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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1451 OF 2015

Hinduja Global Solutions Ltd. .. Petitioner
Vs.
Union of India
Through the Secretary & ors. .. Respondents

Mr.Farrokh Irani a/w Mr.Paras S.Savla, Mr.Harsh R.Shah, for the Petitioner.
Mr.A.R.Malhotra a/w Mr.N.A.Kazi, for Respondents.

CORAM: M.S.Sanklecha
& N.M.Jamdar, JJ.
Thursday 16 July, 2015

P.C. :

Rule. Rule made returnable forthwith. Respondent waives service. By consent taken up for final disposal at the request of the counsel.

2 This petition challenges the order dated 4 March 2015 of the Income Tax Appellate Tribunal ('Tribunal') passed in respect of Assessment Year 2009-2010.

3 The orders of the Tribunal are amenable to challenge under Section 260A of the Income Tax Act, 1961 (the Act) before this Court. Therefore, normally we would not entertain a writ filed from an order of the Tribunal under the Act in view of an

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alternative remedy by way of an appeal being available under the Act. However, we are constrained to exercise our extra-ordinary jurisdiction in view of the manner in which the impugned order has been passed by the Tribunal.

4 The issue before the Tribunal was regarding disallowance made on account of claim for deduction under Section 10A of the Act. This very issue was covered in favour of the Petitioner by the decision of the Tribunal for A.Y. 2005-2006 in the Petitioner's own case. The departmental representative before the Tribunal also accepted the position. Inspite of the agreed position between the parties, the Tribunal by the impugned order yet remands this very issue to the Assessing Officer for fresh examination/determination. This is without in any manner even attempting to indicate why and how its earlier decision will not apply to the facts for the subsequent Assessment year. The Tribunal should not completely disregard its earlier order without some reason. This is the minimum expected of any quasi-judicial / judicial authority. If the Tribunal has failed to perform it's basic judicial functions in such arbitrary manner, the approach of the Tribunal must be corrected, so as to ensure that such lapses do not occur again.

5 The Petitioner has informed us that the appeal for the subsequent Assessment year i.e. A.Y. 2007-2008 is scheduled to come up before the Tribunal in the month of August 2015 and for A.Y 2010-2011 the date has yet to be fixed by the Tribunal. The Petitioner seriously apprehends, and in our view not unjustifiably

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that the Tribunal, while dealing with the Petitioner's appeal for the subsequent years may also restore the issue to the Assessing officer for *de novo* examination disregarding the earlier order. All this would happen without the Tribunal at any point of time considering for what reason is it's own order for the A.Y. 2005-2006 in respect of the Petitioner on identical facts, does not correctly decide the dispute.

6 It is in the aforesaid circumstances and primarily to correct the approach the Tribunal that we are constrained to exercise our extra-ordinary jurisdiction and set aside the impugned order of the Tribunal dated 4 March 2015 and restore it to the Tribunal for fresh consideration and disposal on merits, after addressing itself to it's earlier order passed for the A.Y 2005-2006 in respect of the Petitioners on merits. As far as the other issues decided by the impugned order, on merits, are concerned, it is open to the parties to adopt such remedies as are available to them in law.

7 The impugned order dated 4th March 2015 is set aside to the extent it has restored the issue of the petitioner's claim of deduction under Section 10A of the Act to the Assessing officer. The above issue is restored to the Tribunal for fresh disposal, in light of above.

Rule made absolute in above terms. No order as to costs.

(N.M.Jamdar, J.) *(M.S.Sanklecha, J.)*

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आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, के , मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "K", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री बी.आर. भास्करन, लेखा सदस्य, के समक्ष

Before Shri Joginder Singh, Judicial Member, And
Shri B.R.Baskaran, Accountant Member

ITA NO.1107/Mum/2014
Assessment Year: 2009-10

Deputy Commissioner of Income Tax, Circle-6(3), Room No.522, Aayakar Bhavan, M.K.Road, Mumbai-400020	बनाम/ Vs.	M/s Hinduja Global Solutions Ltd. 171, Hinduja House, Dr. Annie Besant Road, Worli, Mumbai-400018
(राजस्व /Revenue)		(निर्धारिती /Assessee)
P.A. No.AAACT1763A		

