

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, जे, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "J", MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं  
श्री एन. के. प्रधान, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and  
Shri N.K. Pradhan, Accountant Member**

**ITA NO. 6463/Mum/2016  
Assessment Year: 2011-12**

ACIT, Circle-8(2)(2) Room no.348, 3 <sup>rd</sup> Floor Aayakar Bhawan, M.K Road Mumbai 400 020	<b>बनाम/</b> Vs.	Sonata Software Ltd. 208, T.V. Industrial Estate, S.K. Ahire Marg Worli, Mumbai 400 030
(राजस्व /Revenue)		(निर्धारिती /Assessee)
<b>P.A. No. AABCS8459D</b>		

राजस्व की ओर से / Revenue by	Shri Saurabh Rai
निर्धारिती की ओर से / Assessee by	Shri Vijay Mehta

सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>21/03/2018</b>
<b>आदेश की तारीख /Date of Order:</b>	<b>21/03/2018</b>

**आदेश / O R D E R**

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 30.08.2016, of the First Appellate Authority, Mumbai. Grounds no.(i) and (ii), pertain to service

charges recovered from SITL and consequent eligibility for deduction u/s 10A of the Income Tax Act, 1961 (hereinafter the Act), ignoring the fact that the issue is pending before the Hon'ble High Court for disposal.

2. During the hearing, at the outset, Shri Vijay Mehta, learned Counsel for the assessee, claimed that the impugned issue is covered in favour of the assessee by the order of the Tribunal dated 31.07.2015 (ITA no. 4678 & 4338/Mum./2012). The learned D.R., Shri Saurabh Rai, though, defended the addition but did not controvert the factual matrix that the issue in hand has been adjudicated by the Tribunal and decided in favour of the assessee.

2.1 We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the relevant portion from the aforesaid order of the Tribunal for ready reference and analysis:-

*“These are the cross appeals filed by the revenue and assessee against the order of CIT(A), Mumbai, for the assessment year 2007-08, in the matter of order passed u/s.143(3) of the I.T.Act.*

2. The assessee in its appeal i.e. ITA No.4338/Mum/2012, has taken following grounds :-

Ground No. 1:

*On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in holding that 8 separate undertakings namely 1NW, 3SW, 4FL, 5SW, ISW, 5NW, BG2 and 3NW were to be considered as one undertaking and not separate undertakings for the purpose of claiming deduction u/s 10A of the Act and accordingly computed the deduction u/s 10A of the Act at Rs.42,94,03,993/-. Further, the Hon'ble CIT(A) also erred in not considering the income as well as the expenditure in relation to the said 8 separate undertakings while computing book profit u/s 115JB of the Act.*

Ground No. 2:

*On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in holding that an amount of Rs.38,24,955/- is disallowed u/s 40(a)(ia) of the Act in respect of depreciation claimed on software purchased by the appellant on and after 13.07.2006 and treating the same as being in the nature of 'Royalty' u/s 9(i)(vi) of the Act.*

*Each of the above grounds of appeal is without prejudice to each other. The appellant craves leave to add, omit or alter grounds of appeal before or during the hearing of the appeal.*

The revenue in its appeal i.e. ITA No.4678/Mum/2012 has taken the following grounds :-

1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the deduction u/s.10A ignoring the facts that the major claim of deduction in respect of two units which came into existence in A.Y.2005-06 for expansion of business and are not new undertaking of the company."*

2. *"On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in allowing the Ground of recompilation of deduction u/s.10A ignoring the fact that there were interlacing of funds and interdependence of funds between the undertaking."*

3. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the Ground that service charges, Deputation charges and other income recovered from its 100% subsidiary company i.e. SITL is eligible for deduction u/s.10A ignoring the fact that the issue for A.Y. 2001-02 to A.Y. 2005-06 is pending before Hon'ble court for disposal."*

4. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 3,79,26,594/- in respect of unbilled software income ignoring the fact that the decision of Hon'ble ITAT for A.Y. 2002-03 was not accepted by the Department and appeal is pending in the Hon'ble High Court."*

5. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowances of Rs.91,84,717/- u/s. 40(a)(ia) ignoring the fact that appeal against this issue in earlier years is pending in Bombay High Court."*

6. *"On the facts and in the circumstances of the case in law, the Ld. CIT(A) erred in deleting the disallowance u/s. 10A in computation of book profit u/s 115JB ignoring the fact that the decision of deleting the disallowance u/s. 10A was not accepted by the Department."*

