**IN THE INCOME TAX APPELLATE TRIBUNAL**
**COCHIN BENCH, COCHIN**

**Before Shri Chandra Poojari, AM & Shri George George K, JM**

ITA No.109/Coch/2018 : Asst.Year 2006-2007

| | | |
|---|---|---|
| M/s.U.S.Technology International Private Limited<br>721 Nila, Technopark Campus, Kariyavattom<br>Trivandrum – 695 581.<br>**PAN : AAACU5628B.** | Vs. | The Asst.Commissioner of Income-tax<br>Circle 1(1)<br>Trivandrum. |
| (Appellant) | | (Respondent) |

Appellant by : Sri.Raghunathan S.
Respondent by : Sri.Santham Bose

| | | |
|---|---|---|
| **Date of Hearing : 18.09.2018** | | **Date of Pronouncement : 24.09.2018** |

## O R D E R

**Per George George K., JM**

This appeal at the instance of the assessee is directed against CIT(Appeals)'s order dated 31.01.2018. The relevant assessment year is 2006-2007.

2. Brief facts of the case are as follows:-

The assessment u/s 143 r.w.s. 263 of the I.T.Act was completed vide order dated 30.12.2011. The Assessing Officer in the said order did not allow the claim of deduction made u/s 10B of the I.T.Act for a sum of Rs.40,62,940 representing export proceeds which was not billed during the relevant

assessment year and not brought to India within the stipulated time.

3. Aggrieved by the order of the assessment completed u/s 143 r.w.s. 263 of the I.T.Act, the assessee preferred an appeal to the first appellate authority. The CIT(A) rejected the appeal of the assessee without adjudicating the issue on merits. The relevant finding of the CIT(A) reads as follows:-

> *"2. The Hon'ble ITAT has made out very clearly in the said order passed that the Assessing Officer shall examine the material on record independently without being influenced by any of the observations made by the Administrative Commissioner in the impugned order or by the Tribunal in their own order and shall decide the issue afresh in accordance with law after giving a reasonable opportunity to the assessee. In the circumstances narrated above, the order which was passed u/s 143(3) rws 263 on 30.12.2011 against which the present appeal was filed is no more a disputable order as the same has already been nullified which in turn had resulted in a fresh order to be passed at that point of time. Hence, the present appeal which was filed based on the nullified order became infructuous and doesn't require further action to be taken so as to decide the fate of the appeal filed on 02.02.2012. As a result, the appeal filed by the assessee is dismissed for statistical purpose."*

4. Aggrieved by the CIT(A)'s order, the assessee has filed this appeal raising the following grounds:-

> *"The grounds stated hereunder are independent of, and without prejudice to one another. The Appellant submits as under:*
>
> *Ground No.1 - Erroneous reliance on the order passed by the Income Tax Appellate Tribunal.*
>
> *1.1 On the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) ('CIT(A)') has erroneously placed reliance on the order dated 20 March 2012 passed by the Honourable Income Tax Appellate Tribunal ('the*

*Tribunal') in ITA No. 403/Coch2011 wherein the validity of the order issued under section 263 of the Income Tax Act, 1961 ('the Act') by the Commissioner of Income-tax was upheld.*

*1.2 The learned CIT(A) ought to have appreciated that the order passed by the Tribunal is on the validity of the proceedings conducted under section 263 of the Act and not on the non-consideration of unbilled revenue as export turnover for computation of deduction under section 10B of the Act.*

*1.3 The learned CIT(A) has erred in stating that the order which was passed under section 143(3) read with section 263 on 30 December 2011, against which the appeal was filed with the CIT(A) on 02 February 2012, is no more a disputable order as the same has been nullified. The learned CIT(A) erroneously held that since the appeal filed before him was based on the nullified order, the said appeal became infructuous and no further action is to be taken on appeal filed.*

*1.4 The learned CIT(A) ought to have decided on the allowability of the claim under Section 10B of the Act for the portion of export turnover accounted under unbilled revenue.*

*Ground No.2 - Erroneous non-consideration of unbilled revenue as export turnover for computation of deduction under Section 10B*

*2.1 The learned CIT(A) erred in not considering the unbilled revenue of INR 17,0975,535 as export turnover for computation of deduction under section 10B of the Act and consequently, upholding the disallowance of INR 4,062,940 from the deduction under Section 10B pertaining to unbilled revenue.*

*2.2 On facts and in circumstances of the case, the learned CIT(A) has erred in upholding the disallowance made by the AO on the ground that the export proceeds relating to unbilled revenue have not been realized within the time stipulated in the Act, despite the Appellant having realized the same within the time period prescribed by the competent authority as stipulated under Section 10B(3) of the Act read with Explanation 1 thereto.*

*2.3 The learned CIT(A) failed to consider that as per Section 10B(3) of the Act and Explanation thereto, export proceeds are to be repatriated to India, within a period of 6 months from the end of the previous year, or within such further period which the competent authority may allow in this behalf. The learned*

*CIT(A) erred in not considering that the receipt of export proceeds were within the timeline as prescribed by the competent authority, namely the Reserve Bank of India ('RBI') in Circular no 25 dated 01 November 2004, wherein it is specified that export proceeds of the STPI / EOU units should be brought into India within twelve months from the date of export.*

*2.4 The learned CIT(A) erred in disregarding the fact that the date of export, in the case of software exports, is deemed to be the date of invoice as per Regulation 9 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 as issued by the RBI. The learned CIT(A) failed to consider that the Appellant had repatriated the export proceeds within 12 months from the date of invoice and well within the time as stipulated in section 10B(3) of the Act.*

*The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal."*

4.1 The assessee has also filed additional ground, which reads as follows:-

*"The Appellant submits that the additional grounds are independent and without prejudice to the grounds of appeal raised in the appeal filed on 06 April 2018.*

*3. Erroneous non consideration of the principle that parity to be maintained between export turnover and total turnover*

*Without prejudice to the other grounds of appeal, the Assessing Officer failed to consider the principle of parity issue as upheld by the Hon'ble Supreme court in CIT v BCL Technologies Ltd (2018) 93 taxmann.com 33 (SC) and failed to consider that what does not constitute as export in the current financial year 2005-06, as the invoices were made in the subsequent financial year 2006-07, cannot form part of the total turnover while computing the deduction under section 10B of the Act."*

4.2 The learned AR representing the assessee relied on the grounds raised. It was further submitted by the learned AR that the additional ground raised is a pure question of law, which does not require fresh examination of facts. It was submitted that the issue raised in the additional ground is

covered in favour of the assessee by the recent judgment of the Hon'ble Apex Court in the case of *CIT v. HCL Technologies Ltd. [(2018) 93 taxmann.com 33 (SC)]*. The learned Departmental Representative present relied on the finding of the Income-tax authorities.

5. We have heard the rival submissions and perused the material on record. We are of the view that the CIT(A) has erred in not adjudicating the issue raised before him on merits. The ITAT while confirming the jurisdictional of the Administrative CIT in passing the order u/s 263 of the I.T.Act, had clarified that the issue raised on merits was left open and the Assessing Officer shall decide the same *de hors* the observations made by the administrative Commissioner in revisionary order passed u/s 263 of the I.T.Act. The relevant finding of the ITAT reads as follows:-

> *"9. The Administrative Commissioner has directed the assessing officer to redo the assessment after examining the materials on record. This direction of the Administrative Commissioner is in no way prejudice the interest of the assessee. We make it clear that the assessing officer shall examine the material on record independently without being influenced by any of the observations made by the Administrative Commissioner in the impugned order or by this Tribunal in this order and shall decide the issue afresh in accordance with law after giving a reasonable opportunity to the assessee."*

5.1 In view of the above order of the ITAT, we are of the view that there was no specific direction by the Administrative CIT while passing his order u/s 263 of the I.T.Act. Therefore, the issue on merits ought to have been adjudicated by the A.O. as

well as CIT(A) *de hors* the observation of the Administrative CIT.

5.2 Moreover, we find that the additional ground raised is a pure legal issue which does not require fresh examination of facts. The additional ground raised is important and goes to the root of the issue. In the interest of justice and substantial cause the additional ground is admitted and taken on record. Since the CIT(A) had not decided the issue on merits and also the assessee has filed additional grounds before the Tribunal, which we have already admitted, we are of the view that the matter needs to be examined by the CIT(A) afresh. It is ordered accordingly.

6. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 24th day of September, 2018.

| Sd/- | Sd/- |
|---|---|
| **(Chandra Poojari)** | **(George George K.)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Cochin ; Dated : 24th September, 2018.
Devdas*

Copy to :-
1. The Appellant
2. The Respondent
3. The CIT(A) Kottayam
4. The Pr.CIT, Kottayam
5. The DR, ITAT, Cochin.
6. Guard File.

AR/ITAT-Cochin