IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

BEFORE SHRI R.C. SHARMA (AM) AND SHRI RAM LAL NEGI (JM)

ITA No. 2413/MUM/2011
Assessment Year: 2007-2008

Mahindra Engineering Services Ltd., 1st Floor, Mahindra Towers, P.K. Kurne Chowk, Worli, Mumbai - 400018 PAN: AADCM2907L	**Vs.**	The Dy. Commissioner of Income Tax, Circle 2(2), Room No. 545, Ayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		**(Respondent)**

ITA No. 2848/MUM/2011
Assessment Year: 2007-2008

The Dy. Commissioner of Income Tax, Circle 2(2), Ayakar Bhavan, Room No. 545, 5th Floor, M.K. Road, Mumbai - 400020	**Vs.**	Mahindra Engineering Services Ltd., 1st Floor,'B' Wing, Mahindra Towers, Dr. G.M. Bhaosai Marg, P.K. Kurne Chowk, Worli, Mumbai - 400018 PAN: AADCM2907L
(Appellant)		**(Respondent)**

ITA No. 1844/MUM/2014
Assessment Year: 2007-2008

Mahindra Engineering Services Ltd., 1st Floor,'B' Wing, Mahindra Towers, Worli, Mumbai - 400018 PAN: AADCM2907L	**Vs.**	The Asstt. Commissioner of Income Tax, Range-2(2), Aaykar Bhavan, Mumbai
(Appellant)		**(Respondent)**

ITA No. 2604/MUM/2012
Assessment Year: 2008-2009

Mahindra Engineering Services Ltd., Gateway Building, Apollo Bunder, Mumbai - 400001	**Vs.**	The Asstt. Commissioner of Income Tax, Circle 2(2), Room No. 545, Ayakar Bhavan, M.K. Road, Mubmai - 400020
(Appellant)		**(Respondent)**

ITA No. 2469/MUM/2012
Assessment Year: 2008-2009

The Asstt. Commissioner of Income Tax, Circle 2(2), Room No. 545, 5th Floor, Ayakar Bhavan, M.K. Road, Mubmai - 400020	**Vs.**	Mahindra Engineering Services Ltd., 1st Floor,'B' Wing, Mahindra Towers, Dr. G.M. Bhaosai Marg, P.K. Kurne Chowk, Worli, Mumbai - 400018 PAN: AADCM2907L
(Appellant)		**(Respondent)**

&

ITA No. 7003/MUM/2011
Assessment Year: 2006-2007

The Dy. Commissioner of Income Tax, Circle 2(2), Ayakar Bhavan, Room No. 545, 5th Floor, M.K. Road, Mumbai - 400020	**Vs.**	Mahindra Engineering Services Ltd., 1st Floor,'B' Wing, Mahindra Towers, Dr. G.M. Bhaosai Marg, P.K. Kurne Chowk, Worli, Mumbai - 400018 PAN: AADCM2907L
(Appellant)		**(Respondent)**

Assessee by : Shri Karthik Natarajan(AR)
Revenue by : Santanu Kumar Saikia (DR)

Date of Hearing: 14/03/2018
Date of Pronouncement: 20/03/2018

O R D E R

PER RAM LAL NEGI, JM

These are the appeals and the cross appeals filed by the assessee and the revenue pertaining to the assessment years 2006-07, 2007-08 and 2008-09. ITA No 2413/MUM/2011 and ITA No 2848/Mum/2011 are cross appeals filed by the assessee and the revenue respectively against the order dated 07.01.2011 passed by the Ld. CIT (A) for the assessment year 2007-08, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act'). Similarly, ITA No. 2604/Mum/2012 and ITA No. 2469/Mum/2012 are the cross appeals filed by the assessee and the revenue respectively against the order dated 12.01.2012 pertaining to the assessment year 2008-09, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Act. Vide ITA No. 7003/Mum/2011, the revenue has challenged the order dated 13.07.2011 passed by the CIT (A), pertaining to the assessment year 2006-07whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) read with section 147 of the Act. Vide ITA No. 1844/Mum/2014 the assessee has challenged the order dated 27.12.2013 passed by the Commissioner of Income Tax (Appeals) pertaining to the assessment year 2007-08, whereby the Ld. CIT (A) has confirmed the penalty levied by the AO u/s 271 (c) of the Act.

