

Cybertech Systems and Software Vs. Deputy Commissioner of Income Tax

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Apr-07-2005

Reported in : (2007)106TTJ(Mum.)257

Judge : O Narayanan, A.M, T Sharma

Appellant : Cybertech Systems and Software

Respondent : Deputy Commissioner of Income Tax

Judgement :

1. This is a bunch of six appeals. Three appeals are filed by the assessee and three by Revenue. These cross-appeals are directed against the orders passed by the CIT(A)-VIII at Mumbai on 12th March, 2003, 13th March, 2003 and 31st March, 2003 respectively. They arise out of the assessments completed under Section 143(3) of the IT Act, 1961.

Whether the assessee is entitled for exemption under Section 10B of the IT Act, 1961? Alternatively Whether the assessee is eligible for the deduction under Section 80HHE of the IT Act, 1961? 3. The assessee is a company incorporated in India on 19th Jan., 1995, under the name and style of M/s Cybertech Systems & Software Ltd. (CSSL). The main objects of the assessee-company are as follows: 1. To design, develop, alter, make, manufacture, produce, process, assemble, contract, buy, sell, export, import, trade or lease, hire or otherwise deal in computers, computer machinery, spare parts, hardware, software, computer stationery, peripherals, line printers, monitors, modems, hard disc, plotters,

digitizers, electronic and electrical machines, controllers for machines, technical know-how related to software and computer programmes and accessories, telecommunication instruments and systems, facsimile transreceiver, electronic private automatic branch exchange, cordless telephones and pay phones.

2. To design, develop, process, compile, service, renovate, remode, construct, assemble, render technical know-how to run education centre and coaching classes, consultancy services concerning computer scientific knowledge and to compile, make available, render, assist in the field of electronics, mechanical engineering, marketing economic and research and also to render services and know-how in systems and management relating to computers, computer machinery, computer installations, data processing and computer science.

4. The assessee-company has been approved by the Government of India in the Ministry of Industry as an export oriented unit (EOU). The approval was granted by the Ministry through its letter dt. 5th Oct., 1995. The approval was granted for the manufacture of computer software. Later, the approval has been renewed through letter dt. 19th June, 1998 whereby the assessee-company has been further permitted to run advance learning centres for computer technology.

5. The activities of the assessee-company have been carried on the basis of agreements entered into with various parties working in the realm of computer technology, software, training etc. The assessee-company, for the purpose of its activities, has entered into agreements with the following parties: 6. The agreement between the assessee (CSSL) and CIC was made on 5th Nov., 1996. The CIC, the parent company of the assessee is based in USA. The essence of the agreement between the assessee (CSSL) and CIC is the obligation of the assessee to perform services for CIC as agreed upon from time to time, on the basis of the above initial agreement.

The nature of services initially spelt out by CIC is the services relating to recruitment and training of programmers required to be deputed overseas and/or services to be provided from India or a combination of services from India and overseas. The consideration for the services rendered by the assessee (CSSL) to CIC was paid on the basis of the letters of appointment issued by CIC to each of

the recruiters selected and trained by the assessee. Such payments would be made by CIC to the assessee on raising of invoices by the assessee. The assessee would raise invoices on receipt of letters of appointment from CIC to each person recruited by the assessee.

7. The assessee-company (CSSL) has entered into a technical services agreement with Unisys. The services to be rendered by the assessee-company (CSSL) to Unisys are mainly the following: The parent company has a server of Unisys in USA. Unisys has developed a product called C-TOS. When a customer buys a copy of this product, he would install the same on his machines. On installation and post installation as and when the customer has any problem or has any changes in his business dynamics which the product is not able to take care of, the customer would post the request/query on the server provided by Unisys. The assessee would constantly monitor the contents of the server to see if any such requests/queries have been posted. The assessee's engineers would then look into the complaint, make the necessary changes and modifications, develop new patches of programs and thus try to rectify the errors pointed out by the customer or develop new programs for meeting the business dynamics of the customer. After the necessary rectification/modification and developments of new programs for the customers of Unisys, the company would telephonically or through e-mail communicate with the customer and ask him to test the changes/new developments as designed by the company on their system. After the customer of Unisys confirms the fulfilment of the requirement, the same would be released as a new version of the product and be saved as such in the library maintained by the assessee.

8. M/s Unisys remunerated the assessee-company for its services on monthly basis in consonance with annual contracts.

9. The agreement between the assessee-company (CSSL) and RIPL was entered into on 24th Nov., 1995. As per the agreement RIPL would run training facilities for SAP known as 'Cybertec Advanced Learning Centre' to train the recruitees as the licensees of the assessee-company. The said learning centre would be set up in Hyderabad in the premises owned by the licensee. The licensee is expected to

extend all services relating to the initial recruitment and training of the professionals as directed by the assessee-company who would be ultimately recruited by the CIC. The remuneration for the services rendered by RIPL to the assessee-company would be on the basis of the number of persons recruited and trained at the Cybertec Advanced Learning Centre.

10. In contemplation of the activities proposed, the assessee-company had imported a computer software called SAP (Systems Application and Products). The software patented as SAP is owned by a German company SAP Ag. The German company has sold number of licenced copies of SAP software. But, the German company does not have the trained manpower to help its clients to install and operate the software. Therefore, the German company has appointed various technical partners. They are recommended by the German company to its clients for the installation, operation and implementation of the SAP software. The American company CIC, who is the parent company of the assessee-company is one of such partners. The assessee gets its business mainly from CIC. It is, therefore, that the assessee has imported the SAP technology from Germany at a huge cost.

11. Initially, the assessee-company had purchased 18 terminals and a server. The assessee had entered into agreement with CIC on the SAP software and with M/s Unisys on the software called C-TOS. The 18 terminals were subsequently increased to 400 terminals. The assessee had arranged building measuring approximately 65,000 sq. ft. to install its computer facilities for the purpose of carrying on its activities.

It has an optimum capacity for 800 terminals. The company had in fact purchased 110 licenced copies of SAP software. The company had employed more than 300 people consisting of computer engineers, production, mechanical and chemical engineers, chartered accountants and other professionals.

12. According to the assessee, following are the different segments of activities carried out by it: 1. Formation of different teams of professionals to attend various functions to execute the work orders placed by clients.

2. Explaining the exact functional requirement to the professionals and programmers comprised of such teams.
5. Customization of various modules to meet the specific needs of clients.
6. Developing and writing new patches of programmes which are not available in the standard format of system.
7. Testing the functional competence of new modules designed by the assessee.
8. Functional integration of modules and testing of its functional accuracy and finally storing the results projectwise.

