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

INCOME TAX APPEAL NO. 1725 OF 2013

The Commissioner of Income tax-II ..Appellant

v/s.

Ntrance Customer Services Pvt. Ltd. ..Respondent

Mr. Suresh Kumar i/b Vipul Bajpayee for the appellant

Ms. Megha Sharma i/b PDS Legal for the respondent

CORAM : M.S. SANKLECHA &
G.S. KULKARNI, J.J.

DATED : 24th NOVEMBER, 2015.

P.C.

1. This appeal filed by the Revenue challenges order dated 31st October, 2012 passed by the Income Tax Appellate Tribunal (the Tribunal) whereby the Revenue's appeal in respect of Assessment year 2007-2008 was dismissed.

2. The Revenue has urged the following substantial question of law for our consideration :-

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating that the disallowance u/s 40(a)(ia) has been enacted by the legislature to discourage non deduction of tax at source and by allowing deduction u/s 10A on the disallowance, the very purpose of this enactment by the legislature would be defeated?

3. The Respondent-Assessee has claimed deduction on account of expenditure of Rs.46.11 lakhs while determining its profits for the subject Assessment Year. The Assessing Officer disallowed the expenditure on account of failure to deduct tax at the time of the making payment in Section 40(a) (ia) of the Act. The Assessee contended that disallowed expenditure would result in enhanced profit which would continue to be deductible under Section 10-A of the Act and thus, no tax was payable on the expenditure disallowed. However, the Assessing Officer by an order dated 23rd December, 2009 did not accept that the Assessee's contention resulting in an amount of Rs.46.11 lakhs being excluded from the benefit of Section 10-A of the Act and subjected to tax.

4. In appeal, the Commissioner of Income Tax (Appeals) by an order dated 12th October 2012, allowed the Respondent Assessee's appeal. This was by holding that increase in income on account of disallowance of expenditure would result in additional claim being allowed under Section 10-A of the Act. The decision of this Court in the case of the ***Commissioner of Income Tax Vs. Gem Plus Jewellery India Ltd. (2011) 330 ITR 175,*** was followed.

5. Being aggrieved, the Revenue carried the issue in Appeal before the Tribunal. The Tribunal by the impugned order upheld the order dated 12th October, 2002 of the Commissioner of the Income Tax (Appeals), by following the decision of this Court in *Gem Plus Jewellery India Ltd. (Supra)* and dismissed the Revenue's appeal.

6. The grievance of the Revenue is that the entire object of Section 40(a) (ia) of the Act is to discourage an assessee from not deducting tax at source and, therefore, where the expenditure has been dis-allowed, the dis-allowed expenditure must suffer tax. Therefore, the benefit of deduction under Section 10A of the Act

cannot be extended to such income, which is a result of disallowance. It is further submitted that the decision of this Court in *Gem Plus Jewellery India Ltd. (Supra),* would have no application as it dealt with the situation of the dis-allowance under Section 43-B of the Act and not under Section 40 (a) (ia) of the Act, on a specific query. Mr. Suresh Kumar, learned Counsel for the Revenue, on instructions, informs us that the entire income of the Respondent Assessee's is only on account of activity entitled for deuction under Section 10A of the Act.

7. The grievance made by the Revenue in fact stands concluded by the decision of this Court in the case of *Gem Plus Jewellery India Ltd. (Supra),* where disallowance of expenditure under Section 43-B of the Act was added to the income of the Assessee therein but deduction under Section 10A of the Act was sought to be denied to the extent of disallowed expenditure. This Court did not accept the Revenue's contention in its appeal in *Gem Plus Jewellery India Ltd. (Supra)* by making following observations :-

> *"12. …. The disallowance of the provident fund / ESIC payments has been made because of the statutory provisions – Section 43B in the case of the employer's contribution and section 36(v) read with section 2(24) (x) in the case of the employee's contribution which has been deemed to be the income of the assessee. The plain consequence of the disallowance and the add back that has been made by the Assessing Officer is an increase in the business profits of the assessee. The contention of the revenue that in computing the deduction under Section 10A the addition made on account of the disallowance of the provident fund / ESIC payments ought to be ignored cannot be accepted. No statutory provision to that effect having been made, the plain consequence of the disallowance made by the Assessing Officer must follow. The second question shall accordingly, stand answered against the revenue and in favour of the assessee".*
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> *(emphasis supplied)*

8. In the present case also, the plain consequence of disallowance of the expenditure would be to add back the disallowed expenditure to the Respondent-Assessee's income. The entire income of the Respondent-Assessee is attributable to the

activity of export of computer softwares and is entitled to deduction under Section 10A of the Act. In the circumstances, the disallowed expenditure, becomes a part of the income derived from the activity of export of software and entitled to the deduction under Section 10-A of the Act. In these circumstances, as the issue stands concluded by the decision of this Court in the case of *Gem Plus Jewellery India Ltd. (Supra)* against the Revenue and in favour of the Respondent Assessee, no substantial question of law arises for our consideration.

9. Appeal dismissed. No order as to costs.

(G.S. KULKARNI, J.) **(M.S. SANKLECHA, J.)**