ITA NO.1114/Mum/2014
Assessment Year: 2009-10

M/s Hinduja Global Solutions Ltd. 171, Hinduja House, Dr. Annie Besant Road, Worli, Mumbai-400018	बनाम/ Vs.	Deputy Commissioner of Income Tax, Circle-6(3), Room No.522, Aayakar Bhavan, M.K.Road, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
P.A. No.AAACT1763A		

निर्धारिती **की ओर से /** Assessee by)	Shri Sunil M. Lala, Shri Harsh Shah & Shri Pratik Poddar
राजस्व **की ओर से** / Revenue by :	Shri S.D. Srivastava

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सुनवाई की तारीख / **Date of Hearing :**	**19/02/2015**
Date of Order: **आदेश** की तारीख **/**	**04/03/2015**

आदेश / O R D E R

PER JOGINDER SINGH (Judicial Member):

These are cross appeals preferred by the assessee as well as Revenue challenging the impugned order dated 21/10/2013 of the ld. Dispute Resolution Panel(hereinafter DRP), Mumbai. First, we shall take up appeal of the assessee (ITA No. 1114/Mum/2014), wherein, as per ld. AR, first ground raised is general in nature, requires no deliberation; therefore, the same is dismissed as not pressed.

2. The next ground pertains to disallowing the disallowance made on account of claim of deduction u/s 10A of the Income Tax Act, 1961 (hereinafter the Act) for unit no. II and unit no. III (collectively referred to as units) of Rs.44,46,49,552/- and Rs.8,85,74,133/- respectively.

2.1. The ld. counsel for the assessee, Shri Sunil M. Lala along with Shri Harsh Shah and Pratik Poddar, claimed that the impugned issue is covered by the decision of the Tribunal dated 21/01/2015 (Assessment Year 2005-06) ITA No.6394/Mum/2014. This factual matrix was not controverted by Shri, S.D. Srivastava, ld. DR. However, he defended the conclusion arrived at in the impugned order by submitting that the assessee has not adduced any evidence at any stage to the effect that it was not expansion of existing business and further added that no substantial investment was made in the new plant and machinery by the assessee.

2.2. We have considered the rival submissions and perused the material available on record. Before coming to any conclusion, we are reproducing hereunder the relevant factual finding recorded by the ld. DRP for ready reference:-

"*The assessee has 5 units all engaged in providing ITeS services and they are having income as under:*

Sl. No.	Unit No.	Net Profits/(Loss) in Rs.	Remarks
1	I	(5339669)	
2.	II	44,46,49,552	Claimed as deduction u/s 10A
3.	III	8,85,74,133	Claimed as deduction u/s 10A
4.	IV	24493249	
5.	V	(3672192)	

It has claimed deduction under section 10A for units no. 2 and 3. The deduction under section 10A has been disallowed for the 1st time in AY 2005-06. Briefly the reason for disallowance of deduction u/s 10A as recorded in assessment order for AY 2005-06 is that both the units are not new units, but are expansions of units 1. The AO had relied on the approval of STPI, which has been granted to the assessee not for setting up a new unit, but for the expansion of unit 1."

2.3. The assessee has submitted that unit 2 and unit 3 are set up as new units and not as expansion of old unit 1. Unit 2 is engaged in insurance claims processing services from FY 2000-01, whereas unit 3 is engaged in providing call Centre services and it was formed in FY 2001-02. It is submitted that unit 1 is into software development business, which is totally different from the business of unit 2 and unit 3. The new units were setup using fresh investments and new plant and machinery. Customers of the 3 units are all different, unrelated and thus the units are new and independent sources of income. Unit 2 and 3 had acquired new clients and it is not a case of transfer of old clients of units 1 to new units. The employees of new units are also new and therefore it cannot be called as expansion of unit 1, but these are new units.

2.3.1 The documents have been produced by the assessee being applications regarding seeking approval of unit 2 and 3. The perusal of all the documents, including the applications made and the approvals granted, demonstrate without any ambiguity that the assessee sought approval for expansion of old unit 1 and it never sought approval to setup a new units. STPI has granted approval also for expansion of the unit 1. The assessee has relied upon the order of ITAT, Pune, in case of

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Patni Computers Ltd, which has been upheld by Bombay High Court, and has argued that deduction under section 10A cannot be disallowed for the reasons that STPI has granted approval for expansion of unit 1 and not to setup new units. The approval of STPI authority is irrelevant to grant deduction under section 1OA.

2.4. The judgement of Bombay High Court in case of Patni Computers supra has been examined carefully. Bombay High Court has decided the issue whether the deduction under section 10A is allowable to units being expansion of existing units on the ground that ITAT has recorded a finding that the new units set up in that case fulfilled all the conditions prescribed under section 10A(2) of the Act. The 3 units were separate and' independent units and cannot be treated as mere expansion of existing units and up held the order for the reasons that it is a finding of fact and no question of law is involved. Therefore, this is a decision on facts in that case and cannot be held to a decision of general application.

2.4.1 We have considered the order of the AD and the submissions of the assessee. Although assessee has made various submissions in support of its contentions, we find that the matter is still under litigation and has not attained finality. We note that in the order in its own case, Hon'ble ITAT Mumbai has restored the matter for fresh examination by the AD in light of the decision of Hon'ble Pune ITAT in Patni Computers and also other evidences. The Hon'ble ITAT has further directed that the letters including letter dated 10/12/2008 issued by Director STPI should also be looked into. Before us, the assessee has not been able to comprehensively establish its point. In this respect, we find that the provisions of Sec. 10A cannot be looked into isolation and approvals / sanctions by other designated authorities namely, Director STPI in this case is also equally critical. Thus, the conditions of the allowability under the LT. Act have to be examined along with conditions laid down by other rules and regulations specially framed for setting up STPI units. This is an exemption available in the I.T. Act with larger objectives in view and accordingly, approvals by the other authorities are equally important. Both the I.T. Authorities and other competent authorities have to work in unison to ensure that the legislative intentions and other objectives for the exemption are adequately achieved.

2-4.2 The order of ITAT has also been examined. ITAT in the said order has followed another ITAT order in case of Jayant Agro Organics ltd and had held that the manner of approval of STPI is not relevant to determine the allowability of deduction under section 10A. As long as

the new units are independent units, deduction under Section 10A is admissible if other eligibility conditions are fulfilled.

2.4.3 The AD has recorded a finding of fact in order for A. Y. 2005-06 under section 143(3)/254 dated 28.03. 2013 that through the audit report had mentioned that units 2 and unit 3 are registered with STPI Banglore, but there exists no such separate registration of unit 2 went 3 and these 2 units are set up as expansion of existing unit 1 only. Thus the audit report did not disclose the correct facts regarding registration of units 2 and 3 rather the statement of auditors is misleading that the units 2 and 3 are separately registered. The AD has referred to and relied on the document issued by director STPI, dated 12.09.2001, and also letter dated 24.12.2008 which together effectively demonstrate that the premises in which new units have been set up are the private bonded warehouse and the ITeS activities carried out in this location is are included as additional or expanded locations. Therefore, these locations cannot be treated or held as the new units, but they are mere expansion of the old units.

2.4.4 In this light, we find that the AD has rightly held that in the absence of separate STP registrations being obtained for setting up Unit II and Unit III, it is not entitled to deduction under Section 10A of the Act and as these units are only expansion of existing undertaking, the said units are not "independent units" and hence, would not be entitled to deduction under section 10A of the Act. We have also considered the facts that this issue has been examined by the CIT (A) and the earlier DRP. The AO's approach has been confirmed by both the above authorities. We have particularly considered the order of DRP for the A.Y.2008-09. In this order, the Hon'ble Panel has observed that detailed correspondences between the Directorate of Investigation and the Director of STPI, 8angalore, show that the assessee never sought fresh registration for establishing a new undertaking for claiming deduction u/s.10A. This is a pre-requirement even as per Foreign Trade Policy of the Government of light of the above discussion, we uphold the addition made by the AO."

2.3. If the observation made in the assessment order, conclusion drawn in the impugned order, material available on record and the assertions made by the ld respective counsel, if kept in juxtaposition and analyzed, we find that the assessee company had five units, all engaged in providing ITeS services. The assessee claimed deduction of Rs. 53,32,23,685/- u/s 10A

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of the Act for unit no. II (Rs.44,46,49,552/-) and (Rs.8,85,74,133) for unit no.III. The ld. Assessing Officer disallowed the claimed deduction for the first time for Assessment Year 2005-06, broadly on the ground that both the units are not new units but expansion of unit no. I. The stand of the Assessing Officer was based upon the approval of STPI, which was granted to the assessee, not for setting up of a new unit but it was merely a expansion of unit no. I, whereas, the claim of the assessee is that unit no. II and III were set up as new units but not the expansion of old unit no. I and further the new units were set up using fresh investment/new plant and machinery. It was also claimed that customers of unit no.III are different/unrelated, thus, the units are new and independent. Unit no.II and III were claimed to be acquiring new clients and it is not a case of transfer of old clients of unit no.I to new units. The whole case of the assessee is based upon seeking approval of unit no.II and III. The necessary documents were examined by the ld. AO as well as by the ld. DRP and found that **the assessee sought for approval of expansion of old unit no.I and never sought approval to set up of a new units** and further STPI granted approval for **expansion of unit no.I.** Before the AO/DRP, the assessee placed reliance upon the decision of the Pune Bench of the Tribunal in Patni Computers Ltd., which was upheld by Hon'ble jurisdictional High Court. However, we find that the Hon'ble High Court decide the issue with respect to section 10A on the ground that the Tribunal recorded a finding that the new units, set up by the assessee, had fulfilled all the condition prescribed u/s 10A(2) of the Act. Assessee has not

demonstrated before us that the finding recorded by the ld. DRP is perverse or contrary to facts. However, to safeguard the interest of both sides, we remand this issue to the file of AO to examine the claim of the assessee and after providing due opportunity of being heard will decide in accordance with law. The ld. AO is expected to record a factual finding after examining the claim of the assessee. The assessee is expected to explain its case with the help of the documentary evidences, if any, whether it is expansion of earlier business or the assessee has set up new business by making fresh investment in plant and machinery. The ld. Assessing Officer is also to examine whether unit no. II and III/other units are merely expansion of unit no.I or it was merely a change of nomenclature by the assessee. The AO is directed to examine the issue afresh, uninfluenced by any other order, whether the assessee has fulfilled the conditions stipulated in the Act and more specifically within the parameter of section 10A of the Act. The assessee is directed to furnish necessary details, if any, before the AO in support of its claim, therefore, this ground is allowed for statistical purposes only.

3. The next ground i.e. ground no. 3 pertains to reallocation of head office expenses. The crux of argument advanced on behalf of the assessee is that certain common expenses, amongst all the units, may be made on reasonable basis. On the other hand, the ld. DR, Shri Srivastava, defended the conclusion arrived at in the impugned order. Since, this ground is interconnected with the above ground, therefore, this ground is also remanded back to the file of the ld. Assessing Officer, consequently, The ld. Assessing Officer is directed to

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look into the allocation part/the claimed expenses and after examination, decide afresh, thus, this ground is also allowed for statistical purposes.

4. The next ground pertains to disallowance made u/s 14A of the Act. After hearing the rival submissions, we find that the assessee made investment in mutual funds and the group companies and resultantly earned dividend income. The Assessing Officer disallowed Rs.3,21,109/- u/s 14A of the Act read with Rule 8D of the Rules on proportionate basis. The stand of the assessee is that the investment was out of own funds and no expenses were incurred for earning the dividend income. Without going into much deliberation, we direct the ld. Assessing Officer to decide the case of the assessee in the light of the decision from Hon'ble jurisdictional High Court pronouncing in Godrej & Boyce Mfg. Co. Ltd. vs DCIT and also by duly considering the decision of Hon'ble Supreme Court in the case of Rajendra Prasad Moody (115 ITR 519). This ground is also allowed for statistical purposes.

5. The next ground pertains to disallowance of club expenses of Rs.20 lakh. The crux of argument on behalf of the assessee is that these expenses were incurred towards entrance fee of Karnataka Golf Association/wholly and exclusively for the purposes of business. On the other hand, the ld. CIT-DR, defended the conclusion arrived at in the impugned order. We find that right from assessment stage, the stand of the assessee is that the club membership is obtained to enable its Directors/Key Personnel's to develop contacts with various important persons including corporate leaders. After considering the totality of facts, we find that this issue is

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squarely covered in favour of the assessee by the decision from Hon'ble Apex Court in CIT vs United Glass Mfg. Co. Ltd. (2012) Civil Appeal No.6447 of 2012, CIT vs Nestle India Ltd. (2008) 296 ITR 682 (Del.), CIT vs Engineers India Ltd. (239 ITR 237) (Del.) and Gujarat Estate Export Corporation v/s CIT 80 taxman 568 (Guj.). The Hon'ble Delhi High Court in CIT vs Engineer India Ltd. (supra) held that initial admission fee paid to become a member of organization is allowable, likewise, Hon'ble Madras High Court in Sundaram Industries Ltd. (240 ITR 335) (Mad.) held that subscriptions paid by the company to club for enrolling its Director as members are deductible. The assessee paid the membership fee of the club by way of admission fee/corporate membership fee wholly and exclusively in the interest of the business, thus, it has to be allowed as business expenditure. Identical ratio was laid down in CIT vs Samtel Color Ltd. (2009) 180 taxman 82(Del.). The assessee is directed to ensure that such benefit is only available to the Director/Senior Executive of the assessee company and not to each and every employee of the assessee company. This ground of the assessee is therefore, allowed.

6. The next ground i.e. no. 6 is connected to the above ground, therefore, automatically disposed off.

7. The next ground i.e. no. 7 pertains to addition of Rs.56,53.867/- that the ld. TPO erred in recommending in adjustment and the ld. DRP erred in not deleting the said adjustment on account of interest received on loans given to AE. We find that this issue is covered by the decision of the Tribunal in the case of assessee itself order dated 5th June,

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2013 (35 taxman.com 348)(Mum.). The relevant portion of the same is reproduced hereunder:

"17. We have carefully considered the rival submissions and perused the record. The case of the assessee was that LIBOR as on 31.03.2008 was 2.49% against which the assessee has charged interest @ 6% p.a. In other words, interest charged by the assessee is much higher than the corresponding arm's length LIBOR even from an Indian transfer pricing perspective. It is not in dispute that the loan has been denominated in US dollars. Though the learned D.R., for the first time, raised a contention that the assessee might have taken loan in the earlier year to advance the same to its AE in the earlier year, in fact neither the TPO nor the DRP has considered the aspect from that angle and the assessee consistently prayed before the tax authorities that the assessee has not incurred any interest cost on funds given to the AE as the source of fund is surplus available with the assessee. In the absence of any material to prove to the contrary, merely because some interest has been paid in the immediately preceding year, it cannot be assumed that the assessee borrowed funds in the immediately preceding year was the source for the purpose of advancing loans to its AE. Having regard to the overall circumstances of the case we are of the view that issue stands squarely covered by the decision of the ITAT Delhi Bench in the case of Cotton Naturals (I) P. Ltd. Wherein the Bench observed that the CUP method is the most appropriate method in order to ascertain arm's length price of the international transaction i.e., where the lending money was in foreign currency to its AE the domestic prime lending rate would have no applicability and the interbank rate fixed should be taken as benchmark rate for international transactions. We, therefore, hold that LIBOR rate has to be adopted in the instance case since the interest charged by the assessee from its AE is higher than the LIBOR rate in the year under consideration no transfer pricing adjustment in that regard is

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warranted. We therefore set aside the order of the AO in this regard and allow the grounds urged by the assessee."

In view of the above decision, wherein, it was held the LIBOR rate has to be adopted in the instant case, since the interest charged by the assessee from its AE is higher than the LIBOR rate, no transfer pricing adjustment in that regard is warranted, therefore, this ground of the assessee is allowed.

8. Since, the LIBOR method has been found to be applicable to the case of the assessee, therefore, the appeal of the Revenue (ITA No.1107/Mum/2014) is automatically disposed off as it has become in-fructuous.

9. The next grounds i.e. no.9 and 10 are concerned, the ld. Counsel for the assessee contended that the assessee has moved/wants to move application u/s 154 of the Act, therefore, did not press these grounds, consequently dismissed as not pressed.

10. The last ground pertains to levy of interest u/s 234B and 234D of the Act. It is consequential in nature and hence requires no adjudication.

Finally, the appeal of the assessee is partly allowed for statistical purposes, whereas, the appeal of the Revenue is dismissed.

This Order was pronounced in the open court on 04/03/2015.

Sd/-	Sd/-
(B.R. Baskaran)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 04/03/2015

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Shekhar, P.S./नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)-   , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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