2. Since, all these appeals pertain to the same assessee for the different assessment years, the same were clubbed, heard together and are being

disposed of by this common and consolidated order for the sake of convenience.

ITA No. 2413/MUM/2011 (Assessment Year: 2007-2008)

3. Brief facts of the case are that the assessee company filed its return of income for the assessment year under consideration, declaring nil income. The return was processed u/s 143 (1) of the Act. Since, the case was selected for scrutiny, notice u/s 143 (2) and 142 (1) were issued by the AO. In response thereof, the authorized representative of the assessee appeared before the AO and submitted the details called for. The AO after taking into consideration the submissions made by the representative for the AO *inter alia* made disallowance of Rs. 239 lacs claimed by the assessee as expenses pertaining to business development in US, holding the same as capital expenditure. In the first appeal, the Ld. CIT (A) confirmed the action of the AO and dismissed the said ground of the appeal. Against the findings of the Ld. CIT(A), the appellant/assessee has preferred the present appeal.

4. The assessee has challenged the impugned order by raising the following effective ground:-

> *"On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in confirming disallowance of business development expenses to the tune of Rs. 2.39 crs. as capital expenditure for creation of intangible asset without appreciating that it was revenue expenditure incurred for the purpose of business of the Appellant."*

5. Before us, the Ld. counsel for the assessee submitted that the issue involved in this case is covered by the order of the ITAT Mumbai passed in assessee's own case ITA No. 4021/Mum/2010 for the A.Y. 2006-07. Since, the

Tribunal has decided the identical issue in favour of the assessee, the impugned order is liable to be set aside.

6. On the other hand, the Ld. Departmental Representative (DR) relying on the order passed by the Ld. CIT (A) submitted that since the expenditure claimed by the assessee is capital in nature, the Ld. CIT (A) has rightly confirmed the action of the AO. Hence, there is no merit in the appeal of the assessee.

7. We have heard the rival submissions and also carefully perused the material on record. We notice that the assessee had debited expenses amounting to Rs. 239 lacs incurred in US for the purpose of business development. During the course of assessment proceedings as well as during the appellate proceedings, the assessee contended that the expenses were incurred for the purpose of business development mainly in the form of salary paid to an employee developing new clients in US and other business development related expenses including travelling and hospitality. However, the authorities below rejected the contention of the assessee and disallowed the claim. As pointed out by the Ld. counsel, the co-ordinate Bench of the Tribunal has dealt with the identical issue in the assessee's own case for the assessment year 2006-07 aforesaid. The co-ordinate Bench has decided this issue in favour of the assessee holding as under:-

> *"11.2 It is clear from the plain reading of this sub, sec. 1&4 of sec. 10A that the deduction is allowable on the profits and gains delivered by the undertaking and such profit derived from export of articles shall be the amount which bears profits of the business of the undertaking in the proportion as the export turnover bears to the total turnover of the business carried on by the undertaking. Accordingly, the total turnover of the undertakings has to be taken into consideration for the purpose of the profits derived from the export of articles or things or computer software as per sub. Sec. (1) of sec. 10A and not the total turnover of the business of*

the assessee. Therefore, in our the the CIT (A) has gone wrong in interpretation of the provisions of sub sec. (4) of sec. 10A. Further, as per the direction of the Bench, the assessee has filed a comparative chart showing the expenditure and profit ratio of th earlier year and the year under consideration for the non STP units. It is clear from the comparative chart that the profit ratio of the year under consideration of the non STP unit is 16.5% in comparison to loss of 44.65% in the earlier year. Thus, it is clear that there is no case of shifting of expenditure of the STP unit to the non STP unit for the year under consideration because the STPI has been set up in the year under consideration and that too in the month of Jan 2006. When the operating profit as well as net profit of the non STP unit is considerably higher then the earlier year and even the expenses were also less in the year under consideration in comparison of the earlier year, therefore, we do not see any reason of manipulation in the accounts of reducing of profit of non STP unit. Even otherwise, the Assessing Officer has not made out any specific instance of shirting of expenditure or any defect in the accounts of the assessee or in the method adopted by the assessee for computing the income of the respective units.