7. *"The Ld. CIT(A)'s order is perverse in law and on facts and deserves to be set aside."*

8. *"The appellant prays that the order of CIT (A) on the above grounds be set aside and that of the AO restored. The appellant craves leave to amend or alter any ground or add a new ground that may be necessary."*

3. *At the outset, Id. AR placed on record the order of the Tribunal in assessee's own case for the A.Y.2006-07, wherein all the grounds taken by the assessee and revenue are covered in favour of the assessee.*

4. *On the other hand, Id. Dr relied on the order of the AO.*

5. *We have considered rival contentions, carefully gone through the orders of the authorities below and found from the record that assessee is engaged in the business of software development and trading in hardware/software.*

6. During the course of scrutiny assessment, the AO made addition by disallowing the assessee's claim for deduction u/s.10A. The AO also made addition in respect of own built software and disallowed assessee's claim of depreciation on software.

7. By the impugned order, the CIT(A) partly allowed the assessee's claim against which the assessee and revenue are in appeal before us.

8. We had carefully gone through the order of the Tribunal in assessee's own case for the assessment year 2006-07. The ground taken by the assessee with regard to treating 8 separate undertaking as one undertaking and not separate undertaking for the purpose of claiming deduction u/s.10A of the Act has been decided by the Tribunal in assessee's favour vide para 2 to 5.4 at page 2 to 7 of the order, which reads as under :-

2. The assessee is aggrieved on two grounds. The first ground relates to the denial of deduction under section 10A of the Income Tax Act, 1961 (the Act) in respect of eight separate undertakings being considered as one undertaking and not separate undertaking. The second ground relates to the disallowance of Rs.6,17,901/- under section 40(a) (i) of the Act in respect of depreciation claim on software purchased by the assessee.

2.1 The assessee is in the business of development and trading of softwares and hardwares. The return of income for the year under consideration was filed on 27/11/2006 declaring total loss of Rs.20.98 crores. The return was selected for scrutiny assessment and accordingly statutory notices were issued and served upon the assessee. A reference under section 92CA(1) was made to the TPO. The TPO passed an order under section 92CA(3) on 22/10/2009 without making any adjustment. During the course of scrutiny assessment proceedings the AO noticed that the assessee has claimed deduction under section 10A at Rs.42,94,66,344/- in respect of five units. The further observed that the deduction under section 10A was disallowed in A.Y 1998-99 and 1999-2000 on the ground that undertaking was formed by splitting or reconstruction of business 1999-2000. It is further observed that the Tribunal has decided the issue in favour of the assessee and against the Department and in subsequent order, assessment orders of A.Y 1998-99 and 1999-2000 were followed by the AO and the Tribunal followed

*its own order. The AO proceeded by following his own order for A.Y 1998-99 and 1999-2000. The AO further observed that in the present year the deduction under section 10A is disallowed for two additional ground; (a) 10A eligibility of three units which came into existence after A.Y.1999-2000. The major claim of deduction is in respect of two units which came into existence in A.Y 2005-06; (b) Treating business of the assessee as single integrated unit with complete inter dependence and inter-leasing of funds, resources, management and control.*

*2.2 Therefore, the present year is not covered by the orders of the Tribunal in earlier years as these issues were not there before the Appellate Authorities in earlier years. The AO further observed that three units which came into existence after 1999-2000, out of which deduction under section 10A has been claimed for two units at Rs. 41,78,00,213/-. These units came into existence in A.Y 2005-06 only and deduction under section 10A claimed is 97% on total deduction. The business from these two units is 67% of total revenue which means that the assessee is transferring business from older units to new units which is nothing but reconstruction of business already in existence. Therefore, even if the order of Tribunal in A.Y 1998-99 and 1999-2000 is followed these three units are not eligible for deduction under section 10A. The AO concluded by observing that the assessee is not eligible for deduction under section 10A on the grounds that all 10 units are an integrated whole, that is not new units and without prejudice to the same three new units are simple restructuring / reconstruction business for transferring business to new units to old units and these issues are not covered by the decision of the Tribunal in A.Y 1998-99 and 1999-2000. The AO ultimately denied the claim of deduction under section 10A of the Act. Aggrieved by this the assessee carried the matter before Ld. CIT(A).*

