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

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\+ **W.P.(C) 8165/2010**

DSL SOFTWARE LIMITED ...Petitioner

Through: Mr. Ajay Vohra, Sr. Advocate with Ms. Kavita Jha and Mr. Vaibhav Kulkarni, Advocates

Versus

ASSISTANT COMMISSIONER OF INCOME TAX & ANR...Respondents

Through: Mr. Rahul Chaudhary, Senior Standing Counsel with Ms. Lakshmi Gurung, Advocate

**CORAM:**
**JUSTICE S. MURALIDHAR**
**JUSTICE PRATHIBA M. SINGH**

**ORDER**

% **20.07.2017**

1. This writ petition by DSL Software Limited (hereafter 'the Assessee') seeks the quashing of a notice dated 30th March, 2010 issued by the Assistant Commissioner of Income Tax, Central-2, New Delhi [hereafter 'the Assessing Officer' ('AO')] under Section 148 of the Income Tax Act, 1961 ('the Act') as well as the order dated 19th November, 2010 passed by the AO rejecting the objections of the Assessee to the aforementioned notice.

2. The background to this petition is that the Assessee is engaged in the business of development and export of computer software and rendering ITES services. It is stated that the Assessee at present stands amalgamated with its parent company – HCL Technologies Limited.

3. For the Assessment Year ('AY') 2004-2005, the Assessee filed its return of income declaring an income of Rs.13,77,92,301. In this return, the Assessee claimed a deduction under Section 10A of the Act at Rs.83,46,87,478/- in respect of profits derived by various eligible undertakings, namely, the Shivalaya Unit, the BPO Unit and the GNR Unit. No deduction was claimed under Section 10A in respect of the software unit at Chennai. Deduction under Section 80HHE was claimed in respect of the Leela Galleria Unit.

4. At the time of computing its income for the AY in question, the Assessee allocated the profits of its overseas branches at Singapore, United Kingdom ('UK') and United States of America ('USA') to the eligible units and considered the same while calculating the profits of the units for the purposes of Section 10A of the Act. A certificate of the Chartered Accountant ('CA') in Form 56F was also submitted in support of the above deduction claimed under Section 10A of the Act.

5.In the course of the assessment proceedings, the AO issued to the Assessee a notice dated 10th November, 2006 under Section 142(1) of the Act. Specific queries and details/information was sought by the AO in respect of the deductions claimed under Section 10A and 80HHE of the Act. A detailed reply was furnished by the Assessee on 4th December, 2006. The assessment was completed by the AO by passing an assessment order dated 25th December, 2006 under Section 143(3) of the Act making the following adjustments:

| SNo. | | Rupees |
|---|---|---|
| *1.* | *Excess claim of deduction under Section 80HHE* | *87,50,303* |
| *2.* | *Excess claim of deduction under Section 10A in respect of BPO Unit* | *8,60,750* |
| *3.* | *Excess claim of deduction under Section 10A in respect of GNR Unit* | *4,03,10,294* |
| *4.* | *Disallowance of expenses under Section 14A* | *6,83,473* |

6. More than four years later by the impugned notice dated 30th March, 2010 issued by the AO to the Assessee under Section 148 of the Act proposing to reassess the income of the Assessee for the AY in question on the ground that some part thereof that had escaped assessment. By a letter dated 5th April, 2010, the Assessee filed its return of income under protest and sought reasons for the reopening of the assessment.

7. The reasons furnished by the AO to the Assessee for the reopening of the assessment were as under:

(i) Allowability of deduction under Section 10A of the Act on the profits of foreign branches in the case of the three undertakings (Shivalaya unit, Chennai unit and GNR unit).

(ii) Allowability of provision for doubtful debts to the extent of Rs.29.48 lakhs.

8.The Assessee then objected to the reopening by pointing out that both issues had been examined by the AO during the course of the assessment proceedings under Section 143(3) of the Act and the reopening was sought to be made on no fresh tangible material. The reopening was based on mere change of opinion which was impermissible in law. It was specifically urged that there was no failure by the Assessee to make a full and true disclosure of all material facts necessary for the assessment.

9. The above objections of the Assessee were rejected by the AO by the impugned order dated 19th November, 2010. Thereafter, the present writ petition was filed in which while issuing notice on 7th December, 2010, this Court passed an interim order to the effect that the assessment proceedings shall continue and a final order could be passed but would not be given effect to without the leave of the Court. That interim order has continued since then.

