IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER
AND SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

ITA No.1265/Bang/2014
Assessment year : 2005-06

Infosys BPO Ltd., Electronic City, Hosur Road, Bangalore. **PAN : AACCP 4478N**	Vs.	The Assistant Commissioner of Income Tax, Circle 11(4), Bangalore.
APPELLANT		RESPONDENT

ITA No.1320/Bang/2014
Assessment year : 2005-06

The Deputy Commissioner of Income Tax, Circle 11(4), Bangalore.	Vs.	Infosys BPO Ltd., Electronic City, Hosur Road, Bangalore. **PAN : AACCP 4478N**
APPELLANT		RESPONDENT

Assessee by	:	Shri Padamchand Khincha, CA
Revenue by	:	Dr. Shankar Prasad, K., Jt. CIT(DR)

Date of hearing	:	07.07.2015
Date of Pronouncement	:	30.07.2015

O R D E R

Per N.V. Vasudevan, Judicial Member

These are cross appeals by the assessee and the Revenue directed against the order dated 23.6.2014 of the CIT(Appeals)-I, Bangalore relating to assessment year 2005-06.

ITA 1320/B/2014 (Revenue's appeal)

2. First we shall take up the appeal of the Revenue for consideration. Ground No.1 is general in nature.

3. Ground Nos. 2 & 3 is with regard to action of the revenue authorities in excluding the telecommunication charges and expenses incurred in foreign currency from the export turnover and total turnover while computing deduction u/s. 10A of the Act. According to the Revenue, the aforesaid expenses should be excluded only from the export turnover and not from the total turnover. According to the Revenue, the decision of the Hon'ble High Court of Karnataka in *Tata Elxsi Ltd., 349 ITR 98* in which it was held that whatever is excluded from the export turnover, should also be excluded from the total turnover, has not been accepted by the Revenue and a SLP has been filed before the Hon'ble Supreme Court and therefore the order of the CIT(Appeals) should be reversed.

4. The only grievance of the Revenue is that the decision of Hon'ble High Court of Karnataka in *Tata Elxsi (supra)* has not attained finality and

a SLP by the department is pending before the Hon'ble Supreme Court. We are of the view that as of today, law declared by the Hon'ble High Court of Karnataka which is the jurisdictional High Court is binding on us. We therefore hold that the order of CIT(A) does not call for any interference and accordingly the same is confirmed.

5. Ground Nos. 4 & 5 is with regard to grievance of the Revenue that the brought forward unabsorbed losses of earlier years should be set off against the profits of the 10A unit and deduction u/s. 10A should be allowed only after such set off. This issue has also been settled by the judgment of the Hon'ble High Court of Karnataka in the case of *Yokogawa India Ltd., 341 ITR 385 (Karn)*, wherein a view was taken that deduction u/s. 10A appearing in Chapter III of the Act was an exemption provision and therefore set off of brought forward unabsorbed losses should not be made. According to the Revenue, the CBDT had issued a Circular No.7/2003 dated 5.9.2003 wherein it had taken a view that deduction u/s. 10A was in fact a deduction and not an exemption and this aspect had not been considered by the Hon'ble High Court in the decision rendered in *Yokogawa India Ltd. (supra)*. On this issue, we find that the effect of the CBDT Circular vis-à-vis the decision of the Hon'ble High Court of Karnataka in *Yokogawa India Ltd. (supra)* was considered by this Tribunal in the case of *DCIT v. Biocon in ITA.248, 368 to 371 & 1206/Bang/2010, order dt 30.04.2014*. In the aforesaid decision, the Tribunal observed as follows:-

"57. ……. The assessee during the previous year had four units which were entitled to claim deduction u/s. 10B of the Act viz., CMZ Unit, SAP Unit, RHI Unit and IFP Unit. The assessee had claimed deduction u/s. 10B of the Act in respect of the aforesaid units totaling Rs.157,22,33,066 which is the sum total of deduction u/s. 10B for the four units as follows:-

