

Cybertech Systems and Software Ltd. Vs. Assistant Cit, Range 8(1)

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Nov-30-2005

Reported in : (2006)7SOT230(Mum.)

Appellant : Cybertech Systems and Software Ltd.

Respondent : Assistant Cit, Range 8(1)

Judgement :

These cross-appeals arise out of the order dated 29-3-2004 of the Commissioner (Appeals)-VIII, Mumbai for the assessment year 2000-01.

The first ground in the assessee's appeal questions the validity of the assessment framed under section 147 of the Income Tax Act. We have heard both the sides and have carefully gone through the records. The return of income for the assessment year under consideration was processed under section 143(i) of the Act and no notice under section 143(2) of the Act was issued. Subsequently, the assessing officer was of the opinion that the income chargeable to tax had escaped assessment in the light of the fact that in the preceding assessment year there was a finding that the assessee is not eligible for deduction under section 10B of the Act. Accordingly, reassessment proceedings were initiated by issue of notice under section 148 of the Act on the ground that the income had escaped assessment in terms of Explanation 2 to section 147 of the Act. In respect of this action, the main contention of the assessee before us is that there was no omission on the part of the assessee with regard to the claim made in the return of income filed. All the details relating to the claim were available in the return. In the

light of the same it cannot be said that there had been any escapement of income for assessment. According to him there existed no prima facie material for coming to such a conclusion. The contention of the assessee, as we see in the light of the discussions in the impugned order, the reassessment has no legs to stand. Prima facie the assessing officer had no reason to arrive at the conclusion that the income had, in fact, escaped assessment. Moreover, the income was only determined under section 143(i) of the Act and the assessing officer had not issued any notice under section 143 of the Act and the only way to bring the income escaping the tax is by taking recourse to section 148 of the Act. In our view, the facts and circumstances of the case, the reassessment proceedings have been validly initiated and we decline to interfere.

The next set of disputes relates to the assessee's claim for deduction under section 10B of the Act and alternatively the claim for deduction under section 80 HHE of the Act. The facts relevant to these disputes are that the assessee is a domestic company incorporated in India on 19-1-1995 doing business of software technology. The assessee-company has been approved by the Government of India, Ministry of Industry, as an Export Oriented Unit (hereinafter referred to as the EOU). The approval of the Ministry was granted vide letter dated 5-10-1995, for the manufacture of computer software. Such approval had been renewed vide letter dated 19-6-1998. The activities of the assessee-company have been carried on the basis of the agreement, it had entered into with various parties working in the realm of software development. The assessee-company, for the purpose of its activities, has entered into agreements with the following parties for the business of computer software and has received amounts stated against each of them : The above receipts have been claimed to be the profits and gains derived by it as 100% EOU. Accordingly, the assessee claimed deduction under section 10B of the Act or in the alternative deduction under section 80HHE of the Act in respect of the profits derived by it on development of software. The assessing officer, while framing the assessment, was of the view that the assessee did not satisfy the conditions for exemption under section 10B of the Act. He relied upon his own findings in the earlier assessment years as also the finding of the Commissioner (Appeals) in those years to deny the benefit of deduction either under section 10B or under section 80HHE of the Act.

The learned counsel for the assessee reiterated the contentions that were raised before the revenue authorities in relation to the assessee's claim for exemption under section 10B of the Act or the alternative claim of deduction under section 80HHE of the Act in respect of the income in question derived by virtue of the agreements, which the assessee had entered into with its clients. The learned counsel for the assessee explained each of these agreements. All the disputed agreements are part of the paper-book. The assessee has also supported its claim on the basis of the sample invoices, filed again as part of the paper book. Reference to the agreements and sample invoices was made during the course of hearing. The assessee has also furnished the percentage of its total sales in each of such clients to the total sales of the whole concern. The assessee has also filed details of the decision taken by the Commissioner (Appeals). The order of the Tribunal for the assessee's own case for assessment years 1997-98, 1998-99 and 1999-2000 in ITA Nos. 2781, 2782 & 2863/Mum./2003, dated 7-4-2005, has also been filed. The learned counsel for the assessee admitted that certain agreements have been considered by the Tribunal and with regard to the agreements with CIC-ATC (old agreement), various domestic, CIC-recruitment and training and CIT-others, which are respectively at Sr. Nos. 9, 10, 11 and 12 in the client wise analysis statement, are agreed to be covered against the assessee by the aforesaid order of the Tribunal. The learned counsel for the assessee pleaded that the matter has been taken up before the Bombay High Court as also by way of Miscellaneous Application before the Tribunal. But, in any event, the sales involved in these agreements is only to the extent of 19.396 of the total sales, which does not, in any way, disentitle the assessee from claiming relief under section 10B of the Act inasmuch as the sales to other clientele was more than 75% of the assessee's total sales during the year under consideration. The order of the Tribunal, according to the learned counsel for the assessee, covers the eligibility or otherwise of the receipts from only the aforesaid agreements. The learned counsel for the assessee also agreed that in respect of these agreements the view of the Tribunal is expressly in favour of the department and wants us to confirm the decision of the lower authorities in respect of the business income as arising out of these agreements. The learned departmental Representative, on the other hand, strongly relied upon the order of the Tribunal on the issue covering the