13. During the previous period relating to the assessment years under appeal, the assessee-company had provided services to CIC, Unisys and also to associate concerns of CIC like CTE (Cybertec, Europe) and CSI (Cybertec Systems Inc.). According to the assessee, it was engaged in implementation and customization of SAP software; the assessee has bought licenses from SAP Ag. and installed it at its offshore centre in Thane, India for the purpose of carrying out the customization, implementation activities and enhancing the skills of employees for such activities through internal training programmes; in the case of Unisys, the company has provided on its software called C-TOS sold by Unisys outside India; the developments done by the assessee in respect of C-TOS software were uploaded on a patch net developed by the assessee-company and downloaded by customers of Unisys outside India; the personnel of the assessee-company travelled abroad to the sites designate by Unisys to provide such services. According to the assessee-company the services rendered to CTE were in respect of clips and BNP products and in respect of SAP; that clipper and BNP product services were rendered by the personnel of the assessee-company at the site of the customer and completely rendered outside India; that in respect of SAP the services rendered were similar to the services rendered to CIC. According to the assessee-company, the services rendered to CIC were (i) in respect of data migration and version upgrade for Medline, a client of CIC, (ii) in respect of offshore development, implementation and customization support to the onsite projects of CIC and SAP and, (iii) in respect of SAP and CISCO related

development, prototype services of various clients of CIC.¹⁴ The assessee-company on the basis of the activities carried on by it claimed exemption of its income under Section 10B on the ground that the assessee-company is a 100 per cent EOU and earned its income from the export of computer software. Alternatively, assessee-company claimed deduction in respect of its profits on the ground that the assessee was engaged in the business of export out of India of computer software/its transmission from India to a place outside India/providing technical services outside India in connection with the development/production of computer software.

15. But, the assessing authority did not accept the claims made by the assessee-company either for exemption under Section 10B or for deduction under Section 80HHE. As far as the services rendered by the assessee-company to CIC are concerned, it is the view of the assessing authority that the assessee-company was in fact supplying the trained computer manpower to its parent company in USA and nothing more. The assessing authority relying on various stipulations contained in the agreement entered into between the assessee and CIC came to a conclusion that the assessee was in fact recruiting and training professionals for placing them in the employment of CIC at USA and other foreign destinations. The AO came to the above conclusion on the basis of various observations. One of the observations made by the assessing authority was on the basis of advertisements released by the assessee-company inviting applications from software professionals to join the assessee-company for getting trained and later on getting migrated to USA and other foreign countries. The AO examined the nature of those advertisements and found that all those advertisements are worded in a similar manner mainly for inviting applications from qualified professionals to take up employment outside India after getting appropriate training with the assessee-company in India.

Another observation made by the assessing authority was that the assessee-company is remunerated by CIC on the basis of the number of recruitees finally migrated to USA on the basis of visas arranged by CIC. As far as the services rendered to M/s Unisys are concerned, the AO held that the software called "C-TOS" is owned by Unisys and assessee-company has been merely providing

support to the users of the said software and such type of activity cannot be considered as manufacturing or producing of computer software or programmes.

16. The AO after examining the various agreements entered into by the assessee-company with the CIC and Unisys held that the assessee-company had not been engaged in the activities relating to manufacture and export of computer software and programmes. He held that the assessee-company had not developed any software or programme. According to the AO, the main activity of the assessee-company was to train engineers and other professionals in the administration of computer software, especially, SAP and export them outside India on the basis of the requisitions made by CIC. The said activity of manpower export does not come under the exemption/deduction envisaged in Sections 10B and 80HHE. The other activities carried on by the assessee-company, according to the assessing authority were in the nature of supporting services to Unisys and CTE in serving their clients who have purchased computer softwares/programmes from them. The assessing authority held that the services rendered by the assessee-company to CTE and Unisys did not amount to any of the activities specified either in Section 10B or in Section 80HHE. The remaining activity carried by the assessee-company, according to the assessing authority, was the running of an advanced computer training centre and imparting of competent training to engineers and other professionals especially in SAP technology in association with RIPL, which would not again qualify for Section 10B/80HHE benefits.

17. In the light of the above findings, the assessing authority declined to give exemption to the assessee-company of its business income under Section 10B and deduction from its business income under Section 80HHE of the IT Act, 1961.

18. The assessee had some income by way of interest. The assessee had also paid interest. It was the contention of the assessee-company that the receipt and payment of interest should be set off inter se and balance of income should be treated as business income. The assessing authority held that there is no nexus between the interest income received by the assessee-company and the interest payments made by the assessee-company and therefore, the receipts and payments could not be netted off. He also observed that interest income could not

be treated as business income unless an immediate nexus was established between earning of interest and carrying of business activities. He observed that no such nexus has been established in assessee's case. Therefore, the interest income was assessed as income from other sources and the interest payments were allowed as expenditure in computing the business income.

19. The assessments for the impugned three assessment years have been completed by the assessing authority in the above manner after denying the assessee-company, the exemption claimed under Section 10B and deduction claimed under Section 80HHE of the IT Act, 1961.

20. The assessments were taken in first appeal. In the first appeal considered for the asst. yr. 1997-98, the CIT(A) examined the detailed order passed by the assessing authority on the issue of exemption under Section 10B and finally came to agree with the AO that the assessee-company was not entitled for the exemption available under Section 10B of the IT Act insofar as the services rendered to M/s CIC and Unisys. The CIT(A) held that the materials collected by the assessing authority including the newspaper advertisements put in by the assessee-company have established that the assessee-company was in fact training computer professionals and exporting them to foreign countries at the instance of CIC. The CIT(A) held that this view is strengthened by the finding of the assessing authority that at the end of the training imparted by the assessee-company, all the recruits left India and accepted placements outside India and ceased to be the employees of the assessee-company. In fact, they became the employees of CIC. When all the trained candidates had accepted assignments outside India and joined the rolls of foreign employers, it could not have been possible for the assessee-company to utilize their services in India to manufacture or produce the computer software and therefore, the assessing authority was justified in denying the said exemption to the assessee-company. Accordingly, the CIT(A) confirmed the denial of exemption under Section 10B in respect of the entire proceeds of service charges collected by the assessee-company during the previous year relevant to the asst. yr. 1997-98.

21. But, as far as the claim of the assessee-company for deduction under Section 80HHE was concerned, the CIT(A) made a finding that the services rendered by the assessee-company to Unisys amounted to providing technical services outside India in connection with the development or production of computer software. Therefore, the CIT(A) accepted the contention of the assessee-company on the question of deduction under Section 80HHE insofar as the receipts from Unisys were concerned. The finding of the CIT(A) in this regard is extracted below: The Unisys has developed the initial operating system called C-TOS and the appellant-company in terms of the agreement entered into provides for the post-installation support that is in the form of software development by writing additional programmes. Having accepted the job to be done by the appellant-company, it cannot be said that the appellant-company is not providing technical services for the purposes of modification of customer's programs subject to the needs of the customers. Such 'customization' may not in itself be a software programme to make the appellant-company eligible for exemption under Section 10B, however, these services are to be held as technical services in that direction. Since both the producer and the user of the computer programme is abroad, the involvement in the process of customization has to be held as technical services rendered outside India for the development and production of software programmes. For rendering such services, one need not go abroad to become eligible for deduction in terms of Section 80HHE(1)(ii) of the Act. The concept of providing offsite services is very much in vogue. In view of the definition of computer programs provided in Copy Rights Act that is required to be considered for examining whether the services rendered for development and production of software programmes, it has to be held that the receipt for services rendered to Unisys fall in the category provided in Section 80HHE(1)(ii) of the Act. Consequently the appellant shall be eligible for deduction in terms of Section 80HHE(1) of the profits arising out of the said transaction.