*2.3 It was contended before Ld. CIT(A) that the issue was squarely covered in favour of the assessee by the order of the Tribunal in assessee's own case for assessment year 1998-99 and 1999-2000 and also by the orders of the Tribunal for A.Y 2000-01 to 2004-05. It was brought to the notice of Ld.CIT(A) that in all these years, the Ld. CIT(A) has held that the assessee was eligible for deduction under section 10A of the Act. After considering the facts*

and the submissions made by the assessee Ld. CIT(A) observed that the Customs Authorities have recognized only three undertakings and sub-units shown by the assessee have not been recognized as separate undertakings by Custom Authorities /STP. Ld. CIT(A) further observed that all these facts were not earlier before AO/Appellate Authorities. Therefore, earlier finding shall be not applicable to the facts of the case. Ld. CIT(A) finally allowed the claim of deduction in respect of three units. Aggrieved by this the assessee is before us.

3. Ld. Counsel for the assessee reiterated what has been stated before first appellate authority. Ld. Counsel strongly submitted that in earlier years Tribunal has allowed the claim of deduction and, therefore, Ld. CIT(A) has erred in denying the claim of deduction in respect of all the units on frivolous grounds. The Ld. Counsel pointed out that in respect of five units the year of deduction is 9th year. In respect of two units the year of deduction is second year. Out of five units the assessee has claimed deduction in respect of three units only. It is the say of the Ld. Counsel that it is a settled proposition of law that without disturbing the claim of deduction in the initial year of claim the Revenue Authorities cannot deny the claim of deduction in subsequent years. Reliance has been placed on the decision of the Hon'ble Gujarat High Court in the case of Saurashtra Cement & Chemical Industries Ltd., 123 ITR 669 (Guj) and also on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Paul Brothers, 216 ITR 548 (Bom).

4. Per contra, Ld. DR strongly supported the findings of the lower authorities. It is the say of the Ld. DR that the AO has specifically pointed out the distinguishing facts. Ld. CIT(A) has also elaborately discussed the distinguishing facts and, therefore, findings of earlier years cannot be taken into consideration for the year under consideration.

5. We have carefully perused the orders of the authorities below and the decisions brought to our notice. Let us first see how the claim has been made by the assessee.

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5.1 Thus, it can be seen that in respect of three units namely 3SW, 1SW and 5NW the year of deduction is 9th year, which makes initial year to be assessment

year 1998-99. In the first year of claim of deduction i.e. A.Y 1998-99 the matter travelled upto the Hon'ble Bombay High Court and the Hon'ble Court in Income Tax Appeal No.311 of 2004 had an occasion to consider inter-alia the following question of law:

*“(a) Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the assessee was entitled to an exemption in respect of the profit derived from the STP undertaking on the basis of that the condition of section 10A(2) are fulfilled.”*

*And after considering the facts, Hon'ble High Court at para-13 of its order held that the first question of law would have to be answered in the affirmative in favour of the assessee and against the Revenue. In respect of claim of deduction for units BG3 & HYD the year of deduction is second year which makes initial assessment year 2005-06. The claim of deduction in the initial assessment year was allowed by the Tribunal vide ITA No. 3514/Mum/2010.*

*5.2 Thus, it can be seen that the claim of deduction in respect of each unit where section 10A deduction has been claimed as per chart mentioned herein above. The assessee was allowed the deduction in the initial assessment year which make fact of the case squarely covered by the decision of the Hon'ble Gujarat High Court in the case of Saurashtra Cement & Chemicals Ltd. (supra), wherein Hon'ble Court has made the following observations:*

*“The next question to which the Tribunal addressed itself, and in our opinion rightly, was whether the ITO was justified in refusing to continue the relief of tax holiday granted to the assessee company for the assessment year 1968-69, in the assessment year under reference, that is, 1969-70, without disturbing the relief granted for the initial year. It should be stated that there is no provision in the scheme of s. 80 J similar to the one which we find in the case of development rebate which could be withdrawn in subsequent years for breach of certain conditions. No doubt, the relief of tax holiday under s. 80J can be withheld or discontinued provided the relief granted in the in the initial year of assessment is disturbed or changed on valid grounds. But*

*without disturbing the relief granted in the initial year, the ITO cannot examine the question against and decide to withhold or withdraw the relief which has been already once granted.”*

*5.3 Similarly in the case of Paul Brothers (supra), Hon'ble Bombay High Court has held as under:*