very same agreement.

We have carefully considered the submissions in relation to these agreements, which are admittedly covered in favour of the revenue by the order of the Tribunal referred to above. We, therefore, confirm the findings of the Commissioner (Appeals) on this issue, wherein in relation to CIC-ATC agreement, domestic agreement, the benefit of exemption under section 10B or deduction under section 80HHE has been totally denied as these are basically agreements not involving eligible exports under section 10B of the Act. In relation to the agreement relating to CIC-recruitment and training and CIC-others, the Commissioner (Appeals) denied the benefit of exemption under section 10B of the Act -but allowed only 10% of the business income as covered and eligible for deduction under section 80HHE of the Act. The learned counsel for the assessee, who argued before us, has fairly admitted that the Tribunal has totally denied both reliefs in relation to these two agreements. Therefore, considering 10 per cent of the business profits as covered under section 80HHE, as was done by the Commissioner (Appeals), in the light of the order of the Tribunal is incorrect.

Accordingly, we set aside the impugned order in relation to these agreements by restoring the order of the assessing officer on this issue. The ground raised by the revenue in its appeal on this part of the issue is to be treated as allowed in the light of our own order, cited supra for the earlier assessment years.

Now we take up the agreement with other clients, which are subject-matter of determination of relief under section 10B as well as under section 80HHE of the Act. The first agreement for our consideration is the one with Unisys. The learned counsel for the assessee pointed out that exemption under section 10B of the Act was denied by the Tribunal in the earlier years on the reasoning that sales to Unisys was less than 75 per cent of the assessee's total sales. The learned counsel submitted that there appears to be an obvious and inadvertent error in the above mentioned order of the Tribunal because, according to him, what is to be seen is not whether the exports to a particular client is at least 75 per cent of the total sales but exports of software to all clients constitute at least 75 per cent of the total sales. Any other view, according to the learned counsel for the assessee

would make it impossible to satisfy the conditions laid down in section 10B of the Act. He illustrated by way of an example that if the assessee has 100 per cent exports of software to six parties and has no local sales at all to five parties, to each one of them at 20 per cent of total exports, the assessee as per the Tribunal's view would not be eligible for relief under section 10B of the Act which, according to him, will result in an absurd proposition not found in the provisions of section 10B of the Act. The relevant provisions of section 10B are reproduced below : "10B. (1) Subject to the provisions of this section, any profits and gains derived by the 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 : (i)(a) in relation to an undertaking which begins to manufacture or produce any article or thing on or after the 1-4-1994, its exports of such articles and things are not less than seventy-five per cent of the total sales thereof during the previous year;" (Emphasis italicised in print, supplied) He drew our attention to the discussion in para 50 of the aforementioned order of the Tribunal, which discusses this issue. The said paragraph is reproduced below : "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 Commissioner (Appeals) 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 80HHE. But, that fact alone does not qualify the assessee-company to seek exemption under section 10B mainly for the reasons 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)." The other major fatal mistake in the order, according to the learned counsel for the assessee, is that the Tribunal did not consider the provisions of section 10BB of the Act inserted by the Finance Act, 1999 with effect from 10-4-1999. The non-