22. On the same analogy, the CIT(A) further held that 10 per cent of the total receipts of the assessee from CIC could be considered in the nature of services eligible for exemption under Section 80HHE. Accordingly, he further gave a relief by way of exemption under Section 80HHE to 10 per cent of the total receipts, the assessee-company had from CIC.23. The deduction under Section 80HHE was

directed to be given on the relevant receipts excluding the element of reimbursements of travelling expenses.

24. As far as the ground relating to tax treatment of interest was concerned, the CIT(A) held that the interest income received by the assessee-company was to be treated as forming part of the business income of the assessee-company. But, he also directed that 90 per cent of the gross receipt of the interest to be excluded while making computations under Section 80HHE. Obviously, the CIT(A) did not accept the contention of the assessee-company regarding the netting off of the interest.

25. The CIT(A), Mowed his finding arrived at for the asst. yr. 1997-98, in disposing the appeal for the asst. yr. 1998-99 also. The grounds raised by the assessee-company for the asst. yrs. 1997-98 and 1998-99 were identical and the facts and circumstances of the cases were also similar. Therefore, all his findings arrived at for the asst. yr.

1997-98 have been grafted by the CIT(A) in his order passed for the asst. yr. 1998-99.

26. The claim of the assessee-company for exemption under Section 10B has been entirely rejected. The benefit of deduction under Section 80HHE has been granted to the entire receipts made from Unisys. The benefit under Section 80HHE has also been granted to the receipts from CIC but only to the extent of 10 per cent. The interest receipts and payments have also been treated just like done for the asst. yr.

1997-98; that the interest receipt would be treated as part of business profits; 90 per cent of gross interest receipts to be excluded for the purposes of Section 80HHE and no netting off of interest receipts and payments.

27. The CIT(A) followed the same pattern for the asst. yr. 1999-2000 also wherein he has again declined the benefit of Section 10P entirely.

The benefit of Section 80HHE has been granted to the extent of 100 per cent in respect of receipts from Unisys and CTE and to the extent of 10 per cent for the

receipts from CIC. While declining the benefit of Section 10B to the assessee-company, the CIT(A) has also endorsed the finding of the assessing authority that the total amount received by the assessee-company towards development and software programmes was less than 75 per cent of total receipts and on that ground also the benefit of Section 10B would not be available to the assessee-company in view of the second proviso to Section 10B(1).

28. The assessee-company has not raised any grounds for the asst. yr.

1999-2000 regarding the treatment of interest and therefore, no finding thereto was either given by the CIT(A).

29. In short, while disposing of the first appeal, in the impugned three assessment years, the CIT(A) has held as follows: (i) the assessee-company is not entitled for the exemption under Section 10B. (ii) the assessee-company is entitled for the deduction under Section 80HHE in respect of the revenue collected from Unisys and CTE. (iii) the assessee-company is entitled for the deduction under Section 80HHE to the extent of 10 per cent of the revenue collected from CIC. (iv) the interest received by the assessee-company was in the nature of business income; 90 per cent of gross interest needs to be excluded while computing the benefits under Section 80HHE while there is no scope for netting off of interest receipts and payments inter se.

30. The present appeals are filed before us against the above findings of the CIT(A). In the appeals filed for the asst. yrs. 1997-98 and 1998-99, the Revenue has raised a solitary ground which is common. The said ground reads as follows: On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to take the interest income as part of business profit instead of income from other sources without appreciating the facts of the case.

31. The ground raised by the Revenue in its appeal for the asst. yr.

1999-2000 is again on a solitary issue which reads as under: On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to allow deduction under Section 80HHE on the receipts in respect of services

rendered to CIC regarding the development, implementation, customization/SAP related services without appreciating the facts brought out by the AO that the above receipts are not eligible for deduction.

32. Subsequently, the Revenue filed applications for admission of additional grounds for the asst. yrs. 1997-98 and 1998-99. The additional ground sought to be admitted by the Revenue is extracted below: On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to allow the deduction under Section 80HHE on the receipts in respect of services rendered to CIC and Unisys regarding development, implementation, customization/SAP related services without appreciating the facts brought out by the AO that the above receipts are not eligible for deduction.

33. It was argued by the Revenue before the Tribunal that the abovesaid ground has been raised for the asst. yr. 1999-2000 and on same analogy and facts of the case being similar, the said additional ground may be admitted for the earlier two asst. yrs. 1997-98 and 1998-99 also. But, the Tribunal observed that the ground raised by the Revenue for the asst. yr. 1999-2000 objected to the benefits of Section 80HHE given in respect of receipts obtained from CIC alone and the benefits ordered in respect of receipts from Unisys have not been made a subject-matter of appeal. The Tribunal observed that no reason whatsoever has been given as to why the name of M/s Unisys is mentioned in the application dt.

20th Oct., 2004 for admission of additional ground, whereas no such mention has been made in the ground of appeal filed for the asst. yr.

1999-2000. Keeping in view all the facts and circumstances, the Tribunal partly admitted the additional ground through its interim order passed on 4th Jan., 2005. The additional ground admitted by the Tribunal in the appeals filed by the Revenue for the asst. yrs. 1997-98 and 1998-99 is the one following: On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the AO to allow the deduction under Section 80HHE on the receipts in respect of services rendered to CIC regarding development, implementation, customization/SAP related services without appreciating the facts brought out by the AO that the above receipts are not eligible for deduction.

34. In view of the admission of the additional ground mentioned above, in total, the grounds raised by the Revenue in the impugned appeals are the following: (i) that the CIT(A) has erred in allowing the deduction under Section 80HHE on the receipts in respect of services rendered to CIC (Asst. yrs. 1997-98, 1998-99 and 1999-2000) (ii) that the CIT(A) has erred in treating the interest income as part of business profit instead of income from other sources. (Asst.

yrs. 1997-98 and 1998-99) 35. The grounds raised by the assessee-company in all the three appeals are common and those grounds are as follows: 1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in denying exemption under Section 10B to the appellant.

2. The learned CIT(A) erred in restricting benefit of deduction under Section 80HHE only to the extent of 10 per cent of receipts from CIC Inc. USA (excluding reimbursements for travelling), while the appellant has claimed the whole of the revenue towards customization and development of software eligible for deduction under Section 80HHE. 3. The learned CIT(A) erred in not giving retrospective effect to the CBDT Notification No. SO 890(E), dt. 26th Sept., 2000, which allowed benefit of Section 10B and Section 80HHE to human resource services.

4. The learned CIT(A) erred in not allowing the netting off of interest and also erred in excluding 90 per cent thereof under Section 80HHE(3) while the Bombay High Court has held that each and every interest income cannot be excluded.

5. The CIT(A) erred in confirming levy of interest under Sections 234B and 234C though the AO had not made any speaking order and also had not given any opportunity before levy of the same.

6. The learned CIT(A) erred in denying exemption under Section 10B on interest income earned by the appellant.

36. It is discernible from the discussions made in above paras in respect of the grounds raised by the assessee and Revenue in the impugned appeals that, the following issues are arising for our consideration: 1. Whether the assessee-company is entitled for the exemption under Section 10B for the asst. yrs. 1997-

98, 1998-99 and 1999-2000? 2. Whether the assessee-company is entitled for the deduction under Section 80HHE in respect of its entire receipts obtained for services rendered to CIC? 3. The Notification No. SO 890(E), dt. 26th Sept., 2000 issued by the CBDT allowing the benefits under Sections 10B and 80HHE is whether retrospective in operation or not? 5. Whether interest is to be computed as business income or income from other sources? 6. Whether 90 per cent of the interest needs to be excluded for the computation of Section 80HHE? 37. Shri Farooq V. Irani, the learned Counsel along with Sri Yogesh Thar appeared for the assessee-company. Shri Irani argued the case at length. His contentions, submissions and arguments are summarized below: 1. The assessee-company is engaged in implementation and customization of software known as SAP. The assessee-company has bought licences from SAP, Ag in West Germany and installed it at its offshore centre in Thane, India for carrying out the customization, implementation activities and to improve the skill and expertise of its employees. The assessee is a recognized 100 per cent export oriented unit (EOU) recognized by Government of India in the Ministry of Industry. The recognition has been granted only after satisfying that the assessee-company is engaged in the manufacture of computer software and in providing technical services outside India in connection with the development or production of computer software.

2. Manufacture or production of computer software also includes customization of a software which requires development of software programme. 'Manufacture' is explained in Section 10B in Expln. (iii) in an inclusive manner. According to Clause (c) of the said Explanation, manufacture includes recording of programmes on any disc, tape, perforated media or other information storage device.

Likewise the word 'produce' is explained in Expln. (iv) to include production of computer programmes.

3. Activities carried on by assessee-company to provide services to 'CIC' consisted of two parts. The first part is importing of SAP software. The second part is customization of above software and rewriting the same to make it compatible with clients' specific applications.

4. SAP software imported by the assessee-company is a very elaborate system which helps running almost all the activities of an organization like enterprise management, customer relationship, product design and engineering, planning, component procurement, manufacturing, sales and distribution, HR development, finance and accounting, etc. The software is owned by SAP Ag which is a German company.

5. Assessee-company appointed highly qualified people and impart them specialized training on SAP software through a pre-defined curriculum. Assessee-company develops, modifies, rectifies and customizes the software for various projects of the clients. Those developments are stored as projects and presentations by the company. It is after the training and improving their skills that they are deputed to foreign sites specified by the clients.

1. The CIT(A) having held that the entire receipts from Unisys are eligible for the benefits under Section 80HHE, should have also held that the activities of the assessee-company qualified for the exemption of Section 10B. There are no appeals by Revenue on the question of deduction under Section 80HHE with reference to Unisys receipts.

2. The agreement with Unisys has been entered into for providing not only technical services outside India in connection with the development or production of computer software which fact has already been accepted by the CIT(A) in the context of Section 80HHE deduction, but, also for exporting computer software programmes and other tools produced by the assessee and therefore, the exemption under Section 10B is equally eligible in respect of the receipts from Unisys.

3. The assessee provided technical support to Unisys for designing and developing C-TOS operating system; to the customers of Unisys who use C-TOS software by writing new programmes and patches to customize the C-TOS to the needs of those customers.

4. The assessee-company has extended its expertise to develop and provide support cycles to the software products of Unisys.

5. The entire receipts from Unisys are eligible for exemption under Section 10B especially in view of Explns. (ii)(c) and (iv) to Section 10B. C. Exemption under Section 10B in the light of CBDT Notification No. SO 890(E), dt. 26th Sept., 2000 [(2000) 163 CTR (St) 25] 1. Section 10B empowered CBDT to issue notifications to enlarge the scope of exemption provided under that section. The Notification dt.

26th Sept., 2000 issued by CBDT clarified some more computer enabled services and products as eligible for exemption under Section 10B. The said notification included back-office operation, content development or animation, data processing, human resources services, support centres in the class of items eligible for the exemption under Section 10B. 2. Without prejudice to the contentions of the assessee-company already on record, even if the finding of the AO that the services rendered by assessee-company to CIC were that of manpower support alone, still the same is eligible for the exemption under the category "human resource services" listed in the notification.

3. The services rendered to Unisys could not be anything less than content development and data processing. The offshore centre should be treated at least as back office/support centre. These activities also are covered by the said notification.

4. As the notification only clarified the nature of computer enabled products and services eligible for exemption under Section 10B, the notification is clarificatory in nature. Therefore, it is retrospective in operation and so the entire activities carried on by the assessee-company with reference to CIC as well as Unisys are to be construed as eligible for exemption under Section 10B of the Act.

5. The notification issued by the CBDT did not create any new provision for exemption as such. The theme of exemption always existed in the statute. The exemption as explained in the notification applied to computer enabled products and services. The activities of the assessee-company are nothing but computer enabled products and services. Therefore, the specification of items made through the notification is nothing but explanatory. Therefore, it is retrospective.

1. The activities of the assessee-company carried out on the basis of the agreement with CIC show that it has been providing technical services outside India in connection with the development or production of computer software.

2. If the activities of the assessee-company are to recruit and train people, there was no need for building up an infrastructure costing more than Rs. 50 crores by way of land, building, furniture, computers, servers, hardware, SAP software etc.

E. Interest head of income Interest income has been earned by the assessee-company in the course of carrying on its business and out of the business funds temporarily kept under deposits. There is a direct and clear nexus between the business activities of the assessee-company and the interest earned by it. Therefore, the CIT(A) was right in treating the interest income as business income of the assessee-company.

As the CIT(A) has accepted the contention of the assessee that the interest income was business income, he should have accepted the contention of netting off of interest receipts and payments inter se. If at all 90 per cent of the interest income was to be excluded while computing the deduction under Section 80HHE, the 90 per cent of net interest alone should have been excluded.

The assessee-company being an exclusive EOU, its entire income is in the nature of export income and eligible for complete exemption under Section 10B.38. Shri Irani, the learned Counsel relied on the following decisions in support of his arguments and contentions: 1. Cybertech Systems & Software Ltd. v. Asstt. CIT (ITA No. 2022/Mum/2001 dt. 6th Aug., 2002) The contention of the assessee-company for the asst. yr. 1996-97 was accepted by the AO. The assessment order was later set aside by CIT under Section 263. In appeal, the Tribunal held that the view of the AO in accepting the contention of assessee-company of Section 10B was a possible view to be upheld. Revision order has been set aside. Asstt. CIT v. Amadeus India (P) Ltd. (2004) 89 TTJ (Del) 301 : (2001) 79 ITD 407 (Del) The words 'computer programme' having not been defined in the IT Act, meaning given in the Copy Right Act may be adopted. Computer programme included 'data processing software' as well. Intent and meaning of the relevant words and expression to be construed broadly, liberally and consistently. Asstt. CIT v. S & S

Consultants (P) Ltd. (ITA No. 6508/Bom/1997, dt. 21st Dec., 2001) Software development at clients' site was held eligible for exemption under Section 10A. Held that Section 10A was a beneficial provision and even though billing was done on the basis of candidates supplied, the activities need to be treated as manufacture-produce of computer programme/software.

