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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

10-13

+ **ITA 334/2015**

FAST BOOKING (I) PVT. LTD. Appellant

Through: Mr. Ved Jain, Advocate with
Mr. Pranjal Srivastava, Advocate.

versus

DY. COMMISSIONER OF INCOME TAX -11(1)..... Respondent
Through: Ms. Suruchi Aggarwal, Senior Standing
counsel with Ms. Lakshmi Gurung, Junior
Standing counsel.

With

ITA 338/2015

FAST BOOKING (I) PVT. LTD. Appellant

Through: Mr. Ved Jain, Advocate with
Mr. Pranjal Srivastava, Advocate.

versus

DY. COMMISSIONER OF INCOME TAX -11(1)..... Respondent
Through: Ms. Suruchi Aggarwal, Senior Standing
counsel with Ms. Lakshmi Gurung, Junior
Standing counsel.

With

ITA 339/2015

FAST BOOKING (I) PVT. LTD. Appellant

Through: Mr. Ved Jain, Advocate with
Mr. Pranjal Srivastava, Advocate.

versus

DY. COMMISSIONER OF INCOME TAX -11(1)..... Respondent
Through: Ms. Suruchi Aggarwal, Senior Standing
counsel with Ms. Lakshmi Gurung, Junior
Standing counsel.

And

ITA 342/2015

FAST BOOKING (I) PVT LTD Appellant

Through: Mr. Ved Jain, Advocate with
Mr. Pranjal Srivastava, Advocate.

versus

DY. COMMISSIONER OF INCOME TAX -11(1)..... Respondent
Through: Ms. Suruchi Aggarwal, Senior Standing
counsel with Ms. Lakshmi Gurung, Junior
Standing counsel.

CORAM:

HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

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02.09.2015

CM APPL No. 9115 of 2015(for exemption) in ITA 334 of 2015

CM APPL No. 9226 of 2015(for exemption) in ITA 338 of 2015

CM APPL No. 9227 of 2015(for exemption) in ITA 339 of 2015

1. Allowed, subject to all just exceptions.

2. The applications are disposed of.

ITA Nos. 334 of 2015, 338 of 2015, 339 of 2015 and 342 of 2015

3. These four appeals by the Appellant Assessee are directed against the impugned common order dated 10th December 2014 of the Income Tax Appellate Tribunal (ITAT) to the extent that the ITAT has declined to examine the Assessee's Cross Objection Nos. 125/Del/2013 and 145/Del/2013 for the Assessment Years ('AYs') 2009-10 and 2008-09 respectively.

4. Admit.

5. The following question is framed:

“Whether the ITAT was correct in law in not examining the Assessee's cross objections?”

6. The background facts are that the Assessee is engaged in the business of software development and is registered with the Software Technology Park of India ('STPI') Noida. The Assessee is a hundred percent export oriented unit ('EOU') having been duly approved as such by the Joint Director, STPI, Ministry of Communication and Information Technology, Government of India.

7. The Appellant Assessee filed its return of income for AYs 2008-09 and 2009-10, declaring nil income and claiming deduction under Section 10B of the Act in respect of the profit derived from export of computer software.

8. The Assessing Officer ('AO') in the assessment orders dated 20th

December 2010 and 27th December 2011 for the AYs 2008-09 and 2009-10 respectively disallowed the claim on the ground that certification of the Assessee as EOU ought to have been by the statutory Board referred to in the Explanation to Section 10B of the Act and not by the Joint Director.

9. The matter was carried by the Assessee in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. Meanwhile the ITAT, Delhi Bench in the case of ***Valiant Communication Ltd. v. DCIT*** (order dated 23rd April, 2010 in ITA No. 2706/Del/2008), allowed the claim of the Appellant therein under Section 10B by holding that approval by the Joint Director, STPI was sufficient to claim the deduction. On the basis of the above decision, the appeals of the Assessee herein were allowed by the CIT (A) vide order dated 26th October 2012. Since the order of the CIT (A) was in its favour, the Assessee had no occasion to go before the ITAT. However, the Revenue filed appeals against the said order before the ITAT.

10. While the Revenue's appeals were pending, the order of the ITAT in ***Valiant Communications Ltd.*** (supra) was carried in appeal before this Court by the Revenue. The said appeal was considered with a bunch of other similar cases and in ***CIT v. Regency Creations Ltd.(2013) 353 ITR 326(Del)***, this Court held that for the purposes of availing the benefit of Section 10B of the Act, the certification by the Board was mandatory and that such exemption could not be granted on the basis of the certificate issued by the Joint Director.

11. The Respondent Assessee 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 Section 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.”

12. On coming to know of the above order, the Appellant Assessee herein filed its cross objection before the ITAT in the two pending appeals of the Revenue against the order of the CIT(A) for AYs 2008-09 and 2009-10.

13. In the impugned order, the ITAT relied on the decision of this Court in ***Regency Creations Ltd.*** (*supra*) and allowed the Revenue's appeals. The ITAT restored the order of the AO disallowing the claim made by the Assessee under Section 10B of the Act. While taking up the cross-objections, although the delay in filing was condoned, the ITAT declined to permit the Assessee to maintain the cross objections by following the decision of the Coordinate Bench of the ITAT in ***ITO v. Neetee Clothing (P) Ltd.*** [2010] 129 TTJ 342 (ITAT [Del]), on the ground that since the Assessee had not urged the plea of being entitled to the benefit under Section 10 A of the Act before the CIT (A), it could not be permitted to urge such plea for the first time before the ITAT.

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, advertent 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.”

16. It is pointed out by learned counsel for the Appellant that despite bringing to the notice of the ITAT, the order dated 4th January 2013 passed by the Court in the applications filed by the Valiant Communications Ltd., which has been extracted hereinbefore, the ITAT in the impugned order does not advert to said order at all.

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 Assessee 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.

18. Consequently, the question framed is answered in the negative, i.e. in favour of the Assessee and against the Revenue. The impugned order dated 10th December 2014 of the ITAT to the extent that it declined to examine the Appellant Assessee's cross objections on merits is hereby set aside. The Appellant Assessee's cross objections Nos. 125/Del/2013 and 145/Del/2013 for the Assessment Years ('AYs') 2009-10 and 2008-09 respectively are restored to the file of the ITAT for consideration on merits.

19. The appeals are allowed in the above terms, but in the circumstances, with no orders as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

SEPTEMBER 02, 2015

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