*“Held, that (i) since the assessment order for the year 1981-82 had merged in the appellate order, revisional jurisdiction could not be exercised; (ii) the Assessing Officer's order based on a binding decision of the High Court, could not be interfered with in revisional jurisdiction; (iii) unless deductions allowed for the assessment year 1980-81 on the same ground were withdrawn, they could not be denied for the subsequent years. Either in section 80 HH or in section 80J there is no provision for withdrawal of special deduction for breach of certain conditions.”*

*5.4 Considering the facts of the case in the light of the judicial decision cited herein above, in our considered opinion the claim of deduction cannot be denied unless claim is withdrawn right from the initial assessment year. Respectfully following the decisions of the Hon'ble Bombay High Court and Hon'ble Gujarat High Court, we set aside the findings of Ld. CIT(A) and direct the AO to allow the claim of deduction as made by the assessee under section 10A of the Act. Ground No.1 is allowed.*

*9. Ground No.2 taken by the assessee is with regard to disallowance of claim u/s.40(a)(i) amounting to Rs.38,24,955/- has been dealt by the AO at para 20, page 14-16. The CIT(A) has given his finding at para 9 to 9.6 at page 30 to 58 of his order. This issue is also covered by the order of the Tribunal vide para 6 to 9.1, at page 7 to 9 which reads as under :-*

*6. Ground No.2 is against disallowance of Rs.6,17,901/- under section 40(a)(i) of the Act During the course of the assessment proceedings the AO noticed that the assessee has claimed software purchases expenses of Rs.4,28,65,714/- which includes purchases of Rs.20,59,671/- claimed to be purchased by foreign branches of the assessee. The AO found that no TDS has been made on this amount on the ground that the purchases are outside India for outside India. In*

*the light of the provisions of section 195(2) of the Act, the AO disallowed a sum of Rs.20,59,671/- under section 40(a)(i) of the Act.*

*6.1 Aggrieved, assessee carried the matter before Ld. CIT(A). It was pointed out to the Ld. CIT(A) that the assessee has capitalized the said amount of Rs.20,59,619/- and has claimed only depreciation of Rs.6,17,901/-. Therefore, the provisions of section 40(a)(i) of the Act are not applicable for claiming of deduction under section 32 of the Act. After considering the facts and the submissions Ld. CIT(A) observed that the AO is incorrect in holding that the assessee has claimed the entire expenditure of Rs.20,59,671/- as a revenue. Ld. CIT(A), therefore, restricted the disallowance only to the claim of depreciation of Rs.6,17,901/-. Aggrieved by this the assessee is before us.*

*7. Ld. Counsel for the assessee vehemently submitted that the disallowance have been made under section 40(a)(i) of the Act, which is not at all applicable on the facts of the case. It is the say of the Ld. Counsel that the assessee has only claimed depreciation and, therefore, no disallowance need to be made. The Ld. Counsel further pointed out that TDS on royalty was made applicable from 13/07/2006 and the assessment year is assessment year 2006-07, therefore, there was no TDS liability even if entire amount is treated as royalty. Ld. Counsel referred to the non-discriminatory clause in Indo-US Treaty and submitted that if the domestic transaction would not have attracted any tax liability a similar international transaction cannot be subject to TDS liability.*

*7.1 Ld. Counsel for the assessee relied upon the decision of the Tribunal Delhi Bench in the case of SMG Demag (P) Ltd., ITA NO.3636/Delhi/2008, A.Y. 2000-01.*

*8. Per contra, Ld. DR strongly supported the findings of the Revenue authorities.*

*9. Having perused the orders carefully we agree with the submissions made by Ld. Counsel. Firstly, it is an undisputed fact that the assessee has only claimed depreciation and not the entire expenditure. The Tribunal Delhi Bench in the case of SMG Demag (P) supra) has held that provisions of section 40(a) (i) are not applicable for claim of deduction of depreciation under section 32 of the Act. Payments*

*for purchase of software without deduction tax will not be subject to the provisions of Section 40(a)(i) of the Act.*

*9.1 Further, if a similar domestic transaction was made during the year under consideration, it would not have attracted the liability for TDS. Therefore, in the light of the non-discriminatory clause in the Treaty a similar international transaction would also not attract liability of the TDS. Considering the facts in the light of the judicial decisions and our observations made herein above, the findings of Ld. CIT(A) is set aside and the AO is directed to delete the addition of Rs.6,17,901/-. Ground No.2 is accordingly allowed.*