4. ISBC Consultancy Services Ltd. v. Dy. CIT (ITA No. 319/Mum/2002, dt. 29th Aug., 2002) reported at (2004) 83 TTJ (Mumbai) 597--Ed.

It was held that customization of baan standard software was eligible for Section 10A benefits. Customization amounted to "manufacture", in the normal classical sense; in any event customization amounted to "manufacture" as statutorily defined. CIT v. Paramount Premises (P) Ltd. Interest income under the circumstances need to be assessed as business income and not as income from other sources.

2. Lalsons Enterprises v. Dy. CIT (2004) 82 TTJ (Del)(SB) 1048: (2004) 89 ITD 25 (Del)(SB).

For the purpose of Section 80HHC(4B), it is only 90 per cent of net interest remaining after allowing a set off of interest paid, that can be reduced from business profit.

Bajaj Tempo Ltd. v. CIT (1992) 104 CTR (SC) 116 : (1992) 196 JTR 188 (SC) Provisions incorporated for incentive and growth need to be interpreted liberally. Restriction put on an exemption has to be construed so as to advance the objectives and not to frustrate it.

39. Sri V.S. Singh, the learned CIT assisted by Sri Mahesh Kumar, the learned Departmental Representative appeared for the Revenue and argued the case. The contentions, submissions and arguments are briefly stated below: 1. Section 10B of the Act is applicable only if there was an export of article or thing. Section 10B of the Act (as it stood prior to 1st April, 2001) has provided for cent per cent exemption of profits and gains derived by a 100 per cent EOU which 'manufactures or produces any article or thing'. In the Explanation below Sub-

section (7), it has been explained that manufacture includes any process, assembling or recording of programme on any disc, tape, perforated media or other information storage device and produce includes production of computer programme. What qualifies as an article or thing is production of a computer programme.

2. The words 'computer programme' are not defined in the IT Act.

However, the Copy Right Act, 1957 as amended in 1994 defines as 'a set of instructions expressed in words, codes, scheme or any other form including a machine readable medium capable of causing a computer to perform a particular task or achieve a particular result'. Not every instruction fed into a computer nor every output of a computer is a computer programme. It is something which provides a framework for the manipulation of data and has applicability to several tasks of identical nature by one or more user.

3. In the case of CIC, the agreement with CIC, the mode of payment on the basis of number of personnel sent abroad after having been employed by CIC, the advertisements issued by the assessee, references made in the annual reports of the assessee-company to recruitment and training of software professionals clearly established that the assessee was merely engaged in recruitment and training of personnel. No evidence was produced by the assessee-company to make out a case that the assessee-company had in fact produced any computer programme. The credibility of the certificate produced from CIC is doubtful in the light of the details collected in the course of the survey conducted at the business premises of the assessee-company.

4. The voluminous paper books containing so-called evidences are by and large incomprehensible. Even if assumed that the assessee-company had done some data processing, whether they amounted to customization entailing production of computer programme has not been proved by the assessee.

5. The reliance placed by the assessee-company on the decision of Tribunal Delhi Bench A in the case of Amadeus India (P) Ltd. (supra) is not correct. The facts of the present case are distinguishable.

In that case, the main business activity of the assessee was to receive latest information from its customers, create reservation data and records which were processed and exported to Amadeus Data Processing Centre in Germany. The assessee raised invoices every month on Amadeus Germany on the basis of total number of segments exported. There was a categorical finding not disputed by Revenue that the assessee who is collecting, organizing and exporting them to Germany in identifiable segments. It was under those circumstances, that the deduction under Section 80HHE was granted in that case.

6. The assessee-company has relied on the decision of Tribunal, Mumbai Bench 'A' in the case of S & S Consultants (P) Ltd. (supra), wherein the assessee was billing its principal on the basis of personnel and where exemption under Section 10A was allowed. The reliance placed by the assessee-company is misleading as there is a crucial difference between the two cases. In that case, the personnel deputed for overseas assignments remained the employees of the assessee whereas in the present case, the personnel ceased to be the employees of the assessee-company.

7. Another decision relied on by the assessee-company is the decision of ISBC Consultancy Services Ltd. (supra) by Tribunal Mumbai Bench 'C'. In that case, a standard software produced by a foreign party who sold to its customers and in order to deploy the same for specific end use of individual customers, the software had to undergo a qualitative change through the process of customization. The term 'customization' has been understood in the sense that the original standard software is modified and such modification resulted in a new programme produced by the assessee.

It amounted to creation of a new programme, the above decision also did not consider the issue of export while deciding the case which is very relevant in the present case.

8. It has been laid down by Supreme Court in Novapan India Ltd. v. CCE that exemption provisions being in the nature of exception have to be construed strictly at the stage of determination. Whether the assessee falls within the terms or not and in case of doubt or ambiguity, benefit of it must go to the Revenue. Under

such circumstances the onus is on the assessee to prove that it is covered by the said provision.

9. Section 10B is applicable only if there is an export of article or thing. The term 'export' has not been defined in this section or in the Act. In the case of Abdul Gaffar Nadiyadwala v. Asstt. CIT the Mumbai High Court has held that export can only be said to have been made in case the goods or articles have been subjected to custom clearance. It is to be noted that both in Section 80HHE and in the amended provision of Section 10B introduced by Finance Act, 2000 the exemption/deduction is available to items which are exported or transmitted from India by "any other means".

This implies that the statute makes a distinction between exports and transmission without customs clearance. Thus, for the eligibility of deduction under Section 10B of the Act in terms of provisions as it stood at the relevant point of time, custom clearance is necessary and "transmission by any other means" of computer software to a foreign destination will not qualify to be called export for the purpose of Section 10B of the Act.

10. In case of Unisys, the agreement provides for lump sum payment to the assessee for the resolution of the problem pointed out by the customers of Unisys in respect of software supplied by the Unisys.

The agreement with Unisys and especially Article 4 thereof, provided for billing for new features suggestions, customer engineering request and marketing request enhancement. Wherever the resolution of problem of customer entailed a production of new programmes, the assessee was required to separately bill for it. This is also apparent from the bills raised by the assessee on Unisys. Most of the bills are in respect of monthly support fee. Some bills were issued for support fee for new products. Only a miniscule portion of the receipts from Unisys was attributable to the new computer programmes produced by the assessee. Even assuming that the assessee was customizing products of Unisys, such customization did not amount to, in all cases, production of new programme and the receipts from Unisys were not towards consideration for such new programme. Even assuming that the entire receipt from Unisys amounted to consideration for

production of new programmes, there was no export as there was no customs clearance.

The eligibility for customized electronic data for deduction under Section 10B of the Act has been specifically provided for in Section 10B as amended by Finance Act, 2000. The said amendment operates w.e.f. 1st April, 2001. It has been explained therein that any customized electronic data or any product or service of similar nature as may be notified by the Board, would be included within the meaning of computer software. The Notification No. SO 890(E), dt.

26th Sept., 2000 specifically includes data processing and support centres as well as human resource services for the purposes of Sections 10A, 10B and 80HHE of the Act. It is clear that prior to the issue of notification, such activities were not eligible for deduction under Sections 10A, 10B and 80HHE of the Act. In this context, the following are the observations made by Justice G.P. Singh in Principles of Statutory Interpretation (p. 417, Edn. VIII) "Fiscal legislation imposing liability is generally governed by the normal presumption that it is not retrospective and it is a cardinal principle of tax law that the law to be applied is that in force in the assessment year, unless, otherwise provided expressly or by necessary implication." In the case of *Gem Granites v. CIT* the Supreme Court has opined that every statute is prima facie prospective unless it is expressly or by necessary implication made to have been retrospective operation. In the case of *Tata Consultancy Services v. Union of India*, the Karnataka High Court has held that a notification issued on a particular date cannot be made retrospective by judicial interpretation. In the case of *Union of India v. Ganesh Das Bhojraj*, the Supreme Court has held that the date from which a notification becomes effective is, the date of publication of the notification in the Official Gazette. Such views when read in conjunction with the decision in the case of *ISBC Consultancy* (supra) would imply in the context of Section 10B that where customization entails production of new software the exemption would be available prior to 1st April, 2001, but, where such customization does not entail actual production of any software, the exemption under Section 10B of the Act would be available only subsequent to the amendment in Section 10B and the issue of notification in this regard.

C. That, therefore, no exemption is admissible to the assessee on receipts from CIC and Unisys under Section 10B. 1. Section 80HHE provides for deduction on account of export of computer software or its transmission outside India by any other means or providing technical services outside India in connection with the development or production of computer software. Insofar as CIC is concerned, the nature of activity of the assessee is merely recruitment and training of personnel of SAP software who are subsequently appointed by CIC. There is no case of either production of software or its export outside India or of rendering any services to CIC for the development and production of computer software.

2. Insofar as Unisys is concerned, Section 80HHE is admissible only inasmuch as the customer support activity results in the development of new programmes. Wherever the activity of the assessee generated new programme, separate bills are raised. Therefore, deduction under Section 80HHE ought to be limited to the receipts out of such bills alone. The CIT(A) ought not to have allowed any deduction under Section 80HHE from receipts of CIC and should have limited the deduction in respect of receipts from Unisys.

3. Prior to 1st April, 1999, Explan. (b) to Section 80HHE of the Act defined computer software as "any computer programme recorded on any disc, tape, perforated media or other information storage device and includes such programme which is transmitted from India to a place outside India by any means". This was amended by Finance (No. 2) Act, 1998 w.e.f. 1st April, 1999 by which after the words 'any such programme' and before words "which is transmitted from India" the words 'any customized electronic data was inserted'. Clearly, even assuming that assesseees were customizing software received from CIC and Unisys prior to 1st April, 1999, no deduction under Section 80HHE would be available and such deduction could only be availed off subsequent to 1st April, 1999.

1. The additional ground sought to be filed by the Revenue contesting the grant of deduction under Section 80HHE against the entire receipts from Unisys has not been admitted by the Tribunal.

The only additional ground admitted by the Tribunal is with reference to the ground raised by the Revenue against the direction of the CIT(A) to grant deduction under

Section 80HHE in respect of receipts from CIC to the extent of 10 per cent of the gross revenue.

2. Even though the additional ground raised by the Revenue with reference to the Unisys has not been formally admitted as an additional ground, still it is within the powers of the Tribunal to examine the substance of the said contention as the relevant matter is open before the Tribunal for adjudication. Only for the technical reason that the said additional ground has not been admitted, the Tribunal should not go away from the duty cast on it to decide the issue in its entirety. The facts relating to the nature of receipts from Unisys have to be dealt in by the Tribunal in the context of the claim of the assessee for exemption under Section 10B. Therefore, the Tribunal is substantively seized with the issue of the nature of receipts from Unisys. Under the circumstances, notwithstanding the non-admission of the additional ground, the Tribunal is empowered to comment on the eligibility of deduction under Section 80HHE in respect of the receipts from Unisys. *C.C.A.P. Ltd. v. CIT* has held that Tribunal must pass appropriate order after declaring law. When an appeal is preferred, the Tribunal has to pass appropriate orders on the appeal. When it follows certain principles, it cannot shirk its responsibilities after laying down the principle of law without applying the same to the facts and circumstances of the case before it and, even though it might go in favour of the assessee who had not preferred any appeal. When the appeal is before the Tribunal, it is the whole appeal that is before it and in such appeal the exercise of power flows from the appellate authority vested in the Tribunal.

4. The Tribunal has to discharge its function as an appellate authority and passing of an appropriate order is a sine qua non for the exercise of such function. In the case of *CIT v. Ramnath Goenka (Decd.)* the Madras High Court has held that Tribunal has primary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. The Tribunal is duty bound to grant relief to which the assessee is entitled even though there was no plea in that regard.

There is no basis for treating the interest income as business profits of the assessee. The assessee has not established any clear linkage between the

interest income and the business activities carried on by the assessee-company. Unless there is a nexus between the interest on the one hand and the business activities or funds involved on the other hand, the benefit of netting could not be granted.

1. The remuneration received by the assessee from CIC on the basis of the number of employees who went abroad was merely a mode and measure of payment and does not mean that the activity of the assessee-company was simple recruitment of candidates.

2. The contention of the Revenue that customizing of software is not eligible for exemption under Section 10B or deduction under Section 80HHE is directly contrary to the decision of Tribunal Mumbai in ISBC (supra).

3. The contention of the assessing authority that the survey carried out in the business premises of the assessee unearthed modified bills and other information against the assessee is without any basis. The survey was conducted on 20th Feb., 2001 long after export of the previous year period involved relevant to the impugned appeals under consideration. Except for the modification of the bills which was in any way not untrue, no evidence against the activities carried on by the assessee-company was revealed at the time of survey.

4. The contention of the Revenue that no export activity can be construed in the present case is not relevant. The decisions relied on by the Revenue in CIT v. Silver & Art Palace and Abdul Gaffar Nadiyadwala (supra) were in fact dealing with the provisions contained in Section 80HHC. The arguments of the Revenue have overlooked the "wording" of Expln. (b) to Section 80HHE. The argument is contrary to the decision of Tribunal, Delhi Bench 'A' in the case of Amadeus (India) (P) Ltd. (supra), wherein the Tribunal has followed the principles of "updating construction" applied by the Supreme Court in the case of CIT v. Podar Cement (P) Ltd. .

5. An incentive provision which is designed to encourage an important and vital industry like the software industry is to be liberally construed in the light of the decision of Supreme Court in the case of Bajaj Tempo Ltd. (supra).

41. We have heard the arguments of both sides and considered them in detail. We have also examined the facts of the case carefully and the case laws relied on by the respective sides. The facts of these cases have already been narrated in detail in the impugned assessment orders and the first appellate orders. The contentions and submissions made by the assessee-company before the lower authorities have been fully extracted in those orders. Therefore, the facts, arguments and contentions pertaining to these appeals are mentioned only in a brief manner and only to the extent they are relevant as otherwise it would become repetitious, ending up in unnecessary plenitude.

42. First, we will consider the issue of exemption under Section 10B. The relevant provisions of law contained in Section 10B as it stood at the relevant time read as below: 10B Special provision in respect of newly established hundred per cent export oriented undertakings.--(1) Subject to the provisions of this section, any profits and gains derived by an assessee from a hundred per cent export-oriented undertaking (hereinafter in this section referred to as the undertaking) to which this section applies shall not be included in the total income of the assessee.

(2) This section applies to any undertaking which fulfils all the following conditions, namely: (ia) in relation to an undertaking which begins to manufacture or produce any article or thing on or after the 1st day of April, 1994, its exports of such articles and things are not less than seventy-five per cent of the total sales thereof during the previous year; Explanation: The provisions of Explns. 1 and 2 to Sub-section (2) of Section 80-I shall...

(i) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act; (ii) "relevant assessment years" means the five consecutive assessment years specified by the assessee at his option under Sub-section (3) or Sub-section (5), as the case may be; (c) recording of programmes on any disc, tape, perforated media or other information storage device; (iv) "produce", in relation to any article or thing referred

to in Clause (i) of Sub-section (2) includes production of computer programmes.'

43. A reading of the section makes it clear that in order to claim the exemption under Section 10B, the assessee-company should have manufactured or produced any article or thing and the export of such articles and things was not less than 75 per cent of the total sales of the assessee-company during the relevant previous years. What is "manufacture" is explained as process or assembling or recording of programmes on any disc, tape, perforated media or other information storage device. The word "produce" is explained as including production of computer programmes.

44. The thrust of the agreement entered into between the assessee-company and CIC is to regularize the appointment of the assessee-company as the retainer of the CIC to help the latter to source qualified and trained software engineers for placing them under the employment of CIC. This fact is stated in the preamble of the agreement entered into between the assessee-company and M/s Regency Infotech (P) Ltd. (RIPL) on 24th Nov., 1995. It is stated therein that the assessee is retained by CIC to source qualified and trained software engineers. It is in contemplation of the above task entrusted to the assessee-company that it has established an advance training centre at Thane in India and also entered into an agreement with PJPL.

RIPL has been given licence to establish and run an advance training centre for SAP programme at Hyderabad where the recruits of the assessee-company would be trained.

45. The theme of the above agreements has been further implemented by the assessee-company by recruiting qualified professionals and sending them abroad at the disposal of CIC after giving them adequate training in SAP software technology. As pointed out by the assessing authority in his order, the contents of the advertisements published by the assessee-company in various newspapers from time to time were in the nature of recruiting personnel for training and foreign assignment.

Those advertisements did not speak anything about production of any computer programme or processing or assembling or recording of programmes on any

information storage device. Engineers and other professionals were recruited by the assessee-company during the previous year period relevant to the assessment years under appeal, on the basis of the advertisements whose character has been mentioned above.

46. After those recruits are trained in the establishments maintained by the assessee-company in India, their competence are assessed by the CIC (USA) and appointment letters are issued to them to take up employment with CIC at various centres outside India.

47. The assessee-company is remunerated by CIC (USA) on the basis of the number of such professionals recruited and trained by the assessee-company and finally selected by CIC for foreign assignments.

The recruits proceed to various work centres outside India on the strength of the visa arranged by CIC (USA) through the assessee-company.

48. A perusal of the sequence of activities carried out by the assessee-company in respect of CIC (USA) clearly establishes that the activity carried on by the assessee-company with reference to CIC was that of a professional recruiting agency. The value added service provided by the assessee-company is that the recruits are trained in a specific software programme namely, SAP software. Imparting of such training is necessary in the line of computer software. The professionals going abroad must be trained properly and must be competent to take up assignments abroad. If the assessee-company was not in a position to impart such highly specialised training to these recruits, the assessee-company would not get any contract for placements from foreign companies. Therefore, it is to be seen that the training activities are conducted by the assessee-company as an integral part of recruiting professionals for foreign companies and not as an independent computer software programme. The training activities carried out by the assessee-company cannot be disconnected from the principal activity of the assessee-company that of recruiting of specialized computer professionals. In the circumstances, the aspect of giving training to the recruits does not change the basic character of the activities carried on by the assessee-company. We have gone through all the materials placed before us and have examined the various

contentions raised by the assessee-company including the contentions placed before the lower authorities. Even though, it is possible to extend the arguments on the basis of logical grounds, what we could ultimately find in this case is that the assessee was acting as a qualified professional recruiting agency for foreign companies specializing in the recruitment of high calibre computer and software professionals.

49. Therefore, in the circumstances, it is our considered view that the assessee has not manufactured or produced or processed or assembled anything connected with computer programmes for the purpose of exporting them in the ordinary course of its business. The activities relating to software and other information technology enabled activities were incidental to its activities of recruiting, training and exporting manpower. Therefore, we find that the assessee-company is not entitled for the exemption provided under Section 10B of the IT Act, 1961 with reference to its revenue derived from the services rendered to CIC and its subsidiaries.

50. As far as the services rendered by the assessee-company to Unisys are concerned, we still find that the situation is not different. As already discussed and mentioned in the order, the CIT(A) has granted relief under Section 80HHE to the assessee-company with reference to its receipts from Unisys. The grounds proposed to be raised by the Revenue objecting to the above relief have not been admitted by the Tribunal. Therefore, as pointed out by the learned Counsel appearing for the assessee, it is to be seen that the services rendered by the assessee-company to Unisys qualified for the deduction under Section 80HHC. But, that fact alone does not qualify the assessee-company to seek exemption under Section 10B mainly for the reason that the exports of such services to Unisys were less than 75 per cent of the total sales of the assessee-company and therefore, does not satisfy the condition laid down in Section 10B(2)(ia).

51. In the facts and circumstances of the case, we hold that the assessee-company is not entitled for the exemption available under Section 10B.52. The second issue to be considered is whether the assessee-company is entitled for deduction under Section 80HHE in respect of its entire income obtained for

services rendered to CIC.⁵³ The relevant provision of law contained in Section 80HHE for the period under appeal reads as below: 80HHE. Deduction in respect of profits from export of computer software, etc.--(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of,-- (i) export out of India of computer software or its transmission from India to a place outside India by any means; (ii) providing technical services outside India in connection with the development or production of computer software, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of the profits derived by the assessee from such business.

54. Accordingly, the assessee could be considered as eligible for deduction under Section 80HHE with reference to the receipts from CIC only if the assessee-company had exported out of India computer software or transmitted the same from India to a place outside India by any means, or had provided technical services outside India in connection with the development or production of computer software.