11.3 "We find force in the arguments of the ld. AR of the assessee that the main factor of high profitably of STP unit is the reimbursement of Bench time as per terms of agreement by STP unit with the foreign customers. The ld. AR has explained that the Bench time is reimbursement because of dedicated nature of offshore services offered by the assessee and recruitment as per manpower plan given by the customer for the year under consideration. In this way, the assessee was able to utilize 100% of resources developed to STPI.

12. In view of the above discussion, the action of the lower authorities, in reducing the deduction u/s 10A on proportionate turnover basis between the STP and non STP units, is not justified when all the expenses are separately identified. Hence, we delete the addition made by the lower authorities and allowed the claim of the assessee."

8. Since, the co-ordinate Bench has decided the identical issue in favour of the assessee in assessee's own case for the A.Y. 2006-07 aforesaid, we respectfully following the said decision of the co-ordinate Bench, set aside the

findings of the Ld. CIT (A) and allow this ground of appeal of the assessee. Accordingly, we direct the AO to allow the claim of the assessee and delete the addition.

ITA No. 2848/MUM/2011 (Assessment Year: 2007-2008

9. The revenue has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

> *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in allowing relief to the assessee to the extent impugned in the ground enumerated below:-*
>
> 1. *The order of the CIT (A) is opposed to law and facts of the case.*
>
> 2. *On the facts and in the circumstances of the case and in law, the ld. CIT (A) erred in deleting the disallowance of Rs. 18.26 crores under section 10A, ignoring the fact that business done in the New STP unit was a continuation of the business done by Non STP unit and hence ineligible for deduction u/s 10A.*

10. Before us, the Ld. Departmental Representative (DR) submitted that the Ld. CIT (A) has wrongly deleted the disallowance of Rs. 18.26 crores u/s 10A of the Act ignoring the fact that business done in the new STPI Unit was a continuation of business done by the non STIP Unit, therefore, ineligible for deduction u/s 10A of the Act.

11. On the other hand, the Ld. counsel for the assessee relying on the findings of the Ld. CIT (A) submitted that the order passed by the Ld. CIT (A) based on the evidence on record and in accordance with the decision of the

ITAT Mumbai rendered in the assessee's own case for the assessment year 2006-07 in ITA No. 4021/Mum/2010. Therefore, there is no merit in the appeal of the department.

We have heard the rival submissions and also gone through the orders passed by the authorities below and the cases relied upon by the AO and the Ld. CIT (A). The first ground of appeal of the revenue is general in nature, therefore, we do not consider it necessary to adjudicate this ground separately. Second ground of appeal pertains to disallowance u/s 10A of the Act. The Ld. CIT (A) has decided this issue in favour of the assessee holding as under:-

> *"4.3.1 The Assessing Officer and the Appellant have both relied on several decisions to support their mutual propositions. In this context, I find that most of these decisions basically lay down tests which define splitting up and reconstruction of units. Amongst these decisions, very significantly, I find that both the Assessing Officer and the Appellant have relied on the decision of the Hon. Supreme Court in the case Textile Machinery Corpn. Ltd. V/s CIT. Some key tests viz., 'investment of fresh capital in the new undertaking', 'employment of requisite labour', 'earning of profits clearly attributable to the new undertaking' and 'a separate and distinct identity of the industrial unit set up, have been laid out in this decision to define splitting up/reconstruction. Tested on these, I find that the STPI Unit does emerge as a new venture. Further, the Appellant's case is also different from the decisions quoted by the Assessing Officer on facts. As may be noted, whereas, with diverse work on large scale, fresh investments, new personnel, the STPI Unit in the Appellant's case passes the essential tests laid out in these various decisions, the Units in the cases relied upon by the Assessing Officer do not qualify these tests. For example, in the case Naya Sahitya, the assessee was carrying on the same business of publishing book from new premises. As against this, in the Appellant's case, as already discussed, jobs of a totally different kind, scale and magnitude was being execute3d pursuant to the Engineering Service Agreement. Similar is the case with most of the*