*10. The ground taken by the revenue with regard to CIT(A)'s action for allowing deduction u/s.10A with respect to expansion of business are covered in favour of the assessee by a series of order of the Tribunal for A.Y. 1998-99 & 1999-2000 vide para 12-30, for AY.2000-01 to 2001-02 vide para 2 and 2.5, respectively, for A.Y.2002-03 & 2003-04 vide para 3-4.1, for A.Y.2004-05, 2005-06 & 2006-07, vide para 9-13, 4-5 and 2-5.4. In the immediately preceding assessment year i.e. AY 2006-07, the issue has been dealt by the Tribunal in para 2 to 5.4, which reads as under :-*

*2. The assessee is aggrieved on two grounds. The first ground relates to the denial of deduction under section 10A of the Income Tax Act, 1961 (the Act) in respect of eight separate undertakings being considered as one undertaking and not separate undertaking. The second ground relates to the disallowance of Rs.6,17,901/- under section 40(a) (i) of the Act in respect of depreciation claim on software purchased by the assessee.*

*2.1 The assessee is in the business of development and trading of softwares and hardwares. The return of income for the year under consideration was filed on 27/11/2006 declaring total loss of Rs.20.98 crores. The return was selected for scrutiny assessment and accordingly statutory notices were issued and served upon the assessee. A reference under section 92CA(1) was made to the TPO. The TPO passed an order under section 92CA(3) on 22/10/2009 without making any adjustment. During the course of scrutiny assessment proceedings the AO noticed that the assessee has claimed deduction under section 10A at Rs.42,94,66,344/- in respect of five units. The further observed that the deduction under section 10A was disallowed in A.Y 1998-99*

and 1999-2000 on the ground that undertaking was formed by splitting or reconstruction of business 1999-2000. It is further observed that the Tribunal has decided the issue in favour of the assessee and against the Department and in subsequent order, assessment orders of A.Y 1998-99 and 1999-2000 were followed by the AO and the Tribunal followed its own order. The AO proceeded by following his own order for A.Y 1998-99 and 1999-2000. The AO further observed that in the present year the deduction under section 10A is disallowed for two additional ground; (a) 10A eligibility of three units which came into existence after A.Y.1999-2000. The major claim of deduction is in respect of two units which came into existence in A.Y 2005-06; (b) Treating business of the assessee as single integrated unit with complete inter dependence and inter-leasing of funds, resources, management and control.

2.2 Therefore, the present year is not covered by the orders of the Tribunal in earlier years as these issues were not there before the Appellate Authorities in earlier years. The AO further observed that three units which came into existence after 1999-2000, out of which deduction under section 10A has been claimed for two units at Rs. 41,78,00,213/-. These units came into existence in A.Y 2005-06 only and deduction under section 10A claimed is 97% on total deduction. The business from these two units is 67% of total revenue which means that the assessee is transferring business from older units to new units which is nothing but reconstruction of business already in existence. Therefore, even if the order of Tribunal in A.Y 1998-99 and 1999-2000 is followed these three units are not eligible for deduction under section 10A. The AO concluded by observing that the assessee is not eligible for deduction under section 10A on the grounds that all 10 units are an integrated whole, that is not new units and without prejudice to the same three new units are simple restructuring / reconstruction business for transferring business to new units to old units and these issues are not covered by the decision of the Tribunal in A.Y 1998-99 and 1999-2000. The AO ultimately denied the claim of deduction under section 10A of the Act. Aggrieved by this the assessee carried the matter before Ld. CIT(A).

2.3 It was contended before Ld. CIT(A) that the issue was squarely covered in favour of the assessee by

*the order of the Tribunal in assessee's own case for assessment year 1998-99 and 1999-2000 and also by the orders of the Tribunal for A.Y 2000-01 to 2004-05. It was brought to the notice of Ld.CIT(A) that in all these years, the Ld. CIT(A) has held that the assessee was eligible for deduction under section 10A of the Act. After considering the facts and the submissions made by the assessee Ld. CIT(A) observed that the Customs Authorities have recognized only three undertakings and sub-units shown by the assessee have not been recognized as separate undertakings by Custom Authorities /STP. Ld. CIT(A) further observed that all these facts were not earlier before AO/Appellate Authorities. Therefore, earlier finding shall be not applicable to the facts of the case. Ld. CIT(A) finally allowed the claim of deduction in respect of three units. Aggrieved by this the assessee is before us.*