consideration of this provision by the Tribunal has lead to miscarriage of justice. The third point on which the learned counsel for the assessee stressed our attention is that in the earlier years the Tribunal considered the sequence of the events carried on by the assessee-company in respect of CIC-USA, wherein it has come to a conclusion that such activity carried on was that of professional recruiting agency. In the opinion of the Tribunal the value added service provided by the assessee-company is that the recruits are trained in a specific software programme viz., SAP Software, Imparting of such training according to the Tribunal was necessary in the line of computer software. The training activity, the Tribunal opined, conducted by the assessee-company was an integral part of recruiting professional for foreign company and not for development of computer software programme. The discussion in paragraphs 47 and 48 of the aforesaid order of the Tribunal was read out. The Tribunal considered the agreement with CIC to deny the benefit even in relation to agreement with Unisys without appreciating the fact that the scope of work in both these concerns has never remained the same. The learned counsel for the assessee pointed out that relief under section 10B of the Act, in the light of these contentions, has not been properly considered in the light of the express provisions of the Act. So, the observations in the order of the Tribunal should be taken as per incuriam, relevant to the facts of those years and, therefore, it was pleaded that the agreement, which have different scope in nature, should be independently construed in the light of the same argument and the generalization according to the learned counsel for the assessee, has only resulted in the miscarriage of justice. He, therefore, vehemently pleaded that the order of the Tribunal in relation to relief under section 10B of the Act should be considered in the light of the facts existing in each of the agreement vis-a-vis the requirement of the statute under section 10B of the Act. He pointed out that, in any event, the agreement at Sr. Nos. 2, 4, 5, 6, 7 and 8 mentioned in para 3 above are all contracts that were entered into after 31-3-1999 and, therefore, there is no question of applying the ratio of the decision of the Tribunal for the earlier years to the facts emerging out of these agreements.

The learned departmental Representative, on the other hand, pleaded that the contentions of the assessee have been rejected by the Tribunal while considering the assessee's claim for relief under section 10B of the Act in the earlier years and

that order, according to him, we hold the field in favour of the department. According to him, the order of the Tribunal has concluded the matter in relation to the assessee's claim for relief under section 10B of the Act and the assessee should not be permitted to re-agitate the issue in any manner. He mainly relied upon the order of the Tribunal in relation to the denial of relief under section 10B of the Act.

We have anxiously considered the rival contentions and have gone through the record. The relevant provision of section 10B extracted in para 6 above relates to special provision in respect of 100 per cent export-oriented undertaking. It provides that any profits and gains derived by such an undertaking shall not to be included in the total income of the assessee. In other words, the exemption is total and complete. Clause (i)(a) of sub-section (2) provides for a relief where the undertaking exports such articles or things and such exports are not less than 75 per cent of the total sales thereof during the previous year. The plain and simple meaning of this provision is that it should be either 100 per cent EOU or at least its export should be not less than 75 per cent of the total sales. In other words, the Act itself envisages the relief where such exports are at least in excess of 75 per cent of the total sales. This provision enables an assessee to claim such relief even its major manufactured articles or things are exported to a large extent as explained earlier. In the case before us, the assessee has a domestic turnover of 1.51 per cent and ineligible exports to the extent of 19.3 per cent where the assessee cannot be said to be exporting any such articles or things. In other words, the other exports in total are more than 75 per cent of the total sales.

Therefore, the denial of relief to the assessee on the ground that export to a particular client is less than 75 per cent of the total sales is not the requirement of the section itself. It is highly impossible to satisfy the condition that export to each individual client should be more than 75 per cent of the total sales when, in fact, an assessee has a multiple clients as in the case of the assessee. In this case of the assessee the export to eight of the overseas clientele in total is more than 75 per cent but in each case obviously it cannot exceed 75 per cent. Therefore, we agree that such proposition will only result in absurdity or impossible and not the exact requirement of the statute. We, therefore, have to appreciate the assessee's claim

in the light of the plain provisions of the section, which nowhere requires that export to each such client should exceed 75 per cent. Therefore, the decision rendered by the Tribunal in the earlier years in relation to these issues, in our humble opinion, cannot be applied to the facts of this case in the light of the express provisions of the Act. Moreover the Tribunal appears to have lost sight of the provisions of section 10BB, wherein computer programmes have been given an extended meaning. It reads as under : "The profits and gains derived by an undertaking from the production of computer programmes under section 10B, as it stood prior to its substitution by section 7 of the Finance Act, 2000 (10 of 2000), shall be construed as if for the words'computer programmes', the words'computer programmes or processing or management of electronic data'had been substituted in that section." The term 'manufacture or produce used in the aforesaid section has been explained by the provisions of section 10B reproduced above. In the light of the aforesaid provision, in our view, the relief under section 10B of the Act cannot be denied to the assessee on the ground that export of such software to each of the parties was not atleast 75 per cent of the total sales.