55. As we have already examined the nature of activities carried on by the assessee in providing services to CIC, in the above paras, while examining the contention of the assessee-company under Section 10B, it could be seen that the activities carried out by the assessee-company were in respect of recruitment, training and export of software professionals at the instance of CIC. There is no evidence on record to show that the assessee-company had rendered any services or activities specified in Section 80HHE. There is no evidence to hold that the assessee-company had carried on any information technology enabled services in respect of its contract with CIC. Therefore, on the merit of the issue, it is not possible to hold that the assessee-company had provided any services to CIC which qualified for deduction under Section 80HHE.⁵⁶ In the circumstances, we reverse the order of the CIT(A) in granting deduction under Section 80HHE to 10 per cent of the revenue received by the assessee from CIC. We hold that no part of the revenue received by the assessee from CIC is entitled for deduction under Section 80HHE.⁵⁷ The contention of the Revenue on this issue is accepted and that of the assessee is rejected.

58. The third issue to be considered is whether the Notification No. SO 890(E), issued by CBDT on 26th Sept., 2000 is retrospective in its operations and applicable to the impugned asst. yrs. 1997-98, 1998-99 and 1999-2000.

59. The term "computer software" given in Sections 10A, 10B and 80HHE is analogous. The text of the relevant Explanation where the meaning of the term "computer software" as given in Sub-clause (b) of Clause (i) of Expln. 2 to Sections 10A and 10B and Clause (b) of Explanation to Section 80HHE is the same as extracted below: (a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or (b) any customised electronic data or any product or service of similar nature, as may be notified by the Board, which is transmitted or exported from India to any place outside India by any means; (a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or (b) any customized electronic data or any product or service of similar nature, as may be notified by the Board, which is transmitted or exported from India to any place outside India by any means; (i) any computer programme recorded on any disc, tape, perforated media or other information storage device; or (ii) any customized electronic data or any product or service of similar nature, as may be notified by the Board, which is transmitted or exported from India to a place outside India by any means; 60. The provisions of the Explanations to Sections 10A, 10B and 80HHE enable the CBDT to notify further products and services of similar nature as items coming within the meaning of "computer software". The Notification No. SO 890(E), dt. 26th Sept., 2000 has been issued by the Board under the enabling provisions of the three relevant Sections 10A, 10B and 80HHE. Therefore, the notification applies to situations arising under the provisions of Sections 10A, 10B as well as Section 80HHE. The said notification applies mutatis mutandis to all the three sections.

61. The provisions of Sections 10A, 10B and 80HHE extracted in above paras, are the one substituted by the Finance Act, 2000, w.e.f. 1st April, 2001. Prior to its substitution, Section 10B, inserted by Finance Act, 1988, w.e.f. 1st April, 1989 relevant for the impugned previous year period, stood as follows: 10B. Special provision in respect of newly established hundred per cent export-oriented undertakings.--(1) Subject to the provisions of this section, any profits and gains

derived by an assessee from a hundred per cent export-oriented undertaking (hereinafter in this section referred to as the undertaking) to which this section applies shall not be included in the total income of the assessee.

(2) This section applies to any undertaking which fulfils all the following conditions, namely: (ia) in relation to an undertaking which begins to manufacture or produce any article or thing on or after the 1st day of April, 1994, its exports of such articles and things are not less than seventy five per cent of the total sales thereof during the previous year; Explanation--The provisions of Explns. 1 and 2 to Sub-section (2) of Section 80-I shall...

(i) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act; (ii) "relevant assessment years" means the five consecutive assessment years specified by the assessee at his option under Sub-section (3) or Sub-section (5), as the case may be; (c) recording of programmes on any disc, tape, perforated media or other information storage device; (iv) produce", in relation to any article or thing referred to in Clause (i) of Sub-section (2) includes production of computer programmes.

62. As seen from the law as stood for the impugned assessment years, the provisions of Section 10B do not provide anything which enabled the CBDT to issue notification to enlarge the scope of the expression "computer software". The power has been granted on the CBDT to issue such a notification only by the Finance Act, 2000. Thereafter, the impugned Notification No. SO 890(E) was issued by CBDT on 26th Sept., 2000.

63. It is to be seen that the law contained in Section 10B as it stood for the previous year period relevant to the assessment years under appeal, did not permit the CBDT to issue any notification and there was no provision in the law to make such an intervention. When the law applicable to the period relevant to the assessment years under appeal did not have any enabling provision at all, the question of retrospective application of the notification issued subsequent to the

amendment brought in the Act does not arise. The amendment brought in by the Finance Act, 2000 w.e.f. 1st April, 2001 is the line of demarcation in the present case. The effect of the notification relied on by the assessee-company cannot be pulled back to the period prior to 1st April, 2001 for the simple reason that there was no law existing prior to that date which enabled the CBDT to issue such notification under the provisions of Section 10B.64. Therefore, for the above reason, it is not possible to accept the contention of the assessee-company that the Notification No. SO 890(E) issued by the CBDT on 26th Sept., 2000 is to be held as retrospective in operation and applicable to the impugned asst. yrs. 1997-98, 1998-99 and 1999-2000. Therefore, the said issue is decided against the assessee.

65. The remaining grounds raised either by the assessee or by the Revenue, Centre around the interest income reflected in the accounts of the company along with the interest expenditure. The contention of the Revenue in this regard is that the CIT(A) ought not to have treated interest income as business income. The force of the contention is must diluted by the finding of the CIT(A) himself that the 90 per cent of the gross interest income be excluded in computing the benefits available under Section 80HHE. Therefore, we do not find much force in the argument of the Revenue on this point. We dismiss all those grounds.

66. The contention of the assessee with reference to interest income and interest expenditure is that, it should be netted off inter se.

But, as the assessee-company has not established the necessary nexus between the funds involved and the interest earned and interest paid, the contention of netting off interest cannot be accepted. The other contention of the assessee is that the interest income should have been exempt under Section 10B. As the business income of the assessee-company itself is not considered eligible for exemption under Section 10B, the question does not arise in respect of interest income as well. Therefore, all the contentions raised by the assessee with reference to question of interest were also rejected.

67. The learned CIT had, in the course of the argument of the case contended that the Tribunal on the basis of the duty cast on it and in exercise of the appellate

powers conferred on it should consider the ground of the Revenue against granting of deduction under Section 80HHE in respect of the income received from M/s Unisys, even though the relevant additional grounds raised by the Revenue have been rejected by the Tribunal. The objections of the Revenue were considered by the Tribunal while adjudicating its petition for admission of additional grounds. The Tribunal has held through its interim order dt. 4th Jan., 2005 that the said grounds of the Revenue were not admissible. As the Tribunal has already taken a conscientious view on this subject, it is not permissible for us to review the decision.

68. The last issue to be considered is with reference to levy of interest under Sections 234B and 234C. As these grounds are only consequential in nature, no formal adjudication is called for. The assessing authority will recompute the interest liability in accordance with law on revising the assessment orders.

69. In result, the appeals filed by the assessee-company are dismissed and the appeals filed by the Revenue are partly allowed.

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