(1) CMZ Unit	: 6,87,70,229
(2) SAP Unit	: 76,60,29,880
(3) RHI Unit	: 52,42,56,278
(4) IFP Unit	: 21,31,76,679
Total	157,22,33,066

58. The assessee had non-10B units as well. In those non-10B units, there was a loss of Rs.105,92,19,172. In the return of income filed by the assessee, the assessee sought to carry forward the loss of non-10B units for set off against the profits of non-10B units in the subsequent assessment years. The AO firstly noticed that there was income from other sources to the extent of Rs.4,71,15,896 and such had to be set off against the loss of the non-10B units. Accordingly, the AO held that the loss of the non-10B units that had to be considered for carry forward would be Rs.101,21,03,280.

59. Thereafter, the AO was of the view that income of the 10B units had to be set off against the loss of the non-10B units and if it is so set off, there will be no loss that needs to be carried forward. In coming to the aforesaid conclusion, the AO expressed the opinion that provisions of section 10B are deduction provisions and therefore effect will have to be given to the provisions of section 72 of the Act, even in respect of profits of the 10B unit. Accordingly, the claim of the assessee for carry forward of loss of non-10B unit was not allowed by the AO.

60. On appeal by the assessee, it was contended that the provisions of section 10A and section 10B are exemption provisions and therefore the profit of 10A and 10B units will not enter the computation of total income at all and therefore the profits of these units need not be set off against the loss of non-10B unit by invoking the provisions of section 72 of the Act.

> 61. The CIT(Appeals) did not agree with the contention of the assessee and in doing so, he placed reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT v. Himatsingike Seide Ltd., 286 ITR 255 (Kar). In the aforesaid decision, the Hon'ble High Court has taken the view that deduction u/s. 10B has to be allowed after set off of unabsorbed depreciation and unabsorbed investment allowance. The Hon'ble Court took the view that the aforesaid provision was only an exemption provision. The CIT(Appeals) noticed that the aforesaid decision was followed by the ITAT Bangalore Bench in the case of Intelnet Technologies India Pvt. Ltd. v. ITO, ITA No.1021/Bang/2009 dated 12.3.2010. Similar view expressed by the Delhi Bench of the Tribunal in the case of Global Vantage Pvt. Ltd. v. DCIT, 2010 TIOL 24 ITAT (DEL) was also referred to by the CIT(A). A contrary view was expressed by the Bangalore Bench of the Tribunal in the case of KPIT Cummins Info Systems (Bangalore) Pvt. Ltd. v. ACIT, 120 TTJ 956. The CIT(A) found that in the case of Global Vantage Pvt. Ltd. (supra) decided by the Delhi Tribunal this decision has been held to be not in tune with the decision of the Hon'ble High Court of Karnataka in the case of Himatsingike Seide Ltd. (supra). The CIT(A) also referred to the decision of the Chennai Bench of the Tribunal in the case of Sword Global India Pvt. Ltd. v. ITO, 306 ITR 286 (AT), wherein the provisions of section 10A and 10B have been held to be deduction provisions and not exemption provisions.

6. For all the above reasons, the CIT(Appeals) confirmed the order of the Assessing Officer. Against the order of the CIT(A), the Assessee was in appeal before the Tribunal. This Tribunal dealt with the issue in the following words :

> 63. We have given a careful consideration to the rival submissions. The issue as to whether the provisions of Sec.10B of the Act are deduction provisions or exemption provisions will assume great importance. The reason is that if the provisions are considered as

exemption provisions then they will not enter the computation of total income and therefore the loss of the eligible unit cannot be set off against the profits of the non-eligible unit. This issue has already been settled by the Hon'ble Karnataka High Court in the case of Yokogawa India Ltd. (supra). The Hon'ble Karnataka High Court in the case of Yokogawa (supra) had to deal with two substantial question of law. The first substantial question of law was on the right of set off of loss of non-eligible unit against the profit of the eligible unit on which deduction u/s.10B was to be allowed. The Hon'ble Court in para 10 to 20 of its judgment dealt with the issue. The Hon'ble Court noticed that Sec.10-A(1) of the Act (which is in pari materia with Sec.10-B of the Act) read as follows:

> "10B. Special provisions in respect of newly established undertaking in free trade zone etc.,-(1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the Previous-year in which the under-taking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the assesse**e** :"
>
> (emphasis supplied)

64. The expression "Deduction" and "shall be allowed from the total income of the Assessee" used in the aforesaid provisions was considered by the Hon'ble High Court and it held in para 13 to 15 of its judgment that the expression " shall be allowed from the total income of the Assessee" does not mean total income as defined u/s.2(45) of the Act but that expression means "profits and gains of the STP undertaking as understood

in its commercial sense or the total income of the STP unit. Thus the view expressed is that income of the STP undertaking gets quarantined and will not be allowed to be set off against loss of either another STP undertaking or a non STP undertaking. The Hon'ble Court thereafter held that though the expression used in Sec.10A was "Deduction" but in effect it was only an exemption section. These conclusions clearly emanate from para 17 of the Hon'ble Court's judgment.

65. The situation with which we are concerned in the present case is a situation where there is positive income of the eligible unit then the same should be allowed deduction u/s.10B of the Act without setting of the loss of non-eligible unit. The Hon'ble Karnataka High Court in the case of Yokogawa (supra) was concerned with similar situation as set out above. In view of the aforesaid decision of the Hon'ble Karnataka High Court, we are of the view that the claim as made by the Assessee for carry forward of loss of the non-eligible unit had to be allowed without set off of profits of the 10A/10B unit. We hold accordingly and allow the relevant grounds of appeal of the Assessee.

66. We may also observe that the Hon'ble Karnataka High Court's decision in the case of Himatasingike Seide (supra) has held that unabsorbed depreciation (and business loss) of same (s. 10A/10B) unit brought forward from earlier years have to be set off against the profits before computing exempt profits. The assessee in that case set up a 100% EOU in AY 1988-89. For want of profits it did not claim benefits u/s 10B in AYs 1988-89 to 1990-91. From AY 1992-93 it claimed the said benefits for a connective period of 5 years. In AY 1994-95, the assessee computed the profits of the EOU without adjusting the brought forward unabsorbed depreciation of AY 1988-89. It claimed that as s. 10B conferred "exemption" for the profits of the EOU, the said brought forward depreciation could not be set-off from the profits of the EOU but was available to be set-off against income from other sources. It was also claimed that the profits had to be computed on a

"commercial" basis. The AO accepted the claim though the CIT revised his order u/s 263 and directed that the exemption be computed after set-off. On appeal by the assessee, the Tribunal reversed the order of the CIT. On appeal by the department, the High Court in CIT Vs. Himatasingike Seide Ltd. 286 ITR 255 (Kar) reversed the order of the Tribunal and held that the brought forward depreciation had to be adjusted against the profits of the EOU before computing the exemption allowable u/s 10B. In Civil Appeal No.1501 of 2008 dated 19.9.2013 against the aforesaid decision of the Hon'ble Karnataka High Court, the Hon'ble Supreme Court observed as follows while dismissing the appeal:-

> "Having perused the records and in view of the facts and circumstances of the case, we are of opinion that the civil appeal being devoid of any merit deserves to be dismissed and is dismissed accordingly."

