

**IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI
BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
&
SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA No.7574/Mum/2019
(Assessment Year: 2011-12)**

Genesys International Corporation Limited 73A, SDF III, 2 nd Floor SEEPZ, Andheri Mumbai-400 096	Vs.	DCIT-9(3)(2) Aaykar Bhawan M.K.Road Mumbai-400 020
PAN/GIR No.AAACA4528L		
Appellant)	..	Respondent)

Assessee by	Shri V.Chandrasekhar & Shri Harshad Shah, AR's
Revenue by	Shri V.Vinod Kumar, DR
Date of Hearing	25/02/2020
Date of Pronouncement	04/03/2020

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against, the order of the Ld. Commissioner of Income Tax (Appeals)-16, Mumbai, dated 30/10/2019 and it pertains to Assessment Year 2011-12.

2. The assessee has raised the following grounds of appeal:

1. *On the facts and circumstances of the case and in law, the Hon'ble Commissioner of Income-tax [Appeals] -18 ('CIT') erred in not considering the objection of the Appellant to the reasons for the re-opening of the assessment u/s-147 of Income tax Act, 1961(the Act)*

2. *On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in , not considering that notice issued u/s 148 the Act as invalid and void ab initio as the reason recorded amounts to reason to suspect and do not amount to reason to believe and the said reason do not constitute belief.*

3. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the re-opening of the assessment as valid without considering the facts that Appellant had truly and fully disclosed all facts for setting off of losses of non-eligible unit against the eligible, filled report u/s 10AA and the same was disclosed in the Computation of Income, during the Original scrutiny assessment

4. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the re-opening of the assessment without considering the facts that re-opening of the assessment pursuant to audit objection cannot be said that the Ld AO had formed his own opinion that the income had escaped assessment

5. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not appreciating the facts the reopening of the assessment is after 4 years from the end of the assessment year and the earlier assessment was completed u/s.143(3) of the Act and there is no failure on the part of the Appellant to disclose all material facts for the computation of total income and hence, the reopening of the assessment after 4 years from the end of the assessment year is bad in law, invalid and liable to be quashed.

6. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not appreciating the re-opening of the assessment is invalid and void ab initio, as Appellant had truly and fully disclosed all material and there was no fresh or adverse material found or brought by Ld AO.

Without Prejudice to above, all below grounds are without

7. Without Prejudice to above, on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not allowing the set off of losses of non-eligible unit against the income of eligible unit before deduction u/s 10AA of the Act amounting to Rs.1,68,97,503/- without considering the facts that the deduction u/s-10AA of the Act is to be claimed unit per se.

8. Without Prejudice to above, on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not allowing set off of losses of non-eligible unit against the income of eligible unit before deduction u/s-10AA of the Act without considering the facts that in Appellants own case in earlier years, i.e. AY 2004-05 and AY 2005-06, the Hon'ble ITAT in ITA No.3333 & 3334/Mum/2010 dated 31.08.2012 held that it is plain and evident that the deduction u/s-10A has to be given at the stage when the profits and gains of business are computed in the first instance and the deduction is unit per se.

9. Without Prejudice to above, on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not allowing of set off of losses of non-eligible unit against the income of eligible unit before claiming deduction u/s-10AA of the Act without considering the facts that Hon'ble Apex court in case of CIT vs. Yokogawa India Ltd. (2017) 391 ITR 274

(SC) had decided the issue in favour of the Assessee after examining Circular No.7 dated 16.07.2013

10. Without Prejudice to above, on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not applying the Principle of Judicial Precedent by following the decision of the Supreme Court in case of Yokogawa India Ltd. (supra) in respect of section 10A of the Act as being the law of land instead of brushing it aside or overlooking the same.

11. Without Prejudice to above, on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not considering the facts and legal provision that the provisions of section 10A and 10AA are pari materia same with regards to this matter.

12. Without Prejudice to above, on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not allowing set-off of losses of non-eligible unit against the income of eligible unit before claiming deduction u/s-10AA of the Act without considering the facts the Explanation has been added to section 10AA of the Act by Finance Act, 2017 w.e.f from 01.04.2018

13. Without Prejudice to above, on the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in not allowing set-off of losses of non-eligible unit against the income of eligible unit before claiming deduction u/s-10AA of the Act treating the amendment to section 10AA of the Act by Finance Act, 2017 as clarification and hence retrospective in nature.