We now take up the agreements in each of the cases and see whether the assessee has only acted as a recruitment agent or the assessee has engaged itself in manufacture or production of articles or things in the form of computer programme, which is also a part of 'manufacture' as explained by the statute and has specifically given an extended meaning to the provisions of section 10BB already extracted hereinbefore. The agreement with Unisys is placed at pages 87 to 119 of the paper-book. This is a technical service agreement between Unisys Corporation and the assessee. The technical agreement No. 10063 and the statement of the work have been placed at pages 89 to 121 of the paper-book. We may refer to the statement of work placed at pages 101 to 108 of the paper-book. Relevant portion of which is reproduced below : "CyberTech International has available and will provide to Unisys Corporation the manpower, technical expertise, and product knowledge required to completely support all CTOS Software products as specified herein. CyberTech will make every effort to support the products within the Unisys Support Policy as outlined in the Technical Services Agreement. CyberTech will maintain the same interface with external Unisys support organizations as previously supported by the San Jose Engineering

organization." "(1) provide CyberTech with CTOS hardware and operating software for both the Yardley, PA and Bombay, India sites, as identified in Addendum E. Enough hardware and/or software will be provided to allow CyberTech to analyze/ duplicate reported problems, develop...., build and test products to verify all changes, create and.... scenarios to respond to contacts or other questions, build any required special or other system releases, and to, in at least a similar environment, verify the overall system performance of the modified software product.

The development systems will include, test beds, special controllers (slices), test equipment and administrative systems at least two of each unique hardware system or peripheral released by Unisys for the CTOS customer base plus enough components to assessable the following complete systems Five complete systems, one or more controller slices as required for CSC telephone support, and one server configuration. Specific concentrations will be identified and outlined in the transition plan Eight full development systems, at least one server configuration, and one XE system within the test beds. Specific configurations and details will be outlined in the transition plan (2) will provide direct contact to the customer environment needed to demonstrate the problem. CyberTech will be provided access to network connections including TCP/IP, BNet, SNA and OSI.(3) provide access to and license to use source and object code for all CTOS products and the Compilers and Utilities required for development, system generation and configuration management. Written any object code for each supported release level must be established and agreed between Unisys and CyberTech. If special system configurations are required to test any specific release, Unisys will provide access to either Unisys or Customer equipment for this testing.

(4) provide CyberTech with complete documentation of all CTOS products, including product specifications, user documentation, release notes, patch listings, release status reports and statistics for each release level to be supported.

(5) will provide active on-line, update access to the Unisys PRIMUS Database, the MAPPER Database for tracking escalated problems by WALERTs and CSRs, and

the Internet Web Pages and PatchNet System. Cyber Tech will additionally need CTOS OFIS Mail connections with the San Jose (and thus all other Unisys sites) Electronic Mail service for both Yardley and Bombay.

(2) make every effort to analyze and respond to all UCFs within Unisys response guidelines listed below. When necessary, CyberTech will develop and distribute a fixed product to the affected client within the guidelines for the priority of the problem. When a fix is unnecessary or a work around is established, CyberTech will close the UCF as allowed by Unisys guidelines or Support policy. CyberTech will make every effort to follow Unisys policy for Priority A and Priority B problems. Priority C problems will be treated as New Feature Suggestions. Statistics for response and closure will be maintained and reported to Unisys as required." The payment for these work is provided in article 4, which is also reproduced below : 1. The total Software Support compensation to CONTRACTOR for the WORK performed hereunder shall not exceed one million two hundred thousand dollars (\$1,200,000.00) as outlined below, plus any authorized travel and living expenses as specified in sub-paragraph A2 of this Article, and any applicable sales and/or use tax as specified in Paragraph C of this Article.

The following payments for support are in United States Dollars and based on monthly billing by Cyber Tech.

