

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA Nos.1555 & 1556/Bang/2017
Assessment year : 2005-06 & 2004-05

EIT Services India Pvt. Ltd., (formerly Hewlett-Packard Global Soft Pvt. Ltd.), 39/40, Electronic City, Bangalore – 560 100. PAN: AAACD 4078L	Vs.	The Assistant Commissioner of Income Tax, Circle 2(1)(2), [Erstwhile Addl.CIT, Range 11], Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri T. Suryanarayana, Advocate
Respondent by	:	Shri R.K. Mishra, CIT-I(DR)(ITAT), Bengaluru.

Date of hearing	:	28.10.2020
Date of Pronouncement	:	03.11.2020

ORDER

Per N.V. Vasudevan, Vice President

These are appeals by the Assessee/Assessee against two orders dated 15.2.2010 and 26.3.2009 of the CIT(Appeals)-IV, Bangalore relating to assessment years 2005-06 & 2004-05 respectively. Both these appeals arise under identical facts and circumstances and were heard together. We therefore deem it convenient to decide these appeals by this common order.

2. There is a delay in filing the appeals of 2625 days for AY 2005-06 and 2944 days for AY 2004-05. The facts and circumstances giving rise to

these appeals and the reasons for the delay in filing these two appeals need to be considered together.

3. The facts and circumstances giving rise to appeal for AY 2005-06 are that the assessee which is in the business of rendering Software Development Services, filed its return of income for AY 2005-06 declaring total income of Rs.2,19,86,860/-. An order of Assessment dated 30.12.2008 under Section 143(3) of the Income-tax Act, 1961 ("the Act") was passed by the Assessing Officer (AO) computing total income at Rs. 725,277,770. The three additions that were made by the AO in this order were as follows:-

- (i) Expenditure on Software of Rs.95,66,521 which was claimed as revenue expenditure was disallowed and treated as capital expenditure. However depreciation @ 60% was allowed thereby the disallowance on account of treating expenditure on software as revenue expenditure was Rs.38,26,608 and this sum was added to the total income of the Assessee;
- (ii) The Assessee had claimed deduction u/s.10A of the Act at Rs.134,80,27,117/-. The AO found that in applying the formula for claiming deduction u/s.10A of the Act, the Assessee had reduced telecommunication expenses incurred in foreign currency both from the Export turnover and total turnover. According to the AO, as per the definition of Export turnover, the said expenses have to be deducted only from Export turnover and total turnover. The AO accordingly recomputed deduction u/s.10A of the Act. The AO also found the Assessee had 5 units that were Software Technology Parks of India registered units that were eligible for deduction u/s.10A of the Act. One unit had incurred loss during

the relevant previous year. The Assessee had claimed deduction u/s.10A of the Act on profits of the remaining 4 units without setting off the loss in one of the units. The AO computed deduction u/s.10A of the Act by reducing the loss of one of the units from the profits of the 4 units on which deduction u/s.10A of the Act was claimed. As a result of the above two adjustments the deduction u/s.10A was allowed by the AO at Rs.114,87,47,042/-.

- (iii) The third Addition made by the AO was an addition of Rs.50,01,84,225/- on account of determination of Arm's Length Price (ALP) u/s. 92 of the Act, in respect of international transactions entered into with an Associated Enterprise (AE). One of the international transactions was with an AE in United States of America (USA) and addition on account of determination of ALP and transfer pricing with the USA AE was Rs.32,54,19,721 out of the addition of Rs.50,01,84,225/-.

4. The Assessee preferred appeal against the aforesaid order of assessment on 2.2.2009 before the learned Commissioner of Income-tax (Appeals) ["CIT(A)"] challenging all the additions made by the AO including the addition on account of determination of ALP/transfer price. Subsequently, Mutual Agreement Procedure was settled and the TP adjustment was agreed at Rs 273,723,474 as against Rs 325,419,721 for the transactions with the USA AE. The Assessee withdrew the grounds pertaining to the TP adjustment to the extent of the USA portion and the balance TP adjustment of Rs 174,764,504 pertaining to non-USA portion was on appeal before the CIT(A).

