**IN THE INCOME TAX APPELLATE TRIBUNAL**
**PUNE BENCH "B", PUNE**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER**
**AND SHRI R.S. PADVEKAR, JUDICIAL MEMBER**

**ITA No.2554/PN/2012**
**(Assessment Year : 2009-10)**

Clarion Technologies Pvt. Ltd.,
4th Floor, Cybercity, Tower S-4,
Magarpatta City, Hadapsar,
Pune – 411 028.

PAN : AABCC8321Q .... Appellant

Vs.

Dy. Commissioner of Income Tax,
Circle- 1(1), Pune. .... Respondent

**ITA No.2610/PN/2012**
**(Assessment Year : 2009-10)**

Dy. Commissioner of Income Tax,
Circle- 1(1), Pune. .... Appellant

Vs.

Clarion Technologies Pvt. Ltd.,
4th Floor, Cybercity, Tower S-4,
Magarpatta City, Hadapsar,
Pune – 411 028.

PAN : AABCC8321Q .... Respondent

**C.O. No.06/PN/2014**
**(Arising out of ITA No.2610/PN/2012)**
**(Assessment Year : 2009-10)**

Clarion Technologies Pvt. Ltd.,
4th Floor, Cybercity, Tower S-4,
Magarpatta City, Hadapsar,
Pune – 411 028.

PAN : AABCC8321Q .... Cross Objector

Vs.

Dy. Commissioner of Income Tax,
Circle- 1(1), Pune. .... Appellant in Appeal

**ITA No.116/PN/2014**
**(Assessment Year : 2010-11)**

Clarion Technologies Pvt. Ltd.,
4th Floor, Tower S-4, Cybercity,
Magarpatta, Hadapsar,
Pune – 411 028.

PAN : AABCC8321Q .... Appellant

Vs.

Dy. Commissioner of Income Tax,
Circle- 1(1), Pune. .... Respondent

| | | |
|---|---|---|
| Assessee by | : | Shri Ajay Wadhwa |
| Department by | : | Shri A. K. Modi |

**ORDER**

**PER G. S. PANNU, AM**

The captioned four appeals relate to the same assessee and involve certain common issues therefore they have been heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. The assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of development of computer software and ITES services. The assessee's undertaking at Pune is registered with Software Technology Park of India (STPI) as a 100% Export Oriented Unit (EOU). The undertaking was granted approval by the Director, STPI as 100% EOU on 26.05.2004. The profits derived by the undertaking from development of software and export thereof were claimed as exempt as per the provisions of section 10B of the Income Tax Act, 1962 (in short "the Act"). The exemption relating to the profit derived from export of software development is the substantive dispute in the appeals before us. In assessment year 2010-11, the Assessing Officer denied claim made by the assessee for exemption u/s 10B of the Act on the ground that the assessee's undertaking was not approved by the Board appointed in this behalf by the Central Government u/s 14 of the Industries (Development and Regulation) Act, 1951 whereas the assessee was granted approval by Director, STPI only. The aforesaid stand of the Assessing Officer was based on the judgement of the Hon'ble Delhi High Court in the case of CIT vs. Regency Creations Ltd., (2012) 27 taxmann.com 322 (Del). However, the aforesaid objection was not raised by the Assessing Officer in the immediately preceding assessment year of 2009-10 wherein the Assessing Officer allowed the claim of exemption u/s 10B of the Act in-principle with certain modification

regarding the quantification of the claim on account of assessee's offices at Ahmedabad and Bangalore. In assessment year 2009-10, CIT(A) also concurred with the assessee for exemption u/s 10B of the Act in-principle but differed with the assessee only on account of the quantification of the claim.

3. In this background, now in so far as assessment year 2010-11 is concerned, assessee vide its appeal in ITA No.116/PN/2014 is assailing the stand of the income-tax authorities in holding that assessee is not eligible for the claim of exemption u/s 10B of the Act. This appeal is directed against the order of the CIT(A) - I, Pune dated 31.10.2013 which, in turn, has arisen from an order dated 28.01.2013 passed by the Assessing Officer u/s 143(3) of the Act for assessment year 2010-11.