14. The Appellant prays that it may be allowed to add, alter or amend the above grounds of appeal and to make detailed submissions at the time of appeal

3. The brief facts of the case are that the assessee company is engaged in the business of providing Geographical Information Services comprising of photogrammetry remote sensing cartography, data conversion, state of the art terrestrial and 3D Geo-content, including location and other computer based related services. The assessee has filed its return of income for the AY 2011-12 on 29/09/2011, declaring total loss at Rs.3,20,01,621/-. The assessment has been completed u/s 143(3) of the I.T.Act, 1961 on 17/01/2014, determining the total loss at Rs.1,68,97,503/-. The case

has been, subsequently reopened u/s 147 of the I.T.Act, 1961 and the assessment has been completed u/s 143(3) r.w.s. 147 of the I.T.Act, 1961, determining the total income at Rs. *Nil*, after set off of loss from business with profit of eligible units u/s 10AA of the I.T.Act, 1961.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has challenged reopening of assessment, as well as contested the issues on merit, in light of the decision of Hon'ble Supreme Court, in the case of CIT vs Yokogawa India Ltd (2017) 77 taxmann.com 41 and argued that profit of eligible unit claiming exemption u/s 10AA of the I.T.Act,1961, shall be allowed without set off of loss of other units. The Ld.CIT(A) after considering relevant submissions of the assessee, has rejected legal ground taken by the assessee challenging reopening of assessment, on the ground that if, a particular issue is brought to the notice of the Ld. AO by the audit party and the Ld. AO on his/her application of mind finds that the ground is valid, reopening of assessment cannot be quashed, merely because such ground was brought to the notice of the Ld. AO by the audit party. The Ld.CIT(A) has also, rejected the arguments of the assessee that deduction claimed u/s 10AA shall be allowed without set off of loss of other units, on the ground that although, the Hon'ble Supreme Court, in the case of CIT vs Yokogawa India Limited (supra) has held that profit of eligible unit should be allowed as deduction without set off of loss of other units, but the findings of Hon'ble Supreme Court is based on the computation of deduction provided u/s 10A of the Act, but not on

computation of deduction provided u/s 10AA of the I.T.Act, 1961.

The relevant findings of the Ld.CIT(A) are as under:-

6.2.4 I have considered the submissions to the appellant and perused the available on record. At the outset, sec 10AA of the Act is reproduced hereunder: -

"10AA(1) Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause (j) of section 2 of the Special Economic Zones Act, 2005, horn his Unit, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any year commencing on or after the 1st day or April, 2005, a deduction of....,"

6.2.5 The literal interpretation of the above section. As per the provisions (if section 10AA of the Act, a taxpayer having an eligible unit located in SEZ is entitled to a deduction of profits from exports. It is to be noted that as the legal interpretation of the deduction in "the income is first included in the total income and deduction in accordance with the provisions of each section is then reduced" Further, the said section also provides for computation of such deduction. In the computation of the deduction, it is requires aggregation of income of the units (i.e. inclusive result of eligible and non-eligible units) before giving effect to deduction under section 10AA of the Act.

6.2.6 Circular 7 of 2013 dated July 16, 2013 the CBDT clarified that irrespective of the continued placement of section 10A/10AA/10B in Chapter III of the Act, the provisions, as substituted by Finance Act, 2000, provide for deduction of profits from the total income of the taxpayer. It also clarified that the income computed under various heads of income in accordance with the provisions of Chapter IV of the Act shall be aggregated in accordance with the provisions of Chapter VI of the Act. In other words, 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. Subsequently, the income from one head is aggregated with the income or loss of the other head in accordance with the provisions of section 71 of the Act. Subsequent to giving effect to such mechanism deduction in accordance with the provisions of Chapter VI-A or sections 10A/10AA/10B of the Act shall be allowed in computing the total income of the taxpayer.

6.2.7 Also, it is important to be noted that the appellant has placed reliance on the decision rendered by the Hon'ble Supreme Court in the case of CIT vs, Yokogawa India Ltd [2017] 77 taxmann.com 41 (SC). In the decision Hon'ble Supreme Court has clearly pointed the computation of deduction taken u/s 10A of the Act. However, there is not a single point of view on the computation of deduction taken U/s 10AA of the Act. Therefore, that' case on which the appellant has placed its reliance on, does not fall within the Jour corners of the above said ca.se law as the facts of both the cases are different. It is also stated that Section 10A and

Section 10AA are independent of each other. Thus, a case law relevant to section 10A would not be relevant for section 10A A. Further, it is also noted that the in the finance bill 2017-18 proposes to insert the following explanation after sub-section (1) of section 10AA of the Act:

"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"

And the Memorandum in this regard reads as below

"section 10AA allows deduction in computing the total income of the assessee, hence, the deduction is to be allowed for the total income of the assessee as computed in accordance with the provision of the Act before giving effect to the provisions of section

6.2.8 From the above explanation, it is clearly understood that the interpretation of sec 10AA of the Act has been taken wrong by some taxpayer, as taxpayers having units eligible for tax holiday under section 10AA of the Act have been computing profits of the unit and claiming exemption of such profit prior to setting off losses of any other business unit. As a result, taxpayers were carrying forward entire losses under non-lax holiday units to subsequent years.

