

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : “C”, BANGALORE
BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER
AND
SMT.BEENA PILLAI, JUDICIAL MEMBER**

**ITA No.1108(Bang)/2017
(Assessment Year : 2009-10)**

The Asst. Commissioner of Income tax,
Cirle-5(1)(1), R.No.233, 2nd Floor, BMTC Complex,
80 ft. Road, Koramangala,
Bangalore-560 095

Appellant

Vs

M/s Neobytes Software Solutions Pvt.Ltd.,
No.50, 1st Main Road,
9th Cross, 3rd Phase, JP Nagar,
Bangalore

Respondent

**Revenue by : Dr.P.V.Pradeep Kumar, Addl.CIT
Appellant by : Shri S.V.Ravishankar, Advocate**

**Date of hearing : 01-08-2019
Date of pronouncement : 06-09-2019**

O R D E R

PER BEENA PILLAI, JUDICIAL MEMBER :

Present appeal preferred by revenue against order dated 28/02/2017 passed by Ld.CIT(A)-12, for assessment year 2009-10 on following grounds of appeal:

- “1.The order of the CIT(A)_5, Bangalore is opposed to the law and not on the facts and circumstances of the case.*
- 2. Whether on the facts and circumstances of the case, the CIT(A) is justified in deleting the disallowance of*

Rs.3,18,86,593/- as deduction u/s 10A of the IT Act, 1961 as made by the AO on account of non-charging of Director's remuneration.

3. On the facts and in the circumstances of the case, the CIT(A) erred in law in directing the AO to reduce the expenditure incurred in travel, telecommunication etc. both from the ETO as well as the TTO for the purpose of computation of deduction u/s 10A of the IT Act, without appreciating the fact that the statute allows exclusion of such expenditure only from the ETO by way of specific definition of ETO as envisaged by sub-clause(4) of explanation 2 below sub-section 8 of section 10A. On the other hand, there is no specific provision in section 10A warranting exclusion of above expenses from TTO also.

4. For these and other grounds ha may be urged upon, the order of the CIT(A) may be reversed and that assessment order be restored.

5. The appellant craves leave, to add, alter, amend or delete any other grounds on or before hearing of the appeal”.

2. Brief Facts of the case are as under

The assessee company filed return of income for AY: 2009-10 on 23-09-2009 declaring total income of Rs.9,42,810/-. The return was processed u/s 143(1). This case was selected for scrutiny as per CASS and notice u/s 143(2) was duly served on 13.09.2010. Assessee was asked to furnish details as per notice u/s 142(1). Ld.AO observed that assessee declared profit of Rs.11,12,31,614/- on a total turnover of Rs.12,75,46,172/- for AY: 2009-10 and necessary adjustments to net profit as per provisions of the IT Act, assessee has claimed deduction of Rs.10,93,62,500/- u/s 10A and offered Rs.9,42,806/- as taxable income. In support of claim u/s

10A, assessee produced Form-56F duly certified by Chartered Accountant.

2.1 It was observed that assessee derived income from its associated enterprise NeoBytes LLC in US and assessee is eligible to claim deduction u/s 10A. On examination of profit and loss account Ld.AO observed that assessee declared high rate of net profit amounting to Rs.11,12,31,614/- on turnover. The assessee was therefore, asked to substantiate the claim of higher profit for AY: 2009-10. The assessee however, submitted that operations stated towards the end of FY:2007-08 and from AY:2009-10 to AY: 2011-12, return of income were filed consistently declaring higher profits. Further, notwithstanding the fact that deduction u/s10A was no longer available as per law, assessee submitted that it paid advance tax for AY: 2012-13 on similar rate of profit as declared in earlier assessment years. In support of its contention assessee produced copies of profit and loss account of subsequent assessment years and details of advance tax paid in FY: 2011-12 before Ld.AO. Accordingly, assessee submitted that profit declared during AY: 2009-10 was based on actual transactions.

“While framing the assessment, the ld.AO made following disallowances:

“a) The AO reworked the eligible deduction under section 10A of the Act, from Rs.10,93,62,500/- claimed by the appellant to Rs.7,74,75,907/- allowed by the AO thereby not granting an amount of Rs.3,18,86,593/-.

b) Re-computing the deduction under section 10A by making adjustment for export turnover and consequently, treating a sum of

Rs.9,49,350/- as amount not eligible for deduction under section 10A.”.

3. Aggrieved by additions made, assessee preferred appeal before Ld.CIT(A), who allowed claim of assessee.

4. Aggrieved by order of Ld.CIT(A) revenue is in appeal before us now.

5.**Ground No.1, 4-5** are general in nature and do not require adjudication.