4. Whereas for assessment year 2009-10 vide ITA Nos.2554 and 2610/PN/2012, the Revenue and assessee respectively are in cross-appeal arising from the order of the Commissioner of Income Tax (Appeals)-I, Pune dated 08.10.2012 which, in turn, has arisen from an order dated 16.12.2011 passed by the Assessing Officer u/s 143(3) of the Act. In the cross-appeals, the only issue relates to the manner and the quantum of exemption allowable to the assessee u/s 10B of the Act. Additionally, in assessment year 2009-10, assessee has also filed a cross-objection vide C.O. No.06/PN/2014, wherein no independent ground has been raised but it relates to the quantification of eligible exemption u/s 10B of the Act which is subsumed in dispute raised by the assessee in its appeal in ITA No.2554/PN/2012 for assessment year 2009-10.

5. In this background, the appeal of the assessee pertaining to assessment year 2010-11 was taken as the lead case and heard in order to determine the controversy relating to the claim of exemption u/s 10B of the Act

with respect to the profits derived by the assessee's undertaking from development of computer software and export thereof.

6. In this context, the following discussion is relevant. For assessment year 2010-11, assessee-company filed a return of income declaring total income of Rs.4,25,060/-, which, inter-alia included a claim of deduction u/s 10B of the Act amounting to Rs.5,31,24,880/- in respect of the profits derived from the business of development of computer software and export thereof. It was noticed by the Assessing Officer that the unit of the assessee was registered with Directorate of Software Technology Park of India (STPI) and therefore, according to him, it was not eligible for the benefits of section 10B of the Act following the ratio of the judgement of the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra). The primary objection of the Assessing Officer was that in order to be eligible for the benefits of section 10B of the Act, the undertaking of the assessee ought to be a 100% EOU as specified in Explanation 2(iv) below section 10B of the Act, which defines a *"hundred percent export oriented undertaking"* as an undertaking so approved by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951). The Assessing Officer pointed out that subsequent to the delegation of this power by the Ministry of Commerce and Industries to the Development Commissioners, such approvals to 100% EOUs are to be granted by the Development commissioners which are later ratified by the Board of approval. In this background, according to the Assessing Officer, unit of the assessee was neither approved by the Development Commissioners and nor subsequently ratified by the Board of approval and therefore it was ineligible for section 10B benefits. The Assessing Officer has also noted that the function of the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 to grant approval for the

benefits of section 10B of the Act has not been delegated to the Director, STPI. Therefore, since the unit of the assessee was only registered with Director of STPI and not having approval from the Development Commissioner as a 100% EOU as prescribed in Explanation 2(iv) below section 10B of the Act, assessee was not eligible for the benefits of section 10B of the Act. The CIT(A) has concurred with the Assessing Officer on this aspect.

7. Before us, the learned counsel for the assessee has not controverted the factual matrix that the stand of the Assessing Officer as well as of the CIT(A) is in conformity with the judgement of the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra). The Hon'ble Delhi High Court has specifically held that a mere approval by the STPI is not enough and that the approval should be granted by the Board constituted in accordance with the provisions of section 14 of the Industries (Development and Regulation) Act, 1951 in order to be eligible for the benefits of section 10B of the Act.

8. However, the learned Representative for the assessee has pointed out that unit of the assessee is registered with STPI and therefore such an approval should be understood as equivalent to obtaining of approval of the Development Commissioner. In this context, reference has also been made to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Technovate E Solutions P. Ltd., (2013) 354 ITR 110 (Del). In the course of hearing, the learned Representative has also submitted that the decision rendered by the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra) cannot form a basis for refusal of deduction to the assessee u/s 10B of the Act. In this context, it was pointed out that at the time of insertion of section 10B of the Act w.e.f. 01.04.1989 the Exim Policy of 1992-1997 was in force. Under the said policy, Board of approval was responsible for granting approval to the concerned units. However, the Central Government introduced certain

changes in the Foreign Trade Policy/Exim Policy from time to time with respect to the grant of approvals. Subsequently, in the Exim Policy of 2004-2009, it is stipulated that an EOU granted approval under paragraph 6.12(a) shall enjoy the benefits of deduction u/s 10B of the Act. The learned Representative submitted that the aforesaid aspect of the matter has not been considered in the judgement of the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra). The point made by the assessee is that on a conjoint reading of paragraphs 6.12 and 6.26 of the Foreign Trade Policy of 2004-2009, it becomes clear that an entity granted approval under paragraph 6.26 of the said Policy is expressly given the benefit of deduction u/s 10B of the Act and such intendment is expressly contained in paragraphs 6.12(a) of the Policy. Therefore, it has been sought to be canvassed that the aforesaid judgement of the Hon'ble Delhi High Court be not followed in order to deny the assessee's claim for deduction u/s 10B of the Act.