It is important to consider that, this amendment has been passed to provide clarity to the interpretation of the sec 10AA of the Act. Before this amendment the act had been misinterpreted and as such the need to introduce this amendment arose Thus, the original section too provided the same interpretation which has been further clarified by the introduction of the amendment. Thus, the intent of the legislature has been further reinforced by the addition of the explanation in the form of an amendment.

The actual interpretation of the sec 10AA of the Act is taxpayer should aggregation of income of the units (i.e. inclusive result of eligible and non-eligible units) before giving effect to deduction under section 10AA of the Act.

The computation mechanism suggested the benefit to the extent of carry forward and set off of losses from other eligible and ineligible undertaking become restricted, Though the decision in Yokogawa was in the favor of the assessee the suggest amendment will take an overruling stride by making the deduction assessee wise and not eligible undertaking wise.

Therefore as per the provision of sec 10AA of the act, the required eligibility to claim the deduction is; -

- First determine the profits and gains derived from SEZ unit*
- Compute balance income and arrive at the gross total income*
- Give effect to other deductions and arrive at total income as per the suggested amendment.*

Thereafter determine deduction under section 10 AA applying the formula provided, the profit from 10 AA is not exhausted by set off by losses from other units.

6.2.9 In view of the above facts and circumstances as discussed above and as the interpretation of the sec 10AA of the Act and the also the requirement of introduced the explanation on the set. 10AA of the Act. Also, no further evidences or arguments have been put forth by the appellant during the course of appellate proceedings, it is held that no interference is called for in the decision of assessing officer as the appellant has failed to discharge the onus required under Section 10AA of the Act and the Assessing Officer was justified in disallowed the carry forward of losses of Rs.1,68,97,503-.The appeal of the assessee on this ground is dismissed.,

5. The Ld. AR for the assessee, at the time of hearing submitted that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Supreme Court, in the case of CIT vs Yokogawa India Limited (supra), where the Hon'ble Supreme Court has clearly held that profit of eligible units claiming deduction u/s 10A of the Act, shall be allowed without set off of loss of non eligible units. He, further submitted that this issue has been considered by the Hon'ble Bombay High Court in the case of Black & Veatch Consulting Pvt.Ltd. 348 ITR 72, where a similar view has been upheld by the Hon'ble Court. He, further submitted that in assesee own case for earlier years, the Tribunal held that it is plain and evident that the deduction u/s 10A has to be given at the stage, when the profits and gains of business are computed in the first instance. Therefore, he submitted that the Ld. AO, as well as the Ld.CIT(A) were incorrect in set off of loss of non eligible units against profit of eligible units before allowing deduction claimed u/s 10AA of the Act.

6. The Ld. DR, on the other hand, strongly supporting order of the Ld. AO, as well as the Ld.CIT(A) submitted that the Ld.CIT(A) has clearly distinguished decision of Hon'ble Supreme Court, in the case

of CIT vs Yokogawa India Limited and observed that case before the Hon'ble Supreme Court is computation of deduction u/s 10A of the Act, whereas the claim of the assessee is u/s 10AA of the Act, and hence, the findings of the Hon'ble Supreme court is not applicable. Therefore, there is no reason to deviate from the findings recorded by the Ld. AO, as well as the Ld.CIT(A).

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. The issue involved in present appeal, whether deduction provided u/s 10AA of the Act, has to be allowed without set off of business loss or not is not a *res-integra*. The Hon'ble Supreme Court, in the case of CIT vs Yokogawa India Limited has clearly held that the deduction u/s 10A of the Act, 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 Hon'ble Supreme court, further held that though, section 10A, as amended is a provision for deduction, a 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 of the Act. The Hon'ble Bombay High court in the case of Black and Veatch Consulting Pvt.Ltd.vs CIT(supra) has upheld similar position of law. The ITAT, Mumbai benches in assessee own case for earlier years has held that the deduction u/s 10A of the Act, has to be given at the stage, when the profits and gains of the business is computed in the first instance. The sum and substance of ratio laid down by the Hon'ble Supreme Court and Hon'ble Bombay High Court, is that the profit of eligible units claiming deduction u/s 10A/10AA of the Act, shall be allowed

without setting off of losses of other units. Therefore, we are of the considered view that the Ld. AO, as well as the Ld.CIT(A) were erred in set off of loss of business from the profit of eligible units claiming deduction u/s 10AA of the Act, 1961, before allowing deduction provided u/s 10AA of the Act, 1961. Hence, we direct the Ld.AO to allow deductions towards profit of eligible units u/s 10AA of the Act, without set off of loss of non eligible/other units.

8. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on this 04/03/2020

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 04/03/2020
Thirumalesh Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai