A) and order of Tribunal in assessee's own case for A.Y.2009-10.

17. We have given a very careful consideration to the rival submissions. The findings of CIT(A) regarding the availability of own funds in the form of proceeds is not disputed by the revenue. Besides the above it is also not disputed that the entity to which loans were given were sister concerns and there was commercial expediency in giving interest free loans to the sister concerns. These facts are not being disputed by the revenue before the Tribunal nor any other arguments advanced on behalf of the revenue. In this circumstance, we are of the view that the decision of the Hon'ble Bombay High Court in the case of CIT vs Reliance Utilities & Power Ltd. (supra) would be applicable. It has been held by the Hon'ble Bombay High Court in the aforesaid decision that where interest free funds are available with an assessee which are more than interest free advances made to the subsidiary companies then the ITA No.827/Kol/2015 M/s. Axsys Technologies Ltd. A.Y. 2010-11

presumption should be that interest free advances were given out of interest free funds available with the assessee. Besides the above, in the case of S.P.Jaiswal Estates (P)Ltd vs ACIT (supra) it has been held by the Tribunal that where loans have been advanced owing to commercial expediency especially to sister concerns, it cannot be said that borrowed funds have not been used for the purpose of business by the assessee. In the above factual and legal position, we are of the view that the CIT(A) was fully justified in deleting the addition made by the AO. The Order of the CIT(A) is therefore confirmed and ground no.2 raised by the revenue is also dismissed.

18. In the result the appeal by the revenue is dismissed.

Order pronounced in the open Court on 25.08.2017.

Sd/-

[Waseem Ahmed]
Accountant Member

Sd/-

[N.V.Vasudevan]
Judicial Member

Dated : 25.08.2017.

[RG PS]

Copy of the order forwarded to:

- 1.M/s. Axsys Technologies Ltd., Block-EP, Sector-V, Salt Lake, Kolkata-700091.
- 2.D.C.I.T., Circle-2(1), Kolkata..
3. CIT(A)-I, Kolkata.
4. CIT-I, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary
Head of Office/DDO, ITAT Kolkata Benches

