IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, PRESIDENTAND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.955/Mum./2013
(Assessment Year :2002–03)

Asstt. Commissioner of Income Tax
Circle–2(3), Mumbai ……. Appellant

v/s

M/s. Zensar Technolgies Ltd.
Magnet House, 2nd Floor
NarottamMorarjee Marg .....Respondent
Ballard Estatem, Mumbai 400 038
PAN – AAACF0742K

ITA No.276/Mum./2013
(Assessment Year :2002–03)

M/s. Zensar Technolgies Ltd.
Magnet House, 2nd Floor
NarottamMorarjee Marg ……. Appellant
Ballard Estatem, Mumbai 400 038
PAN – AAACF0742K

v/s

Asstt. Commissioner of Income Tax
Circle–2(3), Mumbai .....Respondent

Assesseeby :Shri Mihir Naniwadekar
Revenue by :Shri Anil Kumar Das

Date of Hearing – 21/07/2022	Date of Order – 14/09/2022

O R D E R

PER BENCH

The present cross appeals have been filed by the assessee and the Revenue challenging the impugned order dated 12/11/2012, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned

Commissioner of Income Tax (Appeals)–6, Mumbai, ["*learned CIT(A)*"], for the assessment year 2002–03.

2. The brief facts of the case are: The assessee is engaged in development and marketing of software having factory units at SEEPZ, Noida, Ashok Plaza, Pune and Mohali, Chandigarh. It provides technical services outside India in connection with the development and production of computer software in respect thereto. During the year under consideration, the assessee filed return of income on 24/10/2002 declaring book profit of Rs. 23,65,362, under section 115JB of the Act. Subsequently, the assessee filed revised return of income on 19/08/2003 declaring book profit of Rs. 17,11,423, under section 115JB of the Act. The assessment was completed under section 143(3) of the Act on 29/12/2004, computing normal income at Rs. NIL and book profit under section 115JB of the Act at Rs. 2,38,97,632. Since, the tax on book profit was greater than normal income, book profit was considered as the total taxable income.

3. Subsequently, notice under section 263 of the Act was issued and thereafter revision order was passed on 30/03/2007, by the Commissioner of Income Tax-2, Mumbai ('*learned CIT*') under section 263 of the Act, inter-alia, on the following basis:

(a) While computing the total income the Assessing Officer has allowed deduction under section 80HHE of the Act amounting to Rs. 2,05,57,787 on the income under the head 'Income from Other Sources' ignoring the fact that after setting off brought forward losses

from the earlier years, there was no eligible income for deduction under section 80HHE of the Act.

(b) The assessee's STP units at SEEPZ, Noida and Mohali eligible for deduction under section 10A of the Act suffered losses totalling to Rs. 115.25 lakhs and the unit at Ashok Plaza, Pune, earned a profit of Rs. 134.14 lakh. Deduction under section 10A of the Act was claimed and allowed in respect of the profits of Ashok Plaza Unit without setting off the losses suffered by the other Units. This has resulted in excess deduction under section 10A of the Act.

(c) In the order passed under section 92CA(3) of the Act, the Transfer Pricing Officer held that the profit element involved in the amount of Rs. 11.58 crore received by the assessee by providing software personnel to USA clients cannot be considered for deduction under section 10A as the same does not relates to software exports. However, the Assessing Officer failed to deduct such profit from the amount of deduction allowed under section 10A of the Act.

4. The learned CIT, accordingly, set aside the assessment order treating it to be erroneous and prejudicial to the interest of the Revenue and directed the Assessing Officer to give effect to its directions. As a result, the Assessing Officer passed the order dated 26/12/2007, under section 143(3) r.w.s. 263 of the Act complying with the directions of the learned CIT issued under section 263 of the Act. In appeal, the learned CIT(A) vide impugned order partly allowed the appeal filed by the assessee. Being aggrieved, both assessee and Revenue are in appeal before us.

5. At this stage, it is also relevant to note that assessee vide separate appeal being ITA No. 4137/Mum./2007 had challenged the revision order passed by the learned CIT under section 263 of the Act. The Co-ordinate Bench of the Tribunal vide order dated 17/05/2