6. **Ground No.2** Revenue is aggrieved by impugned order as Ld.CIT(A) deleted addition made on account of directors remuneration.

7. At the outset, Ld.AR submitted that it is out of domain of Ld.AO to notionally charge directors remuneration, which is contrary to law. It has been submitted that Ld.AO charged 25 % of export turn over for A.Y:2011-12 as remuneration payable to directors for year under consideration, thereby inflated 10A deduction. He submitted that assessee commenced its operations during AY 2009-10 and since it was the first year, no remuneration was paid to Directors keeping in view the uncertain nature of operations and future prospects of company. It has been submitted that Directors were paid remuneration from AY: 2011-12 as per provisions of Companies Act, 1956.

Ld.CIT, DR placed reliance on orders passed by Ld.AO.

8. We have perused submissions advanced by both sides in light of records placed before us.

9.Ld.CIT(A) deleted addition by observing as under:

“6. For the services by a Director, the remuneration payable has to be determined by the articles of the company or by a resolution or by a

special resolution passed by the company in a general meeting. If the articles so require. Thus, the remuneration payable to a Director may vary from year to year based on the articles or a resolution passed by the company in a general meeting. It was not mandated under statute that remuneration must be paid to the Directors. The AO has referred to the fact of remuneration paid in AY: 2011-12 and held that by not debiting Director's remuneration in the profit and loss account for AY: 2009-10, it had claimed higher deduction u/s 10A. The AO has held, "This is against the provisions of law". However, as seen above, there is no such legal provision which required charging of Director's remuneration. It is settled law that no expenditure could be forced on an assessee. The AO has not brought on record as to which services were provided by the Directors and for which no remuneration was paid so as to enable the appellant to earn more than ordinary profits. Therefore, the provisions of section 801A(10) and 10A(7) are also not attracted in the present case. Under the circumstances, the disallowance of Rs.3,18,86,593/- as deduction under section 10A as made by the AO on account of non-charging of Director's remuneration is deleted. The ground nos.3,4,5,6 & 7 are allowed".

We are of considered opinion that commercial expediency of a company cannot be questioned by revenue and decision to pay remuneration to Directors or not is within the realm of management decisions and Ld.AO has no role to play in it.

We therefore do not find any infirmity in view of Ld.CIT(A) and the same is upheld.

Accordingly this ground raised by revenue stands dismissed.

10. **Ground No.3** is in respect of computation of deduction under section 10 A of the Act.

Revenue is agitated that Ld.CIT (A) by following decision of *Hon'ble Karnataka High Court* in case of *CIT vs Tata Elxsi Ltd* reported in 349 ITR 98 directed Ld.AO to compute deduction under section 10A, as per ratio laid down by *SAP Labs India Pvt. Ltd. vs ACIT* reported in (2010) 8 Taxmann.com 207 and *Triology E-business software India Pvt Ltd. vs DCIT Hon'ble Court*.

It has been agitated by the Ld.CIT, DR that telecommunication expenses and expenses incurred in foreign currency cannot be reduced from total turnover for computing section 10 A of the Act, as there is no such provision. It has been submitted that section 10 A (iv) is very clear that such expenses are to be reduced only from export turnover.

11.On the contrary, Ld.AR submitted that total turnover is sum total of export turnover and domestic turnover and if an amount is reduced from export turnover then the total turnover also goes down by the same amount automatically.

12.We have perused submissions advanced by both sides in light of records placed before us.

It is observed that *Hon'ble Supreme Court* while deciding case of *CIT vs HCL Technologies Ltd* (2018) 93 Taxmann.com 33 held as under:

"19. In the instant case the deduction of right, telecommunication and insurance attributable to the delivery of computer software under section 10 A of the Act are allowed only into export turnover but not from the total turnover then, it would give rise to an inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the respondent which could have never been the intention of the legislature.

20. Even in common parlance, when the object of the formalised to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and apps erred. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.

21. On the issue of expenses of technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of right, telecommunication etc, otherwise the formula of calculation would be futile. Hence, in the same be, expenses incurred in foreign exchange for providing technical services outside India shall be allowed to exclude from the total turnover.”

We therefore do not find any infirmity in view of Ld.CIT(A) and the same is upheld.

Accordingly this ground raised by revenue stands dismissed.

13. In the result appeal filed by revenue stands dismissed.

Order pronounced in the open court on 06-09-2019

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER
Dated: the 6th September, 2019.

***am**

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
6. ITO (TDS)
- 7.Guard File

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

By Order

Asst.Registrar