10. Mr. Ajay Vohra, learned Senior Counsel appearing for the Assessee submitted that:

(i) There was no failure by the Assessee to disclose fully and truly all the material particulars relevant to the assessment;

(ii) The formation of belief of income having escaped assessment was not passed by the AO afresh on the basis of tangible material and since it was based only on the existing assessment record, which contained all the relevant material which were already disclosed by the Assessee, the reopening was based on a mere change of opinion.

11. Mr. Rahul Chaudhary, learned Senior Standing Counsel appearing for the Revenue, on the other hand, contended that in the present case in terms of Explanation-I to Section 147 of the Act there was no deemed disclosure only because the Assessee had produced the balance sheets and books of account etc. during the assessment proceedings.

12. At the outset, the Court would like to observe that Explanation I does not relieve the Revenue of having to show that there was a failure by the Assessee to disclose, fully and truly, all the relevant particulars necessary for the assessment. All that Explanation I does is to clarify that the mere production of balance-sheet and books of account should not be deemed to be a disclosure. Nevertheless, the Revenue still have to show in what manner there was a failure by the Assessee to make a full and true disclosure of materials relevant to the assessment.

13. The first reason for the reopening of the assessment is that while computing the deduction allowable under Section 10A, the profits which the Assessee had earned from its foreign unit branch situated in UK, USA and Singapore were "wrongly considered" and as a result of the deduction under Section 10A "wrongly claimed in respect of the said branch profits". It was stated that while calculating the profits under the head "P/G/B/P" after the aggregate amount of Rs.50.34 lacs on account of provisions for doubtful debts, the Assessee had only added back an amount of Rs.20.86 lacs and failed to add back Rs.29.48 lacs "which was also liable to be disallowed". It is thereafter simply stated that "the assessee company failed to disclose fully and truly all material facts necessary for its assessment and claimed excess deduction".

14. In the considered view of the Court, this is a mechanical a repetition of the words of the Section without in fact pointing out in what manner there was such failure particularly since the original assessment was completed under Section 143 (3) of the Act and it was only after the AO had issued a

questionnaire which included queries on both the above issues. The formation of belief that the income had escaped assessment is based on the alleged wrong claim for deduction and the failure to add back certain sums which comprised the provision for bad and doubtful debts. Both these issues had been examined by the AO during the original assessment proceedings under Section 143 (3) of the Act. There was neither any failure by the Assessee to disclose the relevant materials nor was there any fresh tangible material to justify the AO's formation of belief that income had escaped assessment. Consequently, the Court is satisfied that the jurisdictional requirement of there having to be a failure by the Assessee to make a full and true disclosure of the material facts relevant for the assessment in terms of the first proviso to Section 147 of the Act is not fulfilled in the present case.

15. The Court has nevertheless also examined the merits of the two reasons given by the AO to justify the reopening of the assessment. As far as the deduction under Section 10A of the Act is concerned, there was a complete disclosure of all the relevant facts for each of the units in respect of which the deduction was claimed. The certificate in Form 56F as prepared by the CA, enclosed the calculations for the deductions claimed. The assessment order also shows that the AO had applied its mind to the issues and after considering the explanation submitted by the Assessee, allowed the deduction. The matter travelled, at the instance of the Assessee, to the Commissioner of Income Tax (Appeals) ['CIT(A)'] as well as Income Tax Appellate Tribunal ('ITAT'). Before the ITAT, the Assessee in fact succeeded to the extent that the AO had made the addition on this score. In

terms of the fourth proviso to Section 147 of the Act, this was an additional reason why the assessment could not have been reopened.

16. There was no fresh tangible material available with the AO which would justify the formation of the reasons to believe that income had escaped assessment. The mere conclusion that the deduction under Section 10A and 80HHE was 'wrongly claimed', without anything more, would not satisfy the statutory requirement or be a sufficient justification for reopening the assessment.

17. Mr. Chaudhary sought to submit that where there was a wrong claim for deduction, then it would not be 'true' disclosure by the Assessee. The Court is unable to accept this submission. An AO, when coming across an earlier assessment order, might feel that although the previous incumbent AO had framed the assessment under Section 143(3) of the Act, he should not have allowed a claim or deduction. Where this is not based on any fresh tangible material, it would be a mere review of the earlier assessment order. That is not what is envisaged by the first proviso to Section 147 of the Act when it states that where the assessment is after four years, the formation of belief that income has escaped assessment should be for the reason that there was a failure by the Assessee to make full and true disclosure of all the material facts necessary for the assessment. Where all the facts relevant to the assessment were in fact placed before the AO, and an enquiry undertaken and thereafter an assessment made, it is not open to the AO to now claim, on the basis of the same assessment record, that only because a wrong deduction was allowed or claimed there was no "true disclosure of all

material facts".

18. As far as deductions under Section 10A and 80HHE is concerned, the Court is left with no manner of doubt that there was a true and full disclosure of all material facts by the Assessee. There was no fresh tangible material with the AO to justify the reopening of the assessment on this aspect. In para 25 B of the notice issued by the AO to the Assessee on 10th November 2006, the tabular form in which the Assessee was required to furnish information pertaining to each operational unit was set out. In its reply dated 4th December 2006, the Assessee stated thus:

> "Exclusion of Branch profits while calculating deduction u/ss 80HHE
>
> The branch profits of Rs. 2,86,04,187/- related to Leela Unit in relation to which tax deduction under section 80HHE was claimed by the Assessee Company have been duly excluded while calculating deduction under section 80HHE. Further, the calculation of deduction u/s 80HHE in relation to Leela Unit is enclosed herewith for your kind reference as per Annexure-D."

19. Annexure D in fact set out the calculation in detail. In the assessment order dated 28th December 2006, the AO noted *inter alia*:

> "The assessee was asked to furnish details of telecommunication charges, freight insurance charges etc. and expenses incurred in foreign exchange for providing technical services outside India and also to explain why these expenses should not be deducted from export turnover.
>
> The assessee furnished details of expenses incurred in Foreign Currency for providing technical services outside India and also telecommunication expenses for all units at Rs. 18,84,66,338/- and Rs. 2,94,32,671/- respectively. He also filed unit wise details of expenses.

> The assessee company has also provided the break up of the expenses on telecommunication and incurred in foreign exchange and is as under in respect of Units where deduction u/s 80HHE and 10A has been claimed."

20. The AO then discussed the issue at length and concluded:

> "Hence the definition of total turnover given in section 80HHC cannot be adopted for the purpose of section 10A. Accordingly, the specified deductions made from the export turnover cannot be reduced from the total turnover. Hence the total turnover is to be adopted without reducing the expenditure i.e. telecommunication charges incurred for the actual delivery of software outside India."

21. Thereafter, as already noted, when the matter travelled to the ITAT, the deduction claimed was said to be allowable and the view of the AO was reversed in part. In the circumstances, this was an instance where the AO who finalised the assessment under Section 143 examined the issue and came to a conclusion which was disagreed with by the ITAT. There had to be some fresh tangible material for the assessment to be thereafter reopened. There is none in this case.

22. As regards the alleged failure by the Assessee to add back to its income Rs. 29.48 lakhs comprising the provision for doubtful debts, the Court finds that the computation in that regard was furnished by the Assessee as is evident from the documents placed on record in the original assessment proceedings. In the letter addressed by the AO to the Assessee, this aspect was specifically adverted to. The reply by the Assessee also dealt with it. It is, therefore, not possible to accept the Revenue’s case that on this aspect there was any failure by the Assessee to make a full and true disclosure of all material facts relevant to the assessment.

23. In ***Maruti Suzuki India Ltd. v Deputy Commissioner of Income Tax (2013) 356 ITR 209***, on the issue regarding the provision for bad debts having to be added back, it was held that "where a claim for deduction has in fact been examined by the AO it would amount formation of an opinion despite the fact that no additions had been made or reasons therefrom had been given in the original assessment order". Thus, when, after examination in the first round, the matter is sought to be reopened by issuance of notice under Section 148 of the Income Tax Act, 1961, it would clearly be a case of change of opinion and the re-assessment proceedings would be invalid.

24. Therefore, neither of the reasons on the basis of which the assessment for AY in question was sought to be reopened by the AO are tenable in law.

25. The impugned notice dated 30th March, 2010 and the order dated 19th November, 2010 passed by the AO and the consequential assessment proceedings are hereby quashed.

26. The writ petition is allowed in the aforesaid terms, but in the circumstances, with no orders as to costs.

**S. MURALIDHAR, J**

**PRATHIBA M. SINGH, J**

**JULY 20, 2017**
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