IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.1859/DEL/2019

Assessment Year: 2011-12

M/s. Avalon BusinessAssociates,	**Vs.**	ITO Ward 41(5)
F-31A, Moti Nagar, Delhi-110015		New Delhi

PAN: AAOFA4380M

Appellant **Respondent**

Assessee by Ms. Hasneeta Matta, CA
Sh. Mahesh Kumar, CA
Revenue by Sh. Ashok Gautam, Sr. DR

Date of hearing:	01.06.2021
Pronouncement on	04.06.2021

ORDER

PER K. NARASIMHA CHARY, JM

Aggrieved the order dated 01.01.2019 passed by the learned Commissioner of Income Tax (Appeals)-14, Delhi ("Ld. CIT(A)") confirming the order dated 30.01.2017 passed u/s.143(3) r.w.s. 263 of the Income Tax Act, 1961 ("the Act") by the ITO, Ward 41(5), Delhi ("AO"),

whereunder while disallowing the claim for deduction u/s.10B of the Act,the learned Assessing Officer assessed the income of the assessee at Rs.6,39,58,019/- as against the returned total income of Rs. NIL and raised a demand of Rs.2,68,77,750/-.

2. Brief facts of the case, as are relevant for the purpose of this appeal, are that the assessee is a partnership firm, having registered as a 100% Export- Oriented Undertaking (EOU) with the Software Technology Park (Noida) for the Development/Manufacture and Export of Computer Software/IT enabled services vide Letter of Permission No. STPIN/APP/1152020/201299/70562 dated 15.01.2010 ("LOP"); that subsequently, in terms of the applicable Foreign Trade Policy, an Agreement dated 26.03.2010 was entered between the appellant and the President of India acting through the Director, STPI Noida, while marking a copy of such agreement to the Dy Commissioner Customs & Central Excise, New Delhi.

3. For the assessment year 2011-12, assessee was allowed deduction under section 10 B of the Act to the tune of Rs. 6,37,26,747/-and the income was assessed at Rs. 2,31,272/-by order dated 5/3/2014 passed under section 143(3) of the Act. Such an order was, however, revised by the Ld. Principal Commissioner of Income Tax by order dated 22/3/2016 under section 263 of the Act and directing the Assessing Officer to consider the issues relating to the bank realisation certificate authenticating the nature of remittances stated to have been received in India and also the approval of the assessee by the board appointed by

the Central government in terms of explanation 2 (iv) of section 10B of the Act.

4. Pursuant to such an order, learned Assessing Officer considered the issue involving the claim of the assessee for deduction under section 10 B of the Act and recorded a finding of fact that the assessee failed to adduce necessary evidence to the effect that the approval granted by the Development Commissioner of STPI was ratified by the board of approval for EOU scheme, and since this is a crucial requirement envisaged under section 10 B of the Act, he, accordingly, disallowed the entire claim of deduction under section 10B of the Act. Learned Assessing Officer further observed that though the assessee provided details of the subsequent receipts of the foreign currency, no documentary evidence, being foreign inward remittances certificates in this regard were furnished and, therefore, could not be verified. On this premise learned Assessing Officer held that the claim of the assessee was found untenable and the export turnover of the assessee would be only Rs. 4,39,59,107/-. Lastly, learned Assessing Officer invoked section 10 B (7) read with section 80 IA (10) of the Act in respect of the transactions of the assessee with the related party M/s Avalon Information Systems Private Limited.

5. Aggrieved by this action of the learned Assessing Officer, assessee preferred this appeal. Initially, the challenge was only in respect of the disallowance of the benefit under section 10B of the Act, but subsequently by way of additional grounds, the assessee sought to take an alternative plea to direct the authorities to allow the deduction under section 10A of the Act in the alternative on the plea that the provisions of section 10 A of the Act are Parimateria with section 10B of the Act in

respect of the undertakings registered and approved by STPI, which fulfils the conditions under section 10 A of the Act also, besides challenging the findings of the learned Assessing Officer on other 2 counts also.