9. On the other hand, the learned CIT-DR has defended the action of the lower authorities by pointing out that the following discussion in the judgement of the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra) :-

> *"In the present case, there is no notification or official document suggesting that either the Inter-ministerial Committee, or any other officer or agency was nominated to perform the duties of the Board (constituted under section 14 of the OR Act), for purposes of approvals under section 10B. Though the considerations which apply for granting approval under sections 10A and 10B may to an extent, overlap, yet the deliberate segregation of these two benefits by the statute reflects Parliamentary intention that to qualify for benefit under either, the specific procedure enacted for that purpose has to be followed. There is nothing in any of the circulars or instructions relied on by the Tribunal in all the orders, implying that approval for purposes of an STP also entitled the unit to a benefit under section 10B. The orders of the Tribunal are consequently, erroneous, and it's reasoning unsupportable."*

10. We have carefully considered the rival submissions. The case set-up by the Revenue is that the undertaking of the assessee has not been approved by the Board appointed in this behalf by the Central Government in

exercise of powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951, which is an express requirement for claiming deduction u/s 10B of the Act because of the presence of Explanation 2(iv) below section 10B of the Act. The assessee has canvassed that it's 100% EOU is approved by the Director, STPI and therefore it should be taken as a substantive compliance with the prescription contained in Explanation 2(iv) below section 10B of the Act. There is no denying the fact that identical controversy has been considered by the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra) and it is on the basis of the said judgement, the lower authorities have denied the claim of the assessee for deduction u/s 10B of the Act. Admittedly, the 100% EOU of the assessee does not enjoy any specific approval from the authority referred to in Explanation 2(iv) below section 10B of the Act. In-fact, the plea of the assessee that the approval by Director, STPI be taken as equivalent to obtaining of approval from the entity prescribed in Explanation 2(iv) below section 10B of the Act has been specifically negated by the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra). The other aspect raised by the learned Representative for the assessee to the effect that a conjoint reading of the Exim Policy/Foreign Trade Policy entitles the assessee to the benefits of section 10B of the Act, once the unit is approved as per the Exim Policy. No doubt, such a plea is not found to have been urged before the Hon'ble Delhi High Court, so however, having regard to the judicial discipline, the Tribunal being inferior to the High Court, cannot disregard the judgement of the High Court in the manner sought to be canvassed before us. The judgement of the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra) is a solitary decision of a High Court on this issue and squarely covers the controversy before us. Therefore, we are unable to find any fault in the action of the lower authorities in denying the claim of the assessee for deduction u/s 10B of the Act, based on the judgement of the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra).

11. Before parting, we may also refer to the judgement of the Hon'ble Delhi High Court in the case Technovate E Solutions P. Ltd. (supra) relied upon by the assessee before us. In the case before the Hon'ble Delhi High Court, the issue related to a claim of deduction u/s 10A of the Act. The controversy was as to whether the approval granted by the Director of STPI was a sufficient approval so as to specify the condition stipulated in section 10A(2)(i)(b) of the Act. The Hon'ble High Court referred to the Instruction and communication of the CBDT and held that the approval granted by the Director of STPI would be deemed valid for the purposes of compliance with the conditions stipulated u/s 10A(2) of the Act. The aforesaid judgement of the Hon'ble Delhi High Court deals with the provisions of section 10A of the Act and not with section 10B of the Act, which is the subject-matter of controversy before us. Therefore, the judgement of the Hon'ble Delhi High Court in the case of Technovate E Solutions P. Ltd. (supra) does not help the assessee in the present case. Therefore, in so far as the action of the lower authorities in holding that the 100% EOU of the assessee was not entitled for the benefit of section 10B of the Act is concerned, the same is hereby affirmed.

12. In the proceedings before the CIT(A), assessee raised an alternate plea that it be allowed deduction u/a 10A of the Act in place of section 10B of the Act as the undertaking of the assessee is approved by the Director, STPI. The CIT(A) denied the alternate plea of the assessee for deduction u/s 10A of the Act also. In terms of his discussion in para 3.10.1 of the impugned order, the CIT(A) held that assessee has not demonstrated that all the requirements for availing the deduction u/s 10A of the Act, including furnishing of the specified Audit Report in Form No.56F have been complied with by the assessee. Against such a decision of the CIT(A), assessee is in further appeal before us.

13. Before us, the learned Representative for the assessee has vehemently argued that the CIT(A) has unjustly denied the claim of deduction u/s 10A of

the Act. The learned counsel pointed out that the claim of deduction u/s 10B of the Act was made in the return of income as it was allowed in the past years and assessee could not have envisaged its disallowance in the subsequent assessment proceedings; and, therefore the alternate claim of deduction u/s 10A of the Act was raised before the CIT(A) after the Assessing Officer disallowed it during assessment proceedings. In this context, it is pointed out that assessee fulfills all the conditions laid down in section 10A of the Act and hence it is eligible for the claim of deduction u/s 10A of the Act. The learned counsel also relied upon the judgement of the Hon'ble Delhi High Court in the case of CIT vs. Valiant Communication Ltd. in ITA Nos.440 – 441/2012 dated 04.01.2013 in support that alternate claim for deduction u/s 10A of the Act is required to be examined if assessee was not held entitled to the benefits of section 10B of the Act. In this context, reliance has also been placed on the judgement of the Hon'ble Madras High Court in the case M/s Heartland KG Information Limited vs. CIT, (2013) 39 taxmann.com 132 (Madras). Reliance has also been placed on the following decisions of the Tribunal in the case of Cloud Softech India Pvt. Ltd. vs. ITO vide ITA No.483/HYD/2013 and ACIT vs. Yashwant Kanetkar vide ITA No.150/Nag/2012, wherein in similar situations it has been held that after rejection of claim u/s 10B of the Act, an assessee is entitled to raise the alternate claim for deduction u/s 10A of the Act, and, the income-tax authorities are required to examine the same as per law.

14. The learned counsel pointed out that before the CIT(A), while assessee raised the alternate claim for deduction us10A of the Act assessee also furnished the prescribed Audit Report in Form No.56F for the claim of deduction u/s 10A of the Act. It has been submitted that the CIT(A) called for a remand report from the Assessing Officer also, so however, the Assessing Officer declined to examine the same on the ground that the prescribed Audit Report is required to be furnished along with the return of income in order to claim the deduction u/s 10A of the Act. The learned counsel submitted that

having regard to the factual matrix the claim of the assessee u/s 10A of the Act has been unjustly shutout.

15. On the other hand, the learned CIT-DR has primarily reiterated the stand of the CIT(A) in not entertaining the claim of deduction u/s 10A of the Act, which has been noted by us in the earlier paragraphs and the same is not being repeated for the sake of brevity.

16. We have carefully considered the rival submissions. In the present case, in the past years assessee has been allowed the claim of deduction u/s 10B of the Act. In the return of income filed for the assessment year under consideration i.e. 2010-11 also assessee claimed deduction u/s 10B of the Act in relation to the profits derived from its STPI unit. This claim of deduction came to be denied on the ground that the approval from Director, STPI was insufficient and that the assessee was required to take approval from the Board appointed for this purpose by the Central Government, following the judgement of the Hon'ble Delhi High Court in the case of Regency Creations Ltd. (supra). In the aforesaid situation, at the time of filing of return of income for the instant assessment year, assessee could not have envisaged the denial of its claim of deduction u/s 10B of the Act, which was being allowed in the past. The aforesaid circumstance clearly establishes the bonafides of the reasons prevailing with the assessee for not having made a claim for deduction u/s 10A of the Act in the return of income. Having regard to the peculiar facts and circumstances of the instant case, in our view, the stand of the Revenue that assessee cannot be allowed the benefits of section 10A of the Act merely because the prescribed Audit Report in Form No.56F was not filed in the return of income, is quite erroneous. Pertinently, after denial of deduction u/s 10B of the Act in the assessment order, the earliest opportunity for the assessee to stake claim for deduction u/s 10A of the Act was before the CIT(A); and, the assessee made the claim before the CIT(A) along with the