*3. Ld. Counsel for the assessee reiterated what has been stated before first appellate authority. Ld. Counsel strongly submitted that in earlier years Tribunal has allowed the claim of deduction and, therefore, Ld. CIT(A) has erred in denying the claim of deduction in respect of all the units on frivolous grounds. The Ld. Counsel pointed out that in respect of five units the year of deduction is 9th year. In respect of two units the year of deduction is second year. Out of five units the assessee has claimed deduction in respect of three units only. It is the say of the Ld. Counsel that it is a settled proposition of law that without disturbing the claim of deduction in the initial year of claim the Revenue Authorities cannot deny the claim of deduction in subsequent years. Reliance has been placed on the decision of the Hon'ble Gujarat High Court in the case of Saurashtra Cement & Chemical Industries Ltd., 123 ITR 669 (Guj) and also on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Paul Brothers, 216 ITR 548 (Bom).*

*4. Per contra, Ld. DR strongly supported the findings of the lower authorities. It is the say of the Ld. DR that the AO has specifically pointed out the distinguishing facts. Ld. CIT(A) has also elaborately discussed the distinguishing facts and, therefore, findings of earlier years cannot be taken into consideration for the year under consideration.*

*5. We have carefully perused the orders of the authorities below and the decisions brought to our notice. Let us first see how the claim has been made by the assessee.*

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5.1 Thus, it can be seen that in respect of three units namely 3SW, 1SW and 5NW the year of deduction is 9th year, which makes initial year to be assessment year 1998-99. In the first year of claim of deduction i.e. A.Y 1998-99 the matter travelled upto the Hon'ble Bombay High Court and the Hon'ble Court in Income Tax Appeal No.311 of 2004 had an occasion to consider inter-alia the following question of law:

“(a) Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the assessee was entitled to an exemption in respect of the profit derived from the STP undertaking on the basis of that the condition of section 10A(2) are fulfilled.”

And after considering the facts, Hon'ble High Court at para-13 of its order held that the first question of law would have to be answered in the affirmative in favour of the assessee and against the Revenue. In respect of claim of deduction for units BG3 & HYD the year of deduction is second year which makes initial assessment year 2005-06. The claim of deduction in the initial assessment year was allowed by the Tribunal vide ITA No. 3514/Mum/2010.

5.2 Thus, it can be seen that the claim of deduction in respect of each unit where section 10A deduction has been claimed as per chart mentioned herein above. The assessee was allowed the deduction in the initial assessment year which make fact of the case squarely covered by the decision of the Hon'ble Gujarat High Court in the case of Saurashtra Cement & Chemicals Ltd. (supra), wherein Hon'ble Court has made the following observations:

“The next question to which the Tribunal addressed itself, and in our opinion rightly, was whether the ITO was justified in refusing to continue the relief of tax holiday granted to the assessee company for the assessment year 1968-69, in the assessment year under reference, that is, 1969-70, without disturbing the relief granted for the initial year. It should be stated that there is no provision in the scheme of s. 80 J similar to the one which we find in the case of development rebate which

*could be withdrawn in subsequent years for breach of certain conditions. No doubt, the relief of tax holiday under s. 80J can be withheld or discontinued provided the relief granted in the in the initial year of assessment is disturbed or changed on valid grounds. But without disturbing the relief granted in the initial year, the ITO cannot examine the question against and decide to withhold or withdraw the relief which has been already once granted.”*

*5.3 Similarly in the case of Paul Brothers (supra), Hon'ble Bombay High Court has held as under:*

*“Held, that (i) since the assessment order for the year 1981-82 had merged in the appellate order, revisional jurisdiction could not be exercised; (ii) the Assessing Officer's order based on a binding decision of the High Court, could not be interfered with in revisional jurisdiction; (iii) unless deductions allowed for the assessment year 1980-81 on the same ground were withdrawn, they could not be denied for the subsequent years. Either in section 80 HH or in section 80J there is no provision for withdrawal of special deduction for breach of certain conditions.”*

*5.4 Considering the facts of the case in the light of the judicial decision cited herein above, in our considered opinion the claim of deduction cannot be denied unless claim is withdrawn right from the initial assessment year. Respectfully following the decisions of the Hon'ble Bombay High Court and Hon'ble Gujarat High Court, we set aside the findings of Ld. CIT(A) and direct the AO to allow the claim of deduction as made by the assessee under section 10A of the Act. Ground No.1 is allowed.*

*11. We also found that this issue is also covered in favour of the assessee by the order of Hon'ble High Court in assessee's own case for the AY 1998-99, 1999-2000, 2002-03 & 2004-05.*