300,000 (the first two months payment (\$50,000) will be due upon Contract signing) 2. Upon Unisys reasonable request, CyberTech will furnish qualified personnel for on-site assistance to Unisys to resolve problems. In such even, Unisys will pay CyberTech at the rates set forth in Addendum B of the Agreement for the time of such personnel and reimburse CyberTech for travel and living expenses in accordance with Addendum C. However, CyberTech will not be entitled to any such payment if the problem is negligently caused by CyberTech." For maintaining brevity we have extracted the relevant portions, but going through the copies of the agreement as also the several addendums, it does not, in any way, lead to the conclusion that the assessee has been paid so much of money just for recruiting the employees or for imparting training of the employees for and on behalf of Unisys. In our view, it is taking too a narrow view of the matter if the

agreement were to be construed as agreement for recruitment of personnel. In any event, the Commissioner (Appeals) himself granted both in the earlier years as also in the assessment year under consideration relief under section 80HHE of the Act. The Tribunal has confirmed the order of the Commissioner (Appeals) giving deduction under section 80HHE of the Act in the earlier years. But appreciating the facts of the case in the light of the agreement provided, we are unable to accept the departmental view that the assessee cannot be considered as engaged in the business of manufacture or production of articles or things within the meaning of sections 10B and 10BB of the Act in respect of the profits and gains arising out of this agreement.

The denial of such relief, in our view, is on a wrong reasoning that export of articles and things under this agreement with Unisys did not exceed 75% of the total sales. It only results in the miscarriage of justice if such a proposition of the department were to be accepted.

We, therefore, direct the assessing officer to allow deduction under section 10B of the Act. The relief under section 80HHE, in the facts and circumstances of the case, as an alternative prayer, becomes academic.

Coming to second agreement, which is placed at pages 36 to 44 of the paper-book, the same is entered into on 1-7-1999 Cressese Inc. Yardley.

The statement of work placed at page 37 of the paper-book is as under: "State of Work'or'SOW'shall mean the written document or documents mutually agreed between customer and consultant providing a general description of consulting services, applicable rates and other terms reasonably necessary to govern work orders and shall be attached hereto as contained in 'Statement C Work'.

Work Product. As used in this Agreement the term 'Work Product'means any deliverable items and other products of Consulting Services, whether or not ... and all related intellectual Property Rights, know how.... mask works, trademarks, formulae, procession, manufacturing techniques, trade secrets, ideas, artwork, software or other copyrightable or patentable work.

Y2K Compliant - shall mean with respect of Software, systems, Consulting Services and deliverables that the same shall not be affected adversely by the occurrence of use of dates before, on or after 1-1-2001 A.D. including dates and leap years between the twentieth and twenty-first centuries ('Millennial Dates') Any Software and deliverables provided by Consultant (including any software, hardware or firmware product(s) delivery by Consultant to Customer) will without error or omission, create, receive, store, process and output (collectively, 'Compute') information related to Millennial Dates. This warranty includes without limitation, that the deliverables and Software provided by Consultant will accurately, and without performance degradation, compute Millennial Dates, date-dependent date, date-related interfaces, or other date-related functions (including without limitation, calculating, comparing and sequencing such functions).

(a) Consultant shall provide Consulting Services to Customer in accordance with the terms and conditions of this Agreement, together with the SOW attached hereto as 'Exhibit A'. The specific scope of any work and details of particular Consulting Services including proposed time and materials cost estimates, fixed price, or Not To Exceed amounts, shall be set forth in the Statement of Work or any other document that references the appropriate Statement of Work to be jointly prepared by Customer and Consultant and approved by Customer prior to the start of any work. Consultant shall not be bound to perform and Customer shall not be required to pay for, any Consulting Services not contained in the Statement of Work or associated documents, unless accompanied by a Change order as set forth in section 2.2.

(b) Consultant will ensure that all personnel assigned shall have the skills necessary to complete the tasks set forth in the Statement of Work.

(c) Any work request shall be via a Statement of Work issued in accordance with this section 2. 1. Nothing in this Agreement shall preclude Customer from obtaining the same or similar services From any other source at any time. Nothing in preclude Consultant from providing similar services to another company, provided Consultant maintains the confidentiality of customer's proprietary information." In this agreement it is provided that the assessee had the expertise in

area related to the business of customer and for the business of providing professional services with regard to those areas of expertise. The details of this agreement in the form of work statement are placed at page 45 of the paper-book for the following services : "This is a Work Statement under the Master Consulting Services Agreement between Customer and Consultant.

2. Description and/or Specifications of the services to be performed and the Deliverables to be delivered to Customer To develop a helpdesk/call centre product that can be developed either as a fully licensed product or using the ASP delivery mode.

Phase one - Research and Development of visualize and conceptualize the best of breed product for Cresere Inc. By studying other competing products available in the market for their features, functionality, architecture.

Going through the above agreement also it cannot be said that the assessee is rendering just a recruitment service or training service as made out by the revenue. The assessee, in our opinion, having regard to the nature of the work mentioned in this agreement, is engaged in the manufacture or production of computer programme which falls within the scheme of 10B read with section 10BB of the Act. The assessee's claim for relief under section 10B of the Act is therefore, directed to be allowed.

In relation to agreement No. 3 with CTE-BNP, the Commissioner (Appeals) has granted 100% deduction under section 80HHE of the Act in the earlier years and that has become final. The only ground on which relief under section 10B was denied is that the assessee's export to this client did not exceed 75% of the assessee's total sales. In the light of the discussions elsewhere in this order, we do not agree with the stand of the revenue that the assessee is not entitled for relief under section 10B of the Act in respect of the exports made to this client. Accordingly, we direct the assessing officer to allow relief under section 10B of the Act in respect of the profits and gains derived as admittedly the agreement is an old agreement and on which the revenue has already granted relief under section 80HHE of the Act, which is directed to be withdrawn.

Now we take up the agreement No. 4 with CIC e-worker. This agreement is newly entered into during the year under consideration. Although the assessee was to recruit and train software professionals, but in that process it develops a software of its own. Agreement in this case is entered into for development of e-worker software. A copy of the manual involving the development and supply of the software is placed at pages 138 to 541 of the paper-book. It may be pointed out that the revenue authorities have considered only 10% of the profits as eligible for deduction under section 80HHE of the Act on the reasoning that it was mainly in the nature of recruitment and training contract. The contract itself is placed at pages 55 to 67 of the paper-book. The contract also contains the scope of the work at page 65 of the paper-book, which reads as under : "This is a Work Statement under the Master Consulting Services Agreement between Customer and Consultant.

2. Description and/or Specifications of the services to be performed and the Deliverables to be delivered to Customer.

To develop e-worker, a commerce serve that enables both B-B (Business to Business) and B-C (Business to Customer) commerce.

Phase one-Study various other leading products in the market, to decide upon features, serviceability and technical architecture of the product.

In terms of the contract user manual which was delivered to the parties is also part of the paper-book and if one were to go through the same it can definitely be seen that this is not a contract pure and simple for recruitment and training of personnel. We, therefore, do not agree with the stand of the revenue that the assessee is entitled to relief under section 80HHE at 10% and not under section 10B of the Act. We, therefore direct the assessing officer to allow deduction under section 10B of the Act for the reasons that are already spelt out in paragraph 8 hereinbefore. We may mention that the scope of the work as detailed in para 9 above does not show that the payment of so much of contracted amount was just for recruitment of employees or for training them. In our opinion, having regard to the terms of the agreement, it was clearly for manufacture or production of articles or things within the meaning of section 10B and its extended meaning as spelt out

in section 10BB of the Act. We may also mention that merely because the payment is based on the man-hour spent on the job or the employees provided, it does not mean that the assessee was not engaged in the activity of manufacture or production of articles or things within the meaning of the provisions stated above. The complex and highly technical activities in the field of computer software, in our opinion, truly is an act of manufacture or production of articles or things as spelt out in the aforesaid provision.

Now coming to the agreement with SAP Arabia, the contract itself provides for carrying on the work of software development relief/ processing/ maintenance of electronic data for which software professional were deputed to customers locations on-site. The scope of the work is clearly covered by the provisions of section 10B read with section 10BB as construed by the Board vide its Circular No. 694, dated 23-11-1994. This is not a case where the assessee has only to do recruitment or training of personnel, but the assessee is engaged in the on-site software development. In this contract with SAP-Arabia the software professionals remained on the payroll of the assessee while they are deputed on-site for carrying out assignment of software development. The relevant copies of the agreement are also placed at pages 10-15 of the paper-book. Having gone through the details contained therein, we are of the opinion that it cannot be said that the assessee is not entitled to relief under section 10B or under section 80HHE of the Act. The revenue authorities have denied both the relief but, in our view, the assessee is entitled to relief under section 10B of the Act in relation to the income derived on export of software out of India to this client.

This takes us to the agreement with Geotronics-UK and Veritema Sweden.

These agreements are of the same nature as has been entered with SAF Arabia. in the light of our decision in relation to the agreement with SAF Arabia, we hold that the assessee is entitled to relief under section 10B of the Act in respect to the profits and gains derived by the assessee under these agreements.

Now it leads us to the agreement with CIC-ATC, which is completely a new agreement dated 1-7-1999. The agreement itself is placed at pages 19 to 27 of the paper-book. The agreement provides that the assessee has expertise in the

following fields and the scope of service is mentioned in clauses 1.1 and 1.2 of the agreement : "(1) Installation, implernentation, enhancements and maintenance of applications -SAP and SIEBEL (2) Design, content development, hosting and maintenance of corporate websites and portals (3) Developing sales and marketing collateral such as brochures, presentations, proposals, case studies etc.

(4) Developing documentation such as implementation methodology, project documentation etc.

(5) Design of networking and internetworking systems architecture, estimations, networking diagrams etc." The assessee is obliged to grant the patent right as provided in articles 4.1 and 4.2 in relation to all software programme undertaken by virtue of the agreement. Having regard to all these, it cannot be said that the assessee is only a recruiting and training agent while considering its claim for relief under section 10B of the Act. We, therefore, in the light of all these discussions, accept the claim of the assessee for relief under section 10B of the Act. As a result of this, the revenue may have to withdraw the relief granted under section 80HHE of the Act as a consequence of this order.

As regards the claim of deduction under section 10B on interest income, in the light of the fact that we have held that the assessee is entitled to relief under section 10B of the Act, the assessee is naturally entitled for relief under section 10B of the Act in respect of the interest income also, which is admittedly a part of business income.

The next ground relates to the levy of interest under sections 234C and 234D of the Act. The learned counsel for the assessee submitted that the department has levied interest on excess refund under section 234D of the Act disregarding the fact that the said section itself has come into force on 1-6-2003 by way of insertion by the Finance Act, 2003. We agree with the contention of the learned counsel for the assessee and hold that the assessee is not liable to pay any interest under section 234D of the Act, which has admittedly come into force on 1-6-2003 and is not applicable to the assessment year under consideration, as interpreted by the Delhi Bench of the Tribunal in its decision reported at 97 TTJ 108. As regard the levy of interest under section 234C of the Act, we hold to be consequential.

The next ground in the assessee's appeal relates to allocation of 1 % of the dividend receipts as expenses incurred for earning the dividend income. We have heard both the sides and direct the assessing officer to follow the ratio laid down by the Delhi Bench of the Tribunal in the case of Maruti Udyog Ltd. v. Dy. CIT(2005) 92 ITD 119 (Del). It is ordered accordingly.

"On the facts and in the circumstances of the case and in law the Commissioner (Appeals) erred in directing the assessing officer to take 10% of the various heads as expenditure on development of computer software and to allow deduction under section 10B or 80HHE of the Act without appreciating the facts of the case." The above ground, as admitted by the learned departmental Representative, was not happily worded. But, however, he addressed us on the issue relating to the direction of the Commissioner (Appeals) to allow deduction either under section 10B or under section 80HHE of the Act fully or partly on certain receipts without appreciating the facts of the case. The learned departmental Representative was directed to file the amended grounds in the light of the argument advanced before us. He accordingly filed the amended ground, which reads as under : "On the facts and in the circumstances of the case and in law, the Commissioner (Appeals) erred in directing the assessing officer to allow deduction under section 10B or under section 80HHE of the Act, fully or partially on certain receipts, without appreciating the facts of the case." We have already held above in para 5 that the assessee is not entitled to deduction either under section 1013 or under section 80HHE of the Act in respect of the profits and gains arising out of the contract entered into with CIC-ATC (old agreement), various domestic, CIC-recruitment and training and CIT-others and has held that to this effect the ground raised by the department is to be treated as allowed.

We have also held that the assessee is entitled to full deduction under section 10B of the Act in respect of the profits and gains arising out of the contracts entered into with other parties and as a consequence directed the assessing officer to withdraw the relief granted by the Commissioner (Appeals) under section 80HHE of the Act. To this effect also the revenue's ground is treated as allowed. Accordingly, the revenue's ground is partly allowed.