prescribed Audit Report in Form No.56F. The Hon'ble Delhi High Court in the case of Valiant Communications (supra) in similar circumstances held that the claim of the assessee for deduction u/s 10A of the Act is required to be examined in accordance with law. Pertinently, even in that case assessee had claimed deduction u/s 10B of the Act in the return of income, which was not allowed ultimately in the absence of the unit being approved by the Board appointed by the Central Government, whereas the unit was only registered with the STPI. The Hon'ble Delhi High Court directed the lower authorities to consider the claim of deduction u/s 10A of the Act in accordance with law. In the present case also, we find no reason to deny the assessee an opportunity to put-forth its claim for deduction u/s 10A of the Act with regard the profits of its STPI unit, subject of-course to the fulfillment of the prescribed conditions.

17. Section 10A of the Act provides a deduction of such profits and gains derived by an undertaking from export of articles or things or computer software manufactured or produced by it. The assessee claimed that it has undertaken export of computer software manufactured by it and its unit is registered with Director, STPI. The approval granted by Director, STPI has been held to be a sufficient compliance with requirements of section 10A(2)(i)(b) of the Act even as per the CBDT vide Instruction No.1 of 2006 dated 31.03.2006. Therefore, prima-facie the 100% EOU of the assessee, being registered with STPI, is eligible to stake claim for deduction u/s 10A of the Act, provided the other conditions laid down in section 10A of the Act are satisfied. Therefore, in conformity with the judgement of the Hon'ble Delhi High Court in the case of Valiant Communications (supra), we deem it fit and proper to remand the matter back to the file of the Assessing Officer for verifying the claim of the assessee for deduction u/s 10A of the Act as per law. The Assessing Officer shall consider the Form No.56F furnished by the assessee before the CIT(A) and such other material and submissions that the assessee may put-forth in order to justify its claim of deduction u/s 10A of the

Act. Needless to say, the Assessing Officer shall allow a reasonable opportunity of being heard to the assessee before adjudicating on the claim of the assessee for deduction u/s 10A of the Act in accordance with law. Thus, on the alternate plea assessee succeeds.

18. There is another aspect of the controversy, which is detailed as under. Without prejudice to his stand that deduction u/s 10B of the Act was not admissible to the assessee in entirety in the absence of the specific approval by the Board appointed by the Central Government in this behalf, the Assessing Officer also examined the quantum of deduction claimed by the assessee u/s 10B of the Act. The Assessing Officer did so, for the reason that if on a later date assessee is found to be eligible for the benefit of section 10B of the Act, then as per him assessee was not eligible for the complete amount of deduction claimed in the return of income. In this context, the Assessing Officer noted that assessee had three different centers, namely, (i) Pune Center; (ii) Bangalore Center; and, (iii) Ahmedabad Center. As per the Assessing Officer, only the Pune Center was registered as a STPI Unit. The Assessing Officer noted that assessee had initially started its activity at Pune with prior approval of STPI authority. Subsequently, it started software development centers at Bangalore on 11.07.2006 and at Ahmedabad on 01.05.2008. The assessee was required to explain the different activities carried out at different centers. From the detail of activities carried out at different centers, the Assessing Officer noted that activities for development of software and other services was divided amongst all the three units of the assessee located at Pune, Ahmedabad and Bangalore. As per the Assessing Officer, assessee-company carried out various software development related works at Ahmedabad and Bangalore units but delivered the product or services from its Pune unit which is registered under STPI. It was also noticed that the units at Bangalore and Ahmedabad were not approved under STPI scheme and there was no export from units at Ahmedabad or Bangalore. It