6. It is the argument of the Ld. AR that though initially at the time of the insertion of section 10 B of the Act in the statute, in view of the prevailing regulatory mechanism in respect of the industries by way of Industries (development regulation) Act, 1951, the change in the industrial policy of the government and the consequent March of law in respect of the revelations under the IDRA are not reflected promptly in the Income Tax Act more particularly in clause (iv) of explanation 2 to section 10 B of the Act. Though Ld. AR argued at length on behalf of the assessee basing on the requirement of approval of the board under explanation 2 (iv) of section 10B the changes that were brought in the powers conferred under section 14 of the industries (development and regulation) Act, 1951 and the rules made thereunder from time to time and also the reasons for the bona fide belief and understanding of the assessee that the assessee had met all the conditions of the STPI approval and entered into a contract which was approved by the competent authority fulfils the legal requirements to be entitled for the benefit of the deduction under section 10B of the Act. Ld. AR fairly conceded that, however, the Hon'ble jurisdictional High Court of Delhi in the case of CIT v. Regency Creations Ltd (2013) 353 ITR 326 (Delhi) held that the approval contemplated as per Explanation 2(iv) to S.10B, even if from the Director STPI, needs ratification by the "Board" specified therein (in Explanation 2(iv) to S.10B) for it to be a valid approval, and such a finding of the Hon’ble jurisdictional High Court holds the field as on the date.

She, however, submitted that subsequently, in the case of Regency Creations *supra,*the Hon'ble Courtrevised its earlier order dated 17.09.2012 vide order dated 04.01.2013and directed the Tribunal toconsider alternative claim for entitlement u/s.10A of the Act where the eligibility to claim benefit u/s.10B was frustrated due to the approval criteria not being met.

7. She further submitted that under similar circumstances involving the similar facts as those of the case on hand, the coordinate benches of the Tribunal considered the question of setting aside the issue of considering the claim of the assessee under section 10 A of the Act. She placed reliance on the decision of the Hon'ble jurisdictional High Court in the case of Fast Booking (I) (P) Ltd vs. DCIT (2017) 80 taxmann.com 142 (Delhi) and the decisions of the Tribunal in the case of M/s Smart Cube India Private Limited vs. ITO in ITA No. 5473/del/2016, Valiant Communications Ltd vs. ACIT in ITA No. 1537 /Del/ 2015. She further submitted that in terms of similar predicament facing the appellant regarding the validity of approval for purposes of S.10B of the Act, in the present appeal, the appellant moved an application dated 04.01.2021 requesting for admission of amended grounds of appeal, including Ground No. 4, for the Hon'ble Tribunal to consider the alternative claim u/s.10A of the Act in view of the revised order dated 04.01.2013 of the Hon'ble Delhi High Court in the case of Regency Creations *(supra).* She further submitted that the adjudication of grounds No. 4 to 6 do not require any fresh material and they can be decided in the light of the law and the decisions of the Hon'ble jurisdictional High Court as well as the coordinate benches of this Tribunal. She supported her plea to admit the

additional grounds, with the decision of the Hon'ble Supreme Court in the case of NTPC Ltd vs. CIT (1998) 229 ITR 383 SC.

8. Per contra, Ld. DR placing reliance on the orders of the authorities below and submitted that the authorities are justified in holding that in the absence of any approval to the assessee from the competent board of approvals, the assessee is not advisable for claim of deduction under section 10 B of the Act and more particularly the order passed under section 263 of the Act was confirmed by the Tribunal in appeal preferred by the assessee. In the circumstances, Ld. DR submitted that there are no grounds, much less valid grounds to interfere with the orders of the authorities below and prayed to dismiss the appeal.