5. When the appeal of the Assessee before the CIT(Appeals) was pending, the Commissioner of Income-tax ("CIT") initiated revisionary proceedings under section 263 of the Act against the order u/s.143(3) dated 30.12.2008 passed by the AO. By an order dated 21.12.2009, the CIT had set aside the assessment order to the office of the AO, and the AO was directed to make a fresh assessment on the following issues viz.,

- (i) Software expenses were regarded as capital in nature and depreciation at 60% was allowed on those expenses without making proper and necessary verification;
- (ii) The AO ought to have verified whether the technical services rendered outside India by the Assessee that were deducted while computing Export turnover of the various STPI units were technical services rendered outside India in connection with business of export of computer software or was a separate business of rendering technical services outside India distinct from and unrelated to the business of export of computer software and if it was so distinct and unrelated then the eligibility of the said receipts to deduction u/s.80HHE of the Act had to be examined; and
- (iii) interest received on income tax refund was directed to be taxed.

6. The Assessee did not file an appeal before the Tribunal against the order of the CIT under section 263 of the Act. According to the Assessee, it was of the bonafide belief that the assessment has been completely set aside and the AO was directed to make a fresh assessment.

7. The CIT(A) by an order dated 15.2.2010 dismissed the appeal of the Assessee against the order of assessment dated 30.12.2008, which is the

order impugned in this appeal holding that the CIT in exercise of his powers u/s.263 of the Act has set aside the impugned assessment order and directed the AO to make fresh assessment and the appeal filed against the said order does not survive, as the very foundation of the appeal ceased to exist. Holding thus, the CIT(A) had considered the appeal as infructuous and dismissed the appeal filed by the Assessee.

8. Pursuant to the order under section 263 of the Act dated 21.12.2009, the AO passed the order dated 24.10.2010 under section 143(3) read with section 263 of the Act. Against the said order the Assessee filed appeal before CIT(A) in which the Assessee raised grounds relating to issues that were not subject matter of proceedings u/s.263 of the Act. The CIT(A) passed an order dated October 18, 2011, wherein he held that the scope of proceedings before the AO pursuant to the order u/s.263 of the Act was only restricted to issues considered in the order u/s.263 of the Act and did not extend to other issues arising from the order of assessment dated 30.8.2008 passed u/s.143(3) of the Act that remain undisturbed. The CIT(A) therefore did not adjudicate those issues. The Assessee filed appeal before the ITAT against the order of CIT(A) holding that he has no authority to adjudicate issues that did not emanate from the order u/s. 263 of the Act. The Tribunal by an order dated 24.6.2016 dismissed the appeal of the Assessee upholding the aforesaid order of the CIT(A) insofar as it relates to jurisdiction of the CIT(A) to consider issues other than the issues that were directed to be considered by the AO in the order u/s.263 of the Act. It was stated by the learned counsel for the Assessee that the Assessee has preferred appeal against the order of the Tribunal dated 24.6.2016 before the Hon'ble High Court and the same is pending.

9. According to the Assessee, it was on the basis of professional opinion, under the belief that the issues that were sought to be agitated

before the CIT(A) against the order of assessment dated 30.12.2008 could be agitated before the AO in the proceedings pursuant to the order u/s.263 of the Act. But after the Tribunal verdict dated 24.6.2016, it sought proper legal course given the fact that its grievance regarding issues arising from the order of assessment dated 20.12.2008 remains non-adjudicated. On legal advice, the Assessee has sought to file an appeal before the Tribunal, against the order of the CIT(A) dated February 15, 2010. The last day for filing the appeal before the Tribunal against the order of the CIT(A) dated March 09, 2010 was May 07, 2010. The Assessee has filed the subject appeal on July 15, 2017 with a delay of 2625 days (May 08, 2010 to July 15, 2017).

10. In support of the application to condone delay in filing appeal, one Mr. Marshal Correia, Managing Director of the Assessee has filed affidavit, in which, the facts stated above have been elaborated. The learned counsel for the assessee reiterated the contents of the affidavit as above and has prayed for condonation of delay in filing the appeals. His submission was that in tax matters, substantive rights cannot be denied on the basis of technicalities and a liberal approach should be adopted in the matter of condoning delay in filing appeal. The Id. DR, however, opposed prayer for condoning delay on the ground that the delay is inordinate.

