IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A' : NEW DELHI)

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.2775/Del./2014
(ASSESSMENT YEAR : 2008-09)

DCIT (LTU), New Delhi.	vs.	M/s. Avtec Limited, 8th Floor, Birla Tower, 25, Barakhamba Road, New Delhi – 110 001. **(PAN : AAFCA1313C)**
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Salil Kapoor, Advocate
Ms. Ananya Kapoor, Advocate
REVENUE BY : Smt. Anchal Khandelwal, Senior DR

Date of Hearing : 30.08.2018
Date of Order : 10.09.2018

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

The appellant, Deputy Commissioner of Income-tax (LTU), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal, sought to set aside the impugned order dated 28.02.2014 passed by Ld. CIT (Appeals)-LTU, New Delhi qua the assessment year 2008-09 on the grounds inter alia that :-

> ***"1. On the facts and circumstances of the case and in law Ld. CIT(A) has erred in deleting the addition of Rs.3,90,35,968/-***

made by AO on account of disallowance of set off of loss of MEPZ (10M) unit against income of taxable units.

2 On the facts and circumstances of the case and in law Ld. CIT(A) has erred in deleting the addition of Rs.25,48,189/- made by AO on account of proportionate allocation of head office expenses to MEPZ (10M) unit.

3 On the facts and circumstances of the case and in law Ld. CIT(A) has erred in deleting the addition of Rs.36,29,525/- made by AO on account of proportionate allocation of bank and loan processing charges to MEPZ (10M) unit.

4 On the facts and circumstances of the case and in law Ld. CIT(A) has erred in deleting the addition of Rs.1,05,902/- made by AO on account of allocation of bad debts written off to MEPZ (10M) unit.

5 On the facts and circumstances of the case and in law Ld. CIT(A) has erred in deleting the addition of Rs. 70,13,384/- made by AO on account of price difference in respect of goods transferred to MEPZ (10AA) unit from other units.

6. On the facts and circumstances of the case and in law Ld. CIT(A) has erred in deleting the addition of Rs.27,15,753/- out of total addition of Rs.43,60,825/- by directing to treat the same as revenue expenditure instead of capital as treated by the AO."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : The assessee is in the business of manufacturing and selling of automobile power-trains and power-shift transmissions along with components forming part of heavy duty power trains, having unit at Chennai known as MPEZ unit situated in SEZ and its income is claimed as exempt under section 10AA of the Income-tax Act, 1961 (for short 'the Act'). During the year under assessment, the assessee has declared loss of Rs.3,90,35,968/- which has been set off against the other units. Assessing Officer, declining the contentions raised by the assessee,

disallowed/made addition on account of disallowance of loss of MEPZ unit to the tune of Rs.3,90,35,968/-; on account of allocation of head office expenses against MEPZ unit of Rs.25,48,189/-; on account of allocation of bank and loan processing charges against MEPZ unit of Rs.36,29,525/-; on account of addition of bad debts written off of RS.1,05,902/-; addition u/s 80IA(8) for goods transferred to MEPZ Unit of Rs.70,13,384/-; disallowance of R&D expenses of Rs.18,47,250/-; disallowance of software expenses of Rs.17,44,330/- and disallowance of amount on reconciliation of Rs.11,416/-.

3. Assessee carried the matter by way of appeal before the ld. CIT (A) who has given part relief by partly allowing the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

4. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1

5. Undisputedly, the assessee has claimed business loss of Rs.3,90,35,968/- from MEPZ Unit at Chennai, eligible for deduction u/s 10AA. It is also not in dispute that assessee has

claimed set off of this loss against the income from other units. AO proceeded to hold that loss from MEPZ unit at Chennai, which is eligible for deduction u/s 10AA, was not eligible to be set off against the profits from other units. However, ld. CIT (A) granted the relief to the assessee by relying upon the decision rendered by ***Hon'ble Bombay High Court in M/s. Hindustan Unilever Ltd. vs. DCIT – 325 ITR 102 (Bom.), ITAT, Bangalore Bench in Mindtree Consulting P. Ltd. vs. ACIT – 102 TTJ 691, Navin Bharat Industries Ltd. vs. DCIT – (2004) 90 ITD 1 (Mum.)(TM), ITAT, Delhi Bench in Honeywell International (India) P. Ltd. vs. DCIT – 108 TTJ 924 (Del.)*** and CBDT Circular No.7/DV/2013 dated 16.07.2013, that the provisions of section 10A is not in the nature of exemption and as such, the assessee was entitled to set off of losses sustained by eligible unit u/s 10A against the normal business income.