9. We have gone through the record in the light of the submissions made on either side. Though Ld. AR argued at length stating that in view of the scheme under the software technology Park (STP) scheme, 1991 (STP scheme) and the electronic hardware technology Park scheme, 1993 (EHTP scheme) certain exceptions are carved out for R&D, software and IT enabled services and the administration of the STP/HTP was entrusted to the Ministry of communication and information technology through the Director, software technology Park of India and therefore, the requirement of the approval by the board appointed in this behalf by the Central government is not required, she fairly conceded that the decision of the Hon'ble jurisdictional High Court in the case of Regency Creations Ltd (supra), the authority holding the field as on today clearly laid down that the approval contemplated as per explanation 2 (iv) to section 10 B of the Act, even if from the Director, STPI, it needs ratification by the board specified therein.

10. She, therefore, fairly submitted that in view of the fact that the case of the Hon'ble High Court in Regency creations (supra) is against the case of the assessee, grounds No. 1 to 3 to be decided against the assessee. She, however, submitted that subsequently, in the case of Regency Creations (supra) the Hon'ble High Court revised its earlier order dated 19/9/2012, vide order dated 04/01/2013 and directed the Tribunal to consider the alternative claim of the assessee for entitlement under section 10 A of the Act. She, therefore, submitted that this factual and legal situation necessitated the assessee to make an application for admission of the additional grounds.

11. On this aspect, the fact remains that the adjudication of the additional grounds do not require any fresh material to command record and the same could be adjudicated basing on the material available on record. In view of the decision of the Hon'ble Supreme Court in the case of NTPC Ltd (supra), we find that the additional grounds could be admitted and the assessee can be permitted to argue the case on their alternative prayer to consider the entitlement of deduction under section 10 A of the Act instead of section 10 B of the Act.

12. The prayer of the Ld. AR as to the entitlement of the assessee to make a request to consider the case under section 10A of the Act instead of section 10 B of the Act if the conditions required under section 10 A of the Act are fulfilled, is premised on their submission that the operating conditions concerning and STPI undertaking or identical under section 10 A (2) and (3) and section 10 B (2) and (3), including the compliances like contents of audit report in form number 56F and 56G together with the computation mechanism etc. Further, such an issue is no longer res

Integra and as rightly argued by the Ld. AR, it is covered by the decision of the Hon'ble jurisdictional High Court in the case of fast booking (supra) and also by the view taken by the coordinate benches of this Tribunal in the case of M/s smart cube India private limited (supra) and valiant communications Ltd (supra). In M/s a smart cube India private limited (supra), and valiant communications Ltd (supra) coordinate Benches of this Tribunal following the observations of the Hon'ble jurisdictional High Court in the revised order passed by the High Court in such case in CM No. 19897/2012 set aside the matter to the file of the assessing officer to consider the case of the assessee under section 10 A of the Act.

13. In fast booking (supra) the Hon'ble jurisdictional High Court observed that,-

> *11. The Respondent Assessees in the above cases, including Valiant Communications Ltd. and Regency Creations Ltd. filed applications before this Court for clarification that even though they may not be entitled to the benefit under Section 10B, they should not be denied the benefit under Section 10A as they satisfied the requirements for availing the benefit under Section 10A. On these applications, this Court passed the following order on 4th January 2013:*
>
> > *"Issue notice. Sh. Kiran Babu, Sr. Standing Counsel accepts notice on behalf of the Revenue.*
> >
> > *The applicant assessee had succeeded before the Tribunal in the contention that it was entitled to the benefit of Section 10B of the Income Tax Act. It had urged that the supporting materials disclose that there was STP clearance/approval under Sectin 10A and that such approval was sufficient to entitle it to the benefit of Section 10B. But judgment, this Court negatives the plea with regard to the approval vis-vis Section 10B and has ruled that separate regime exists.*

> *The applicant contends that the CIT(A) and the Tribunal had, in the present case, not gone into the merits of the alternative claim for entitlement under Section 10A. This fact is apparent from a reading of the order of CIT (A) as well as that of the Tribunal in the order impugned. In the circumstances, the Tribunal shall consider the relevant documents on the basis of the claims and ascertain whether the applicant is entitled to the benefit of Section 10A, as claimed. The judgment and order of this Court dated 17.09.2012 is accordingly modified; the Tribunal shall proceed to pass appropriate orders after hearing both parties."*

… …

14. Having heard the learned counsel for the parties, the Court is of the view that ITAT was in error in declining to examine the cross objections filed by the Appellant Assessee. The powers of the ITAT while hearing appeals and cross objections have been explained by this Court in ***CIT v. Edward Keventer (Successors) Pvt. Ltd. (1980) 123 ITR 200*** *in the following words:*

> *"Now, adverting to the rights of the respondent in an appeal, we start with the basic idea that, if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has a grievance, he has a right to file a cross-appeal (and under the Civil Procedure Code and the I.T. Act of 1961, a memorandum of objections). But, if no such thing is done, he is deemed to be satisfied with the decision. He is, therefore, entitled to support the judgment of the first officer on any ground but he is not entitled to raise a ground which will work adversely to the appellant. In fact such a ground may be a totally new ground, if it is purely one of law, and does not necessitate the recording of any evidence, even though the nature of the objection may be such that it is not only a defence to the appeal itself but goes further and may affect the validity of the entire proceedings. But the entertainment of such a ground would be subject to the restriction that even if it is accepted, it should be given*

effect to only for the purpose of sustaining the order in appeal and dismissing the appeal and cannot be made use of, to disturb or to set aside, the order in favour of the appellant (See Bamasi v. CIT). This liberty to the respondent is reserved by Rule 27 of the Tribunal Rules.

We have next to consider the powers of the Tribunal while disposing of the appeal. Rule 12, earlier referred to, also lays down that the Tribunal, in deciding an appeal, is not confined to the grounds set forth in the memorandum of appeal or those which the appellant may urge with its leave. It can decide the appeal on any ground provided only that the affected party has an opportunity of being heard on that ground. But it has been laid down in a number of cases that this rule does not enable the Tribunal to raise a ground, or permit the party who has not appealed to raise a ground, which will work adversely to the appellant and result in an enhancement."

15. The Supreme Court in ***NTPC v. CIT(1998) 229 ITR 383 SC*** *has also explained that the power of the Tribunal in dealing with the appeals under Section 254 of the Act is " expressed in the widest possible terms". It was further observed as under:*

"5. …..The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be

prevented from considering questions of law arising in assessment proceedings although not raised earlier."

…   …

17. The basis of this Court remanding the matters in Valiant Communications Ltd. cases to the ITAT was precisely to consider whether the benefit under Section 10A could be granted to those Assessees notwithstanding that they may not be entitled to the benefit under Section 10B. It was, therefore, open to the Appellant Assessee herein to seek support of the order of the CIT (A) on the ground which was not urged before the CIT (A) as long as it was not going to be adverse to the case of the Appellant i.e. the Revenue before the ITAT. The ITAT in considering such plea was not going to be persuaded to come to a different conclusion as far as the appeal of the Revenue pertaining to the benefit under Section 10B of the Act was concerned. Particularly in the light of the order passed by this Court on 4th January 2013 in the applications filed by Valiant Communications Ltd., there should have been no difficulty for the ITAT to have examined the Appellant Assessee's cross objections.

14. In the circumstances, in view of the similarity of the facts and we find it just and proper to accept the contention of the assessee in the light of the additions referred to above and set aside the impugned order and remand the issue to the file of the learned Assessing Officer with a direction to the examine the claim of the assessee under section 10 A of the Act. We accordingly, set aside the impugned order and remand the issue to the file of the learned Assessing Officer to comply with the above observations. In view of our this conclusion, we find it is not necessary to adjudicate the grievance of the assessee in respect of the requirements of section 10B (3) and also the invocation of section 10 B (7) read with section 80IA of the Act. Assessee is free to raise all the contentions before the assessing officer and the learned Assessing Officer, while

considering the contentions of the assessee in the light of the above additions, is free to take a fresh view on this aspect.

15. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 04 /06/2021

Sd/-	Sd/-
(G.S. PANNU)	**(K. NARSIMHA CHARY)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 04/06/2021

Copy forwarded to:
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2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR
ITAT NEW DELHI