other cases relied upon by the Assessing Officer. In the Appellant's case, it is clear, different job on a different scale is being done by different persons at all levels and accordingly, in terms of the tests laid out in these cases, splitting up/reconstruction has not taken place in the Appellant's case.

4.3.2 In line with the foregoing, I do not find justification in the denial of the exemption. Accordingly, the Assessing Officer is directed to restore the exemption. The ground of appeal is accordingly, allowed".

12. The Ld. CIT(A) has pointed out that the AO has denied the deduction mainly on the ground that by setting up the STPI Unit, the appellant had not started a new business. The Ld. CIT(A) has further observed that findings of the AO are based on an inadequate premise as the AO has based his findings on the purchase order dated 15.10.2004 and the nature of services in the pre existing non STPI unit and the comparable rates of pre STPI and STPI jobs. We find that the observations of the Ld. CIT(A) are based on the evidence on record. As observed by the Ld. CIT(A) the purchase order dated 15.10.2004 was in connection with only a Pilot Project mounted to test the ability of the appellant company to do business on a magnitude and level compatible to the expectations of ITEC. The work given for the Pilot Project was initially for a sum of Rs. 9.3 crores, however, after signing the contract with International Truck and Engine Corporation (ITEC), the STPI unit earned revenue of Rs. 42.74 crore. As per para 2.3 of the Agreement, with the commencement of joint Venture, the purchase order dated stood terminated. Hence, in our considered opinion, the findings of the Ld. CIT (A) are based on the evidence on record and in accordance with the settled principles of law. We, therefore, do not find any reason to interfere with the findings of the Ld. CIT (A). Accordingly, we uphold the findings of the Ld. CIT(A) and dismiss both the grounds of the revenue's appeal.

ITA No. 1844/MUM/2014 (Assessment Year: 2007-2008)

13. The AO levied penalty u/s 271 (c) of the Act, on the basis of addition of Rs. 239 lacs discussed in the quantum appeal aforesaid. The Ld. CIT (A) confirmed the penalty levied by the AO in the first appeal. The assessee is in appeal against the impugned order passed by the Ld. CIT (A) by raising the following effective ground of appeal:-

> *"On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in confirming levy of penalty in respect of disallowance of business development expenses of Rs. 1.79 crores without appreciating the fact that the Appellant had neither concealed particulars of income nor furnished inaccurate particulars of income."*

14. The assessee has challenged the order passed by the Ld. CIT (A) confirming the penalty levied u/s 271 (c) in respect of disallowance of business development expenses. Since, we have decided the quantum appeal in favour of the assessee and deleted the addition, the penalty order under challenge does not survive. We accordingly allow the appeal of the assessee and direct the AO to delete the penalty levied u/s 271 (c) of the Act.

ITA No. 2604/MUM/2012 (Assessment Year: 2008-2009)

15. In this case, the assessee filed nil return, which was processed u/s 143 (1). Since, the case was selected for scrutiny, the AO issued notice u/s 143 (2) and 142 (1) and served upon the assessee. In response to the said notice, the authorized representative of the assessee attended the assessment proceedings and submitted the details called for by the AO after hearing the assessee the

AO inter alia made disallowance of Rs. 15,82,113/- on account of foreign exchange, fluctuation loss holding it as notional loss, disallowance of Rs. 57,34,179/- on account of business development expenses and disallowance of Rs. 4,01,126/- u/s 14A of the Act. In the first appeal, the Ld. CIT (A) confirmed all the three disallowances made by the AO.