67. Thus the ratio has to be confined to the facts and circumstances of the case. The aforesaid observations have to be confined to the facts of that case and as applicable to a case where brought forward losses and depreciation of the very same STP undertaking are not adjusted while arriving at the profits of the 10B unit for allowing deduction u/s.10A/10B of the Act and not in respect of brought forward losses and depreciation of other undertakings/non-10A/10B units. S. 10A/10B(6) as amended by the FA 2003 w.r.e.f. 1.4.2001 provides that depreciation and business loss of the eligible unit relating to the AY 2001-02 & onwards is eligible for set-off & carry forward for set-off against income post tax holiday which means that they need not be so set off as mandated in the decision of the Hon'ble Karnataka High Court in the case of Himatasingike Seide Ltd. (supra). As we have already seen, in Yokogawa India Ltd. 341 ITR 385 (Kar), it was held that even after s. 10A/10B were converted into a "deduction" provision w.e.f 1.4.2001, the benefit of relief u/s 10A/10B is in the nature of "exemption" with reference to "commercial profits" and that as the income of the s. 10A unit has to be excluded at source itself before arriving at the gross

> total income, the question of setting off the loss of the current year's or the brought forward business loss (and unabsorbed depreciation) against the s. 10A profits does not arise. Therefore the decision of the Hon'ble Karnataka High Court in the case of Himatasingike Seide (supra) will not apply to the facts of the present case."

7. In the light of the aforesaid decision, we find that there is no merit in ground Nos.4 & 5 raised by the Revenue also. Accordingly, the same are dismissed.

8. In the result, the appeal by the Revenue is dismissed.

ITA 1265/B/2014 (Assessee's appeal)

9. The effective grounds raised by the assessee read as follows:-

> "1. The order passed by the learned Commissioner of Income tax (Appeals) to the extent prejudicial to the appellant is bad in law is liable to be quashed.
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> 2. The learned CIT(A) at para 3.6 to 3.10 of his order has erred in concluding that losses of STPI unit cannot be set off against other income. The impugned conclusion of the learned CIT(A) is contrary to facts, not at all relevant for the year under consideration and consequently bad in law and liable to be quashed.
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> 3. Even otherwise, as a matter of principle, losses of STPI unit are eligible for set off against other income in accordance with the provisions of the Act.
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> 4. In view of the above and on other grounds to be adduced at the time of hearing, it is requested that the order passed by the learned CIT(A) to the extent prejudicial to the appellant be

quashed or at least the impugned conclusion of the learned CIT(A) at para 3.6 to 3.10 of his order be reversed / deleted."

10. The CIT(Appeals) in paras 3.6 to 3.10 has observed that if there is a loss in 10A unit, that cannot be set off against profits of non-10A unit and tax payable on the profits of non-10A unit cannot be reduced by doing so. In coming to the aforesaid conclusion, the CIT(Appeals) place reliance on the decision of the Bangalore Bench of the Tribunal in the case of *Karle International Pvt. Ltd., 140 ITD 261*.

11. The ld. counsel for the assessee brought to our notice that there was no such issue raised by the assessee before the CIT(Appeals). In this regard, our attention was drawn to the profit & loss account of the 10A units which is placed at page 15 of the paperbook, which shows that two 10A units at Bangalore and Pune earned profits during the previous year of Rs.27,50,48,179 and Rs.3,34,60,503 respectively. According to him, therefore, the assessee's appeal will have to be allowed that on the short point that there is no factual basis for the CIT(A) to have given the impugned directions referred to earlier.

12. We have heard the rival submissions and are of the view that the submissions made by the ld. counsel for the assessee are correct. In this regard, we have also perused computation of total income of the assessee which is at page 7 of the PB and we find that there is no such set off that has been claimed by the assessee. We therefore hold that the order of

CIT(Appeals) on this issue is incorrect and does not arise out of the order of the AO. Consequently the same is quashed. The assessee's appeal is allowed.

13. In the result, the appeal by the Revenue is dismissed, while the assessee's appeal is allowed.

Pronounced in the open court on this 30th day of July, 2015.

Sd/-	Sd/-
(ABRAHAM P. GEORGE) Accountant Member	(N.V. VASUDEVAN) Judicial Member

Bangalore,
Dated, the 30th July, 2015.

/D S/

Copy to:

1. Appellant
2. Respondents
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar /
Senior Private Secretary
ITAT, Bangalore.