11. We have given a careful consideration to the rival submissions and we find that it is only on the receipt of Tribunal's order in the appeal arising out of proceeding subsequent to the order passed by the CIT u/s. 263 of the Act that the assessee came to know that the issues, which were not subject matter of 263 proceedings and which arose out of additions made in the original order of assessment, had to be challenged by way of filing appeals against the order of CIT(Appeals) dated 15.2.2010 for AY 2005-06. The date on which the assessee received the order of Tribunal was on 12.7.2016 for AY 2005-06. The appeal before the Tribunal has been filed

only on 14.7.2017. As far as delay from the date of the impugned order passed in the year 2009 till 12.7.2016 is concerned, the belief entertained by the Assessee based on legal advice that the additions made in the original order of assessment can still be challenged in the proceedings pursuant to order passed u/s.263 of the Act, cannot be said to be not bonafide. As far as the delay from the date of Tribunal's order in the year 2016 till filing of the appeal only in the year 2017, is concerned, it has been submitted in the affidavit that after prolonged discussion and legal advice, it was suggested that the appeals should be filed against the orders of CIT(Appeals) dated 15.2.2010 for AY 2005-06. We are of the view that given the factual scenario and nature of disputes, the plea of assessee that delay in filing of the appeals before the Tribunal was due to *bona fide* reasons has to be accepted. Keeping in mind the principle that substantive rights should not be denied by technicalities, we condone the delay in filing the appeals before the Tribunal.

12. As far as merit of appeals are concerned, we are of the view that the scope of proceedings pursuant to an order u/s.263 of the Act, have not been properly appreciated. The relevant provisions of Sec.263 of the Act read thus:-

“Revision of orders prejudicial to revenue.

263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

(a) an order passed on or before or after the 1st day of June, 1988] by the Assessing Officer shall include—

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A ;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120;

(b) "record" shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.”

13. It is not in dispute before us that the issues which were sought to be raised in the appeal before the CIT(A) were not at all subject matter of original proceedings u/s. 263 of the Act and therefore in terms of Explanation (1)(c) to section 263(1) of the Act, the issues raised in the appeals before the CIT(A) ought to have been adjudicated by the CIT(Appeals) and his conclusion that the entire assessment order has been set aside in the proceedings u/s. 263 is erroneous. The issue with regard to expenditure on computer software, method of computation of deduction u/s.10A of the Act have been considered from a different facet in the order u/s.10A of the Act and that facet had nothing to do with the issues that

were raised by the Assessee in the appeal before the CIT(A). The Transfer pricing adjustment issue was not at all an issue that was considered in the order u/s.263 of the Act. Therefore the CIT(A) ought to have adjudicated the issues raised by the Assessee before it. Since the issues sought to be now raised in the present appeals have not been adjudicated by the CIT(Appeals), we deem it fit and proper to set aside the order of CIT(A) and restore the issues raised in the appeals before the CIT(A) for adjudication by the CIT(Appeals) on merits. We hold and direct accordingly.

14. As far as the appeal for AY 2004-05 is concerned, the facts are identical. In the AY 2004-05, the AO passed order u/s.143(3) of the Act on 29.12.2006. In this year the Assessee claimed deduction u/s.10A of Rs.139,63,36,628/- and for identical reasons given in AY 2005-06, the AO computed deduction u/s.10A of the Act at Rs.126,58,02,038/-. The Assessee had claimed deduction u/s.80HHE of the Act at Rs.39,22,804. The AO allowed the claim for deduction only at Rs.24,88,343/- but the reasons for such reduction in the claim has not been elaborated in the order of Assessment. An addition on account of determination of ALP to the extent of Rs.17,53,48,548/- was also made by the AO. The Assessee preferred appeal before CIT(A) against the said order of assessment on 25.1.2007. When the said appeal was pending determination by the CIT(A), through Mutual Agreement Procedure TP adjustment was agreed at Rs. 134,615,081 for the transactions with the USA AE. The Assessee withdrew the grounds pertaining to the TP adjustment to the extent of the USA portion and the balance TP adjustment of Rs. 40,729,859 pertaining to non-USA portion was on appeal before the CIT(A).