*12. Ground taken by the revenue with regard to recomputation of deduction u/s.10A of the Act is covered in favour of the assessee by the order of the Tribunal for the A.Y.2006-07 vide para 20, which reads as under :-*

*“20. Ground No. 6 relates to the recompilation of deduction under section 10A of the Act. This issue*

*is directly related to our decision in assessee's appeal allowing the claim of deduction under section 10A. As we have allowed the claim of deduction under section 10A, this ground is dismissed."*

13. *The ground taken by the revenue with regard to allowing service charges, deputation charges and other income recovered from its 100% subsidiary company u/s.10A has been dealt by the Tribunal in assessee's own case for the A.Y.2006-07 vide para 21 of its order and same was decided in assessee's favour. We also found that the issue is also decided in favour of the assessee by the Tribunal for the A.Y.2002-03 and 2003-04, 2001-02, 2004-05 and 2005-06. The relevant observation of the Tribunal in the A.Y.2006-07 are at para 21 which reads as under :-*

*" 21. Ground No.7 relates to deletion of the addition on account of service charges recovered from 100% subsidiary. This issue has already been decided in favour of the assessee and against the Revenue by the Tribunal from A.Y 2001-02 to 2005-06. Ld. CIT(A) has decided this issue at para 7.4 of his order, wherein he has followed the finding of the Tribunal in assessee's own case for A.Y 2001-02 to 2006-07. Since Ld. CIT(A) has followed the decision of the Tribunal in assessee's own case for earlier years we do not find it necessary to interfere with the findings of the Ld. CIT(A). Accordingly, ground No.7 is dismissed."*

14. *The next grievance of the revenue relates to deleting the addition of Rs.3.79 crores in respect of unbilled software income is also covered in favour of the assessee vide order of the Tribunal for A.Y.2002-03 and 2003-04, 2001-02, 2004-05, 2005-06 & 2006-07. The relevant observations of the Tribunal in A.Y.2006-07 are at para 17 & 18, which read as under :-*

*"17. Ground No.4 is in relation to the deletion of the addition of Rs.8,15,75,087/- in respect of unbilled software income.*

*18. At the outset Ld. Counsel for the assessee pointed out that this issue is squarely covered in favour of the assessee and against the Revenue by the decision of the Tribunal for A.Y 2002-03. The AO has considered this issue at para 20 of his order. Ld. CIT(A) has considered the grievance at para 8 of his order and at para 8.3 following the decision of the Tribunal, the Ld. CIT(A) has deleted the addition of Rs.8,15,75,087/-. As the Ld. CIT(A) has followed the decision of the Tribunal in assessee's own case*

*in earlier years no interference is called for. Ground No.4 is accordingly dismissed.”*

15. *Ground taken by the revenue with regard to for deleting disallowance of Rs.91.84 lakhs u/s.40(a)(ia) is covered in favour of the assessee vide para 6 to 9.1 of Tribunal for the A. Y.2006-07, which reads as under :-*

*6. Ground No.2 is against disallowance of Rs.6,17,901/- under section 40(a)(i) of the Act During the course of the assessment proceedings the AO noticed that the assessee has claimed software purchases expenses of Rs.4,28,65,714/- which includes purchases of Rs.20,59,671/- claimed to be purchased by foreign branches of the assessee. The AO found that no TDS has been made on this amount on the ground that the purchases are outside India for outside India. In the light of the provisions of section 195(2) of the Act, the AO disallowed a sum of Rs.20,59,671/- under section 40(a)(i) of the Act.*

*6.1 Aggrieved, assessee carried the matter before Ld. CIT(A). It was pointed out to the Ld. CIT(A) that the assessee has capitalized the said amount of Rs.20,59,619/- and has claimed only depreciation of Rs.6,17,901/-. Therefore, the provisions of section 40(a)(i) of the Act are not applicable for claiming of deduction under section 32 of the Act. After considering the facts and the submissions Ld. CIT(A) observed that the AO is incorrect in holding that the assessee has claimed the entire expenditure of Rs.20,59,671/- as a revenue. Ld. CIT(A), therefore, restricted the disallowance only to the claim of depreciation of Rs.6,17,901/-. Aggrieved by this the assessee is before us.*