was also noted that assessee was not maintaining separate books of account in respect of the three units; nor the turnover or expenditure were separately allocated in the books of account. The Assessing Officer was of the view that deduction u/s 10B of the Act was not in respect of 'total business' of the assessee but it was specifically in respect of business or profession of the 100% EOU engaged in carrying on an eligible business. The Assessing Officer was of the view that the assessee had erroneously claimed deduction u/s 10B of the Act on whole of the profits of business even though units of the assessee at Bangalore and Ahmedabad were not 100% EOUs. Under these circumstances, the Assessing Officer proceeded to limit the deduction u/s 10B of the Act only in relation to the profits and gains of business or profession of the 100% EOU at Pune. For the said purpose, the Assessing Officer derived the profit of the three units by allocating the total profit of the assessee on the basis of the expenditures incurred at the three units. Accordingly, the profit of the Pune unit was computed at Rs.3,87,43,974/- as against Rs.5,31,24,880/- computed by the assessee and the balance profit of Rs.1,43,80904/- relating to the Bangalore and Ahmedabad units was held not eligible for deduction u/s 10B of the Act. However, as the entire deduction was disallowed by the Assessing Officer on the ground that the unit of the assessee was not approved by the Competent authority, no separate disallowance was made by the Assessing Officer on this ground. The aforesaid position was challenged by the assessee before the CIT(A). Though the CIT(A) agreed with the Assessing Officer that the entire deduction u/s 10B of the Act was disallowable, however, he has also considered the plea of the assessee that the Assessing Officer was not justified in scaling down the deduction pertaining to section 10B of the Act. In-principle, the CIT(A) has upheld the stand of the Assessing Officer. However, instead of determining the profits of Pune unit on the basis of the expenditure incurred at the respective units, he has re-computed the export profits of the eligible unit i.e. Pune unit by determining the profit of Bangalore and Ahmedabad units with markup of 20%

of expenditure of the two units. Accordingly, he computed the profit of Bangalore and Ahmedabad units at Rs.67,77,213/- instead of Rs.1,43,80,904/- considered by the Assessing Officer, thereby partially upping the quantum of deduction allowable to the assessee u/s 10B of the Act.

19. Against the aforesaid, assessee is in appeal before us by way of raising the following Additional Ground of Appeal :-

> *"The Ld. CIT((A) has erred on facts and in law in holding that the profit of Rs.67,77,213/- is a markup of 20% on the expenditure attributable to Bangalore and Ahmedabad units and the same will not be eligible for deduction u/s 10B or 10A in respect of the profits."*

20. The learned counsel submitted that the aforesaid Additional Ground emanates from the impugned order of the CIT(A) but it was not raised while filing the Memo of Appeal on the ground that since the deductions u/s 10A as well as under section 10B of the Act were disallowed by the CIT(A), the question of proportionate disallowance was inconsequential. So however, it is pointed out that the said ground is germane to the controversy and is relevant in order to determine the ultimate tax liability of the assessee. Therefore, on the basis of the judgement of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT, (1998) 229 ITR 383 (SC), it is submitted that the said Additional Ground be admitted for adjudication.

21. On the other hand, the learned CIT-DR has not seriously opposed the plea of the assessee for admission of the said Additional Ground of Appeal.

22. We have considered the rival stands and find that undoubtedly the aforesaid Additional Ground of Appeal arises from the impugned orders of the authorities below and, in any case, the relevant facts in order to adjudicate the aforesaid Additional Ground are available in the orders of the income-tax authorities. Therefore, we deem it fit and proper to admit the aforesaid

Additional Ground of Appeal, as was announced in the course of hearing. Accordingly, both the parities have made their arguments on the merits of the said Additional Ground.

23. As noted by us in earlier paragraphs, the Assessing Officer concluded that the entire profits declared by the assessee from development of software and export thereof are not entitled to the deduction u/s 10B of the Act on the ground that some level of profits is attributable to the units of the assessee located at Ahmedabad and Bangalore, which are not registered under STPI and only Pune unit is registered with STPI. The CIT(A) has justified the action of the Assessing Officer in-principle though he has differed with the Assessing Officer on quantification of profit relatable to the STPI unit. The fundamental point made out by the CIT(A) is that the deduction contemplated u/s 10A or 10B of the Act is not a benefit attached to the assessee but it is a deduction allowable with reference to the export profits of the eligible undertaking. The CIT(A) has also justified the action of the Assessing Officer in re-working the profits relatable to the Pune unit on account of sub-section (7) of section 10A/10B of the Act, which are identically worded and read as under :-

> *"The provisions of sub-section (8) and sub-section (10) of section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purposes of the undertaking referred to in section 80-IA."*

24. Sub-section (7) of section 10A and 10B of the Act provides that the provisions of sub-section (8) and sub-section (10) of section 80-IA shall apply in relation to the undertaking referred to in section 10A or section 10B as the case may be. At this stage, it would also be appropriate to refer to the provisions of section 80-IA(8) of the Act, which read as under :-

> *"(8) Where any goods [or services] held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods [or services] held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the*

*accounts of the eligible business does not correspond to the market value of such goods [or services] as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods [or services] as on that date :*
***Provided*** *that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.*
*[Explanation.—For the purposes of this sub-section, "market value", in relation to any goods or services, means the price that such goods or services would ordinarily fetch in the open market.]"*

25. In terms of the aforesaid provision, it is provided that where there is transfer of goods and services from an eligible business to any other business carried on by the assessee or where there is a transfer of goods and services from any other business carried out by the assessee to the eligible business then in either case, for the purposes of the deduction allowable, the profits and gains of such eligible business shall be computed as if the transfer in either case has been made at the market value of such goods or services as on that date. On the basis of the aforesaid, as per the CIT(A), the action of the Assessing Officer to re-compute the profits of Pune unit is justified. The relevant discussion in the order of the CIT(A) is as under :-

*"3.11.1 Where there is inter unit transfer of goods and services (i.e. transfer from eligible unit to the other unit and vice versa), sub-sec.(8) of section 80-IA provides that the profits and gains of eligible business shall be computed having regard to fair market value of such goods and services. In the case of present appellant, as explained by the appellant itself, the System Analysis for a particular project is done at Bangalore unit and transmitted to Pune unit. The Design team at Ahmedabad unit provides the required images to delivery team at Pune. Thus, there is inter unit transfer of goods and services i.e. transfer from non-eligible units to the eligible unit at Pune and the profits of the eligible undertaking can be computed having regard to fair market value of such goods and services so transferred by the non-eligible units under sub-sec. (8) of sec. 80-IA. As regards the contention of the appellant that Bangalore and Ahmedabad centers are only support centers, it is to be noted that the undertakings at Ahmedabad, Bangalore and Pune are distinct and separate undertakings/units started in different years and each center has separate establishment of its own and carried out a particular activity. Therefore, the units at Ahmedabad and Bangalore cannot be said to be mere support centers of Pune unit even if the specific jobs being executed by these centers were inseparable part of software exported by Pune unit. As the units of the appellant at Ahmedabad and Bangalore are not registered under STPI or under clause (iv) of Explanation-2 to section 10B, deduction u/s 10A/10B cannot be allowed in respect of profits attributable to Bangalore and Ahmedabad undertakings."*

26. The moot point is as to whether the CIT(A) is justified in invoking section 10B(7)/10A(7) r.w.s. 80-IA(8) of the Act in the present case. In the present case, the business of the assessee is development of software and export thereof. The undertaking of the assessee at Pune is registered with STPI. There is no dispute that the exports are effectuated from the STPI unit at Pune. As per the assessee, the Bangalore and Ahmedabad centers are only support centers and are not distinct or separate units. The CIT(A) disagreed with the assessee and concluded that the Bangalore and Ahmedabad centers are distinct undertakings even though according to him, the specific jobs being executed by these centers were *"inseparable part of software exported by Pune unit"*.

27. In this connection, the activities being carried out at different centers were detailed by the assessee before the lower authorities, and in particular the same has been extracted by the CIT(A) in para 3.4 of his order, which reads as under :-

> *"Teams Used:*
>
> *From Pune: Delivery Team – Service Delivery Manager (SDM), Team Leader, Developer, Quality Auditor, from Bangalore: R&D Team, System Analyst, from Ahmedabad: Graphic Designer.*
>
> *Work Summary:*
>
> - *After assigning the project SDM and Team Leader understood the project requirements and got the System Analysis done from Bangalore team. Team prepared the requirement document and handed back to delivery team. It was then got verified by client and development was kicked off.*
> - *The entire system was built in classic ASP and client wanted us to evaluate if the new modules can be built in ASP.Net and integrated with current Classic ASP system. This task of research was given to Bangalore team who did the study and confirmed that we cannot use ASP.Net for developing new modules as the existing code is not feasible be integration. Team continued the development in classic ASP.*
> - *When the payment integration module development came, delivery team and client was not able to decide which the best payment gateway suitable for this project is. Bangalore R&D team did the analysis and told that Paypal/Payflow payment gateway is the best suited one. It was then integrated by delivery team.*