15. Meanwhile, the CIT initiated revisionary proceedings u/s. 263 of the Act and pronounced an order u/s. 263 of the Act dated 17.2.2009 wherein the CIT had set aside the assessment order to the office of the AO, and the AO was directed to make a fresh assessment. By the said order, the CIT

held that the AO ought to have verified whether the technical services rendered outside India by the Assessee that were deducted while computing Export turnover of the various STPI units were technical services rendered outside India in connection with business of export of computer software or was a separate business of rendering technical services outside India distinct from and unrelated to the business of export of computer software and if it was so distinct and unrelated, then the eligibility of the said receipts to deduction u/s.80HHE of the Act had to be examined.

16. The Assessee had not filed an appeal before the Tribunal against the order of the CIT under Section 263 of the Act as the Assessee was of the bonafide belief that the assessment has been completely set aside and the AO was directed to make a fresh assessment in this regard.

17. Pursuant to the order under section 263 of the Act dated 17.2.2009, the AO passed the order dated 30.12.2009 under section 143(3) read with section 263 of the Act. Against the said order the Assessee filed appeal before CIT(A) in which the Assessee raised grounds relating to issues that were not subject matter of proceedings u/s.263 of the Act. The CIT(A) passed an order dated 17.7.2012, wherein he held that he held that the scope of proceedings before the AO pursuant to the order u/s.263 of the Act was only restricted to issues considered in the order u/s.263 of the Act and did not extend to other issues arising from the order of assessment dated 30.8.2008 passed u/s.143(3) of the Act that remain undisturbed. The CIT(A) therefore did not adjudicate those issues. The Assessee filed appeal before the ITAT against the order of CIT(A) holding that he has no authority to adjudicate issues that did not emanate from the order u/s.263 of the Act. The Tribunal by an order dated 17.10.2016 dismissed the appeal of the Assessee upholding the aforesaid order of the CIT(A) in so far as it relates to jurisdiction of the CIT(A) to consider issues other than the

issues that were directed to be considered by the AO in the order u/s.263 of the Act. It was stated by the learned counsel for the Assessee that the Assessee has preferred appeal against the order of the Tribunal dated 17.10.2016 before the Hon'ble High Court and the same is pending.

18. According to the Assessee it was, on the basis of professional opinion, under the belief that the issues that were sought to be agitated before the CIT(A) against the order of assessment dated 30.12.2009 could be agitated before the AO in the proceedings before the AO pursuant to order u/s.263 of the Act. But after the Tribunal verdict dated 17.10.2016, it sought proper legal course given the fact that its grievance regarding issues arising from the order of assessment dated 30.12.2009 remains non adjudicated. On legal advice, the Assessee has sought to file an appeal before the Tribunal, against the order of the CIT(A) dated 26.3.2009.

19. The last day for filing the appeal before the Tribunal against the order of the CIT(A) dated March 26, 2009 was June 22, 2009. The Assessee has, however, filed appeal before Tribunal only on 15.7.2017 with a delay of 2944 days.

20. As far the request of the Assessee for condoning delay in filing appeal is concerned, we have already condoned similar delay in filing appeal for identical reasons while dealing with the appeal for AY 2005-06. For the reasons stated therein, we condone the delay in filing the appeal by the Assessee for AY 2004-05 also.

21. As far as the merits of the appeal of the Assessee for AY 2004-05 is concerned, we are of the view that the issues dealt with by the CIT in the order passed u/s.263 of the Act in AY 2004-05 had nothing to do with the issues that the Assessee sought to raise in its appeal against the original order of assessment dated 29.12.2006 passed u/s.143(3) of the Act.

Therefore the CIT(A) ought to have adjudicated the issues raised by the Assessee before it. Since the issues sought to be now raised in the present appeals have not been adjudicated by the CIT(Appeals), we deem it fit and proper to set aside the order of CIT(A) and restore the issues raised in the appeals before the CIT(A) for adjudication by the CIT(Appeals) on merits. We hold and direct accordingly.

22. In the result, the appeals of the assessee are treated as allowed for statistical purposes.

Pronounced in the open court on this 3rd day of November, 2020.

Sd/-
(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 03rd November, 2020.

/Desai S Murthy/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.