*7. Ld. Counsel for the assessee vehemently submitted that the disallowance have been made under section 40(a)(i) of the Act, which is not at all applicable on the facts of the case. It is the say of the Ld. Counsel that the assessee has only claimed depreciation and, therefore, no disallowance need to be made. The Ld. Counsel further pointed out that TDS on royalty was made applicable from 13/07/2006 and the assessment year is assessment year 2006-07, therefore, there was no TDS liability even if entire amount is treated as royalty. Ld. Counsel referred to the non-discriminatory clause in Indo-US Treaty and submitted that if the domestic transaction would not have attracted any tax liability*

*a similar international transaction cannot be subject to TDS liability.*

*7.1 Ld. Counsel for the assessee relied upon the decision of the Tribunal Delhi Bench in the case of SMG Demag (P) Ltd., ITA NO.3636/Delhi/2008, A.Y. 2000-01.*

*8. Per contra, Ld. DR strongly supported the findings of the Revenue authorities.*

*9. Having perused the orders carefully we agree with the submissions made by Ld. Counsel. Firstly, it is an undisputed fact that the assessee has only claimed depreciation and not the entire expenditure. The Tribunal Delhi Bench in the case of SMG Demag (P) supra) has held that provisions of section 40(a)(i) are not applicable for claim of deduction of depreciation under section 32 of the Act. Payments for purchase of software without deduction tax will not be subject to the provisions of Section 40(a)(i) of the Act.*

*9.1 Further, if a similar domestic transaction was made during the year under consideration, it would not have attracted the liability for TDS. Therefore, in the light of the non-discriminatory clause in the Treaty a similar international transaction would also not attract liability of the TDS. Considering the facts in the light of the judicial decisions and our observations made herein above, the findings of Ld. CIT(A) is set aside and the AO is directed to delete the addition of Rs.6,17,901/-. Ground No.2 is accordingly allowed.*

*16. The ground taken by the revenue with regard to deleting the disallowance u/s.10A in computation of book profit u/s.115JB ignoring the fact that the decision of deleting the disallowance u/s.10A was not accepted by the revenue, has been dealt by the Tribunal vide its order for the A.Y.2006-07 at para 19, which reads as under :-*

*“ 19. Ground No.5 relates to the computation of the book profit under section 115JB of the Act. In our considered opinion this issue is consequential to our finding allowing the claim of deduction under section 10A of the Act. The A.O is directed to recompute the book profit under section 115JB of the Act after giving appeal effect to our order. This ground is treated as allowed for statistical purposes.”*

*On a careful perusal of the findings recorded by the Tribunal in this regard, we found that while dealing with the issue the Tribunal observed that the issue in regard to deduction u/s.10A has already been allowed, therefore, the issue of computation of book profit as has been raised by the revenue u/s.115JB of the Act is consequential and directed the AO to recompute the book profit claimed under Section 115JB of the Act after giving effect to the Tribunal's order. Accordingly, we direct the AO to recompute the book profit as has been claimed by the assessee u/s.115JB.*

*17. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's own case for the immediately preceding assessment year i.e. 2006-07 as well as earlier assessment years and also the decision of Hon'ble jurisdictional High Court in case of assessee itself as discussed above, we allow the appeal of the assessee."*

We note that in the aforesaid order, vide Para-12 and 13 (Page-14), the Tribunal has followed the decision of the Tribunal for assessment year 2006-07 and also some other assessment years like 2001-02, 2002-03 to 2005-06 and decided the issue in favour of the assessee. Following the aforesaid order of the Tribunal, we find no merit in the ground raised by the Revenue, therefore, dismissed.

4. The next ground raised by the Revenue pertains to deletion of addition made on account of unbilled software income. The ld. Counsel for the assessee claimed that this issue is also covered by the aforesaid decision of the Tribunal. We find that the Tribunal vide

Para-14, has followed the order of the Tribunal for assessment year 2006-07 and decided in favour of the assessee. No contrary decision was brought to our notice by either side and more specifically by the Revenue, therefore, following the aforesaid order of the Tribunal, we find no merit in the ground raised by the Revenue, consequently, dismissed.

Finally, the appeal of the Revenue is dismissed.

This Order was pronounced in the open court in the presence of learned representatives from both sides at the conclusion of the hearing on 21<sup>st</sup> March, 2018.

*Sd/-*

(N.K. Pradhan)

लेखा सदस्य / ACCOUNTANT MEMBER

*Sd/-*

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : **21/03/2018**

**Pradeep J. Chowdhury, Sr. PS**

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Revenue
3. आयकर आयुक्त,(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**