6. In the backdrop of the aforesaid facts and circumstances of the case, the first question arises for determination in this case is :-

> ***"as to whether the assessee is entitled for set off of loss of MEPZ Unit u/s 10AA while computing the gross total income of eligible undertaking under Chapter IV of the Act?"***

7. The ld. AR for the assessee relied upon the judgment of ***Hon'ble Apex Court in CIT vs. Yokogawa India Ltd. – (2017) 391 ITR 274 (SC)*** and CBDT Circular No. 7/DV/2013 dated 16.07.2013. The ld. AR for the assessee further relied upon the judgments of ***Hon'ble Apex Court in Allied Motors (P.) Ltd. vs. CIT – (1997) 224 ITR 677 (SC) and CIT vs. Gold Coin Health Food (P.) Ltd. – (2008) 304 ITR 308 (SC)*** to support his contention that the amendment relied upon by the Revenue is declaratory in nature. However, on the other hand, ld. DR for the Revenue relied upon the decision rendered by AO and contended that the decision relied upon by the ld. AR as to the declaratory in the nature is not sustainable in the eyes of law.

8. Hon'ble Apex Court in ***CIT vs. Yokogawa India Ltd.*** (supra) has decided the issue in controversy in favour of the assessee after examining Circulars No.794 dated 09.08.2000, No.1 dated 17.01.2013 and Circular No.7 dated 16.07.2013 by framing the following questions :-

> ***"(i) Whether Section 10A of the Act is beyond the purview of the computation mechanism of total income as defined under the Act. Consequently, is the income of a Section 10A unit required to be excluded before arriving at the gross total income of the assessee?***
>
> ***(ii) Whether the phrase "total income" in Section 10A of the Act is akin and pari materia with the said expression as appearing in Section 2(45) of the Act?***

(iii) Whether even after the amendment made with effect from 1.04.2001, Section 10A of the Act continues to remain an exemption section and not a deduction section?

(iv) Whether losses of other 10A Units or non 10A Units can be set off against the profits of 10A Units before deductions under Section 10A are effected?

(v) Whether brought forward business losses and unabsorbed depreciation of 10A Units or non 10A Units can be set off against the profits of another 10A Units of the assessee."

9. Hon'ble Apex Court decided the issue in favour of the assessee by returning following findings :-

"17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No. 794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding

the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'.

18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly.

10. Even para 5.2 of Circular No.7 dated 16.07.2013 is also categoric enough to decide the issue in controversy and para 5.2 thereof is extracted as under for ready perusal :-

"5.2 The income computed under various heads of income in accordance with the provisions of Chapter IV of the IT Act shall be aggregated in accordance with the provisions of Chapter VI of the IT Act, 1961. This means that first the income/loss from various sources i.e. eligible and ineligible units, under the same head are aggregated in accordance with the provisions of section 70 of the Act. Thereafter, the income from one ahead is aggregated with the income or loss of the other head in accordance with the provisions of section 71 of the Act. If after giving effect to the provisions of sections 70 and 71 of the Act there is any income (where there is no brought forward loss to be set off in accordance with the provisions of section 72 of the Act) and the same is eligible for deduction in accordance with the provisions of Chapter VI-A or sections 10A, 10B etc. of the Act, the same shall be allowed in computing the total income of the assessee."