16. Aggrieved by the impugned order aforesaid, the assessee has filed the present appeal raising the following effective grounds:-

1. *"On the facts and circumstances of the case and in law, the learned CIT (A) erred in confirming disallowance of foreign exchange fluctuation loss of Rs. 15,82,113 by wrongly concluding it as notional loss.*

2. *On the facts and circumstances of the case and in law, the learned CIT (A) erred in confirming disallowance of business development expenses to the tune of Rs. 57,34,179 without appreciating that these were marketing expenses and revenue in nature.*

3. *On the facts and circumstances of the case and in law, the learned CIT (A) erred in confirming disallowance of expenditure u/s 14A to the tune of Rs. 4,01,126 attributing these expense to earning exempt income."*

17. The first ground pertains to disallowance of foreign exchange fluctuation of to the tune of Rs. 15,82,*113/-* on the ground that it was notional loss. The Ld. counsel for the assessee submitted that the observations of the Ld. CIT(A)that it is a loss of contingent nature cannot be accepted as, under the mercantile system of accounting, provisions for all known losses have to be accounted for to arrive at actual profit. Moreover, the loss in respect of such

outstanding bills is revenue neutral as in the year of settlement only additional loss would be claimed or reversal of loss would be offered to tax. The Ld. counsel further submitted that this issue is covered in favour of the assessee by the judgment of the Hon'ble Supreme Court in *Woodward Governor 312 ITR 0254*. Hence, the impugned order is liable to be set aside. On the other hand the Ld. DR relied on the order passed by the Ld. CIT(A).

18. In the light of the rival submissions of the parties, we have perused the material on record. In Woodward Governor India P. Ltd. (supra), the Hon'ble Supreme Court has held that the Loss suffered by the assessee in respect of a revenue liability on account of exchange difference as on the date of the balance sheet is an item of expenditure allowable under s. 37(1) in the year of accrual. Since, this issue is covered by the judgment of the Hon'ble Supreme Court, the Ld. CIT (A) has wrongly confirmed the disallowance made by the AO on account of foreign exchange fluctuation loss. We therefore allow this ground of appeal of the assessee.

19. The second ground of the appeal pertains to confirmation of disallowance of business development expenses to the tune of Rs. 57,34,179/-. The Ld. counsel further submitted that this issue is covered by the decision of the Tribunal rendered in assessee's own case for the A.Y. 2006-07. Since, the Tribunal has decided the identical issue in favour of the assessee, the impugned order is liable to be set aside.

20. On the other hand, the Ld. DR relying on the findings of the Ld. CIT (A) submitted that the similar claim of the assessee was

disallowed by the then CIT (A) in the assessee's own case for the assessment year 2007-08. Therefore, the Ld. CIT(A) has rightly confirmed the action of the AO.

21. We have perused the material on record in the light of the rival submissions. Since, we have allowed the identical ground in the assessee's own case, ITA No. 2413/M/2011 for the A.Y. 2007-08 discussed above, consistent with our findings in the assessee's case aforesaid, we allow this ground of appeal of the assessee for the same reasons.

22. The Third ground pertains to disallowance of expenditure u/s 14A to the tune of Rs. 4,01,126/-. The Ld. counsel for the assessee submitted that AO has not recorded any satisfaction to the appellant's contention that there was no expenditure incurred for earning exempt income. The Ld. counsel further relied on the decision of ITAT, Mumbai in the case of Lina Kasbaker vs. ACIT ITA No. 5620 and 5621/M/2013.

23. On the other hand, the Ld. DR submitted that since the AO has calculated the disallowance u/s 14A read with Rule 8D of the Income Tax Rules, there is no infirmity in the findings of the Ld. CIT (A) to interfere with the same.

24. We have perused the material on record in the light of the rival submissions, we notice that the AO has calculated the disallowance as per the provisions of Rule 8D of the Income Tax Rules. The AO has made addition of 0.5% of the average investment of the assessee

in accordance with the provisions of rule 8D (2)(iii) of the Income Tax Rules. Since, the AO has made the addition in accordance with the provisions of law, in our considered opinion the Ld.CIT (A) has rightly upheld the addition made by the AO. We therefore do not find any infirmity in the findings of the Ld. CIT (A) to interfere with the same. Accordingly, we dismiss this ground of appeal of the assessee.