- *Client wanted to have some graphic images modified in his application Design team from Ahmedabad worked on it and provided the required images to delivery team."*

28. The aforesaid would show that the activities being carried out at Ahmedabad and Bangalore centers are not independent of the software development activity undertaken at Pune and in any case it is also the conclusion of the CIT(A) that the jobs being executed by these centers are inseparable part of the software exported by the STPI unit at Pune. Moreover, the Assessing Officer has also emphasized that there is no independent activity of export carried out from Ahmedabad and Bangalore centers. It has also been held by the Assessing Officer that no separate account books or separate expenditure or separate turnover is being maintained/allocated with respect to the different centers. In this background, we may now consider the phraseology of section 80-IA(8) of the Act. A perusal of sub-section (8) of section 80-IA of the Act would reveal that it applies in situations where an assessee is carrying on an *"eligible business"* and *"any other business"*. Ostensibly, the provisions of sub-section (8) of section 80-IA of the Act would come into play if an assessee can be said to be carrying on an eligible business as well as any other business. In this background, one is required to examine as to whether the Ahmedabad and Bangalore centers can be considered to be *"any other business"* being carried out by the assessee so as to fall within the meaning of section 80-IA(8) of the Act.

29. The factual matrix noted above does not suggest that the support centers at Ahmedabad and Bangalore carry out any other business. The activities being carried out can, at best be, considered as supporting activities to the activity of software development and exports effectuated from the STPI unit at Pune. The finding of the CIT(A) that the specific jobs being executed by the Ahmedabad and Bangalore centers are inseparable part of software development and export unit at Pune coupled with the findings of the

Assessing Officer that the Bangalore and Ahmedabad centers do not have separate account books, expenditure or turnover reflects that the two centers cannot be said to be any other 'businesses' being run by the assessee. Therefore, considering the entirety of facts and circumstances, we are unable to concur with the Revenue that there exists *"any other business"* within the meaning of section 80-IA(8) of the Act qua the activities being carried out at Ahmedabd and Bangalore centers. Thus, in our view, invoking of section 80-IA(8) r.w.s. 10A(7) or 10B(7) of the Act in the present case is not justified. As a consequence, in our view, the stand of the CIT(A) in holding that the profits are required to be attributed to the Bangalore and Ahmedabad centers and only the resultant profit shall be eligible for the deduction u/s 10B or 10A of the Act, as the case may be, is not justified. Thus, we set-aside the orders of the authorities below on this aspect. Accordingly, assessee succeeds on this aspect.

30. The only other Ground of Appeal remaining for assessment year 2010-11 is with respect to a disallowance of Rs.1,29,852/- made u/s 14A of the Act. The said Ground has not been pressed at the time of hearing and the same is accordingly dismissed.

31. With respect to the appeals relating to assessment year 2009-10, the only dispute relates to the quantification of deduction u/s 10B of the Act which has been scaled down by the Assessing Officer on account of his perception that the Ahmedabad and Bangalore centers are independent businesses. The said aspect has been dealt with by us in the aforesaid paragraphs while dealing with the appeal for assessment year 2010-11. The ratio of our decision on this aspect in assessment year 2010-11 shall apply *mutatis-mutandis* in the appeals for assessment year 2009-10 also. Moreover, for assessment year 2009-10 no separate arguments have been made as according to the parties the issue raised is liable to be decided in the light of

our decision in assessment year 2010-11. Accordingly, we direct the Assessing Officer to consider our decision for assessment year 2010-11 on the aspect of the proportionate disallowance of deduction and thereafter re-compute the income of the assessee as per law.

32. In the result, whereas the appeal of the Revenue is dismissed, the other captioned appeals of the assessee are partly allowed, as above.

Order pronounced in the open Court on 30th October, 2014.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(R.S. PADVEKAR)** | **(G.S. PANNU)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Pune, Dated: 30th October, 2014.

*Sujeet*

*Copy of the order is forwarded to: -*

1) The Assessee;
2) The Department;
3) The CIT(A)-I, Pune;
4) The CIT-I, Pune;
5) The DR "B" Bench, I.T.A.T., Pune;
6) Guard File.

By Order

//True Copy//

Assistant Registrar
I.T.A.T., Pune