11. Furthermore, after the decision of Hon'ble Apex Court in ***CIT vs. Yokogawa India Ltd.*** (supra), the Explanation has been added to section 10A of the Act which is extracted as under :-

> ***"7. In section 10AA of the Income-tax Act, after sub-section (1), the following Explanation shall be inserted with effect from the 1st day of April, 2018, namely:—***
>
> > ***"Explanation.—For the removal of doubts, it is hereby declared that the amount of deduction under this section shall be allowed from the total income of the assessee computed in accordance with the provisions of this Act, before giving effect to the provisions of this section and the deduction under this section shall not exceed such total income of the assessee.".***

12. Keeping in view the fact that section 10AA makes the assessee eligible for deduction in the same manner, the deduction prescribed u/s 10A and 10B and it cannot be treated in the nature of exemption and as such, the loss suffered by the assessee in the unit eligible for deduction u/s 10AA can be set off against the normal business income.

13. So far as question of amendment of section 10A is concerned, the Hon'ble Supreme Court in ***Allied Motors (P.) Ltd. vs. CIT*** and ***CIT vs. Gold Coin Health Food (P.) Ltd.*** (supra) has decided the identical issue by holding that, *"when the amendment is curative in nature it has to be read from its inception."* So, we are of the considered view that the amendment of section 10A by

way of inserting explanation is only declaratory in nature having retrospective effect.

14. In view of what has been discussed above, we are of the considered view that the ld. CIT (A) has taken valid, legal and plausible view that the deduction is to be allowed from the total income of the unit and not from the total income of the assessee under Chapter IV of the Act and not at the stage of total income under Chapter VI of the Act. So, ground no.1 is determined against the Revenue.

GROUNDS NO.2, 3, 4 & 5

15. Since grounds no.2, 3, 4 & 5 are offshoot of Ground No.1 being the addition on account of allocation of head office expenses; allocation of bank and loan processing charges; bad debts written off and addition on account of goods transferred to 10AA unit, the same have been rightly decided by ld. CIT (A). So, finding no illegality or perversity, the same are determined against the Revenue.

GROUND NO.6

16. Assessee claimed expenses to the tune of Rs.43,60,825/- for acquiring computer software out of which the AO has provided depreciation @ 60% and thereby made addition of Rs.17,44,330/-

to the total income of the assessee. However, ld. CIT (A) allowed the depreciation @ 60% on the amount of Rs.16,54,000/- as against total expenses of Rs.43,60,825/- made by the AO by returning following findings :-

> ***"6.9 Vide Ground No.11 of the appeal, the appellant has challenged the action of the AO of treating the computer software expenses as capital in nature. On careful consideration of the details of the software expenses, I find that the bulk of the expenses pertain to 'additional customization charges' of Rs.15,62,125/- for ERP implementation, which were paid to M/s Birla Soft India Ltd. Such a software, which has enduring usage in the appellant's business, cannot be held as a routine software used on licensing basis. Further, the appellant has acquired the right to use this software and hence the same was rightly capitalized by the Ld. AO. Similarly, I also hold that the claim of Rs.82,947/- in respect for oracle DAV module was also correctly held as capital in nature. However, the E-TDS software, E-scan, antivirus attachment control, ME&S Software upgrade are clearly in the nature of routine software for the purpose of antiviral control and for upgrading the existing software and hence the same are held as revenue in nature. On the balance amount of Rs.16.45 lakhs, the AO is directed to allow depreciation allowance @ 60%."***

17. We are of the considered view that the ld. CIT (A) has granted the relief in accordance with the settled principles of law by holding that, "*the E-TDS software, E-scan, antivirus attachment control, ME&S Software upgrade are clearly in the nature of routine software for the purpose of antiviral control and for upgrading the existing software" a*nd held the same to be revenue

in nature and on the balance amount of Rs.16,45,000/- directed the AO to allow the depreciation @ 60%. Assessee has not preferred to challenge the findings given by the ld. CIT (A) by filing cross appeal. So, finding no illegality or perversity in the findings of ld. CIT (A), ground no.6 is determined against the Revenue.

18. In the result, the appeal of the Revenue is dismissed.

Order pronounced in open court on this 10th day of September, 2018.

Sd/-	**sd/-**
(N.K. BILLAIYA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 10th day of September, 2018
TS

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)-LTU, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.