ITA No. 2469/MUM/2012 (Assessment Year: 2008-2009)

25. The revenue has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

> *"On the facts and in the circumstances of the case and in law, the Ld. CIT (A), erred in allowing relief to the assessee to the extent impugned in the ground enumerated below:-*
>
> 1. *"On the facts and circumstances of the case and in law, the learned CIT (A) erred in deleting the disallowance of Rs/ 18,64,84,203/- crores u/s 10A ignoring the fact that business done in the New STP unit was a continuation of the business done by Non STP and hence ineligible for deduction u/s 10A.*
>
> 2. *On the facts and circumstances of the case and in law, the learned CIT (A) erred in deleting the disallowance u/s 40(a)(ia) of Rs. 26,46,002/- ignoring the fact that the assessee had made lower deduction of tax at source and failed to appreciate that that Sec. 40(a)(ia) squarely applicable for lower deduction of tax at source.*

26. The Ld. DR as the Ld. counsel for the assessee reiterated their arguments respective advanced in the assessee's case for the assessment year 2007-08 aforesaid. In the light of their respective arguments we have perused

the relevant material on record. The first ground of appeal is general in nature, therefore, we do not consider it necessary to decide this issue separately.

27. The second ground pertains to disallowance u/s 10A to the tune of Rs. 18.64 crores on the ground that business done in new STPI unit was continuation of business done by non STPI unit. Since, we have decided this issue in favour of the assessee in the assessee's own case for the assessment year 2007-08 aforesaid consistent with our findings, we uphold the findings of the Ld. CIT(A) and allow this ground of appeal for the same reasons. Accordingly, we direct the AO to allow the claim of the assessee and delete the addition.

28. The third ground pertains to disallowance u/s 40(a)(ia) of Rs. 26,46,002/- made by the AO. The Ld. DR relying on the assessment order submitted that the Ld. CIT (A) has wrongly deleted the disallowance u/s 40(a)(ia) to the tune of Rs. 26,46,002/- ignoring the fact that the assessee had made less deduction of source at source and failed to appreciate that section 40(a)(ia) is applicable for lower deduction of tax at source.

29. On the other hand, counsel for the assessee relying on the order passed by the CIT (A) submitted that since the issue under consideration is covered in favour of the assessee by the decision of the Kolkata Bench of ITAT passed in DCIT vs. S.K. Tekriwal ITA No. 1135/Kol/2010, there is no merit in the appeal of the revenue.

30. We have perused the material on record in the light of the rival submissions. The Ld. CIT (A) has decided this issue in favour of the assessee relying on the decision of the ITAT, Kolkatta in the case of M/s S.K. Tekriwal ITA No. 1135/Kol/2010. The observations of the Ld. CIT (A) are reproduced as under:-

"B ITAT, Kolkata in the case of M/s S.K. Tekriwal (ITA No. 1135/Kol/10) held that the conditions laid down u/s 40(a)(ia) of the Act for making addition is that tax is deductible at source and such tax has not been deducted if both the conditions are satisfied then such payment can be disallowed u/s 40(a)(ia) of the Act but where tax is deducted by the assessee, even under bonafide wrong impression, under wrong provisions of TDS, the provisions of section 40(a)(ia) of the Act cannot be invoked. Relevant portion of the decision is reproduced for the sake of convenience.

> *"We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs, one is where, inter alia, assessee has to to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act.*
>
> *4.3ii. In the light of the above decision, the A.O. is directed to delete addition of Rs. 26,46,002/-. This ground is accordingly allowed."*

31. Since, the findings of the Ld. CIT(A) is based on the decision of the Kolkata Bench of the Tribunal in the case M/s S.K. Tekriwal (supra), and the no decision contrary to the decision contrary to the one relied upon by the Ld. counsel for the assessee, we do not find any reason to interfere with the

findings of the Ld. CIT(A). Hence, we uphold the findings of the Ld CIT(A) and dismiss this ground of appeal of the revenue.

ITA No. 7003/MUM/2011 (Assessment Year: 2006-2007)

32. The assessee filed its return of income for the assessment year under consideration declaring the total income of Rs. 71,76,710/-. The assessment was completed u/s 143(3) of the Act determining the total income of Rs. 2,07,15,209/- after allowing deduction of Rs. 2,20,66,616/- u/s 10A of the Act out of the total amount of Rs. 3,29,17,544/- claimed by the assessee. Subsequently, the assessment was reopened u/s 147 of the Act by issuing notice u/s 148 of the Act on the ground that assessee's claim u/s 10A has been rejected in the assessment year 2007-08 as the assessee's new undertaking (STP unit) was formed by splitting up/reconstruction of business already in existence and therefore the new undertaking does not fulfill the second condition in section 10A(2)(ii) of the Act.

33. In response to the notice u/s 148 of the Act the authorized representative of the assessee attended the proceedings and submitted the details called for. The assessee contended that the action of reopening is bad in law. The assessee further contended that since basic eligibility conditions have been examined and deduction has been allowed u/s 10A of the Act, reopening of the assessment is invalid and *void ab initio*. However, the AO disallowed the deduction holding that the assessee's new undertaking was formed by splitting up/ reconstruction of business already in existence and accordingly, added the amount of deduction allowed u/s 10A of the Act in the scrutiny assessment, to the income of the assessee. In the first appeal, the Ld, CIT(A) upheld the reopening but directed the AO to restore the exemption relying on the findings of his predecessor in assessee's own case for the assessment year 2007-08.

Against the said findings of the Ld. CIT(A), the revenue is in appeal before the Tribunal.

34. The revenue has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

> *"On the facts and in the circumstances of the case and in law, the Ld. CIT (A), erred in allowing relief to the assessee to the extent impugned in the ground enumerated below:-*
>
> 1. *The order of the CIT (A) is opposed to law and facts of the case.*
>
> 2. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting the disallowance of Rs. 329.17 lakhs u/s 10A, ignoring the fact that business done in the new STP unit was a continuation of the business done by Non STP and hence ineligible for deduction u/s 10A.*

35. Before us, the Ld. departmental representative (DR) relying on the assessment order passed u/s 143(3) read with section 147 of the Act, submitted that since the business done in the new STP unit was continuation of business done by the non STP unit and the assessee was not eligible for deduction u/s 10A of the Act, the Ld. CIT(A) has wrongly deleted the disallowance of Rs. 329.17 lakh u/s 10A of the Act.

36. On the other hand, the Ld. counsel for the assessee submitted that the since the findings of the Ld. CIT(A) are based on the findings of the Ld. CIT(A) in the assessee's own appeal for the assessment year 2007-08, there is no infirmity in the order passed by the Ld. CIT(A) in the present appeal. The Ld. CIT(A) in assessee's case for the assessment year 2007-08 has specifically pointed out that the appellant's case is different from the decision relied upon by the AO on facts.

37. We have heard the rival submissions and carefully perused the material on record in the light of the rival contentions. The first ground of appeal is general in nature which does not require separate adjudication. So far as the second ground is concerned, since we have upheld the findings of the Ld CIT(A) and decided the identical issue issue in favour of the assessee in the assessee's own case ITA No. 2848/M/2011 for the A.Y. 2007-08, in consistent with our findings, we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue. We accordingly, direct the AO to allow the deduction and delete the addition.

In the result, appeals filed by the assessee for assessment year 2007-08, is allowed and the cross appeal filed by the revenue is dismissed and appeal filed by the assessee against confirmation of penalty levied pertaining to the said AY is allowed. Appeal filed by the assessee for the assessment year 2008-09 is partly allowed and the cross appeal filed by the revenue is dismissed. The appeal filed by the revenue for the assessment year 2006-07 is dismissed.

Order pronounced in the open court on 20th March, 2018.

Sd/-	*Sd/-*
(R.C. SHARMA)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 20/03/2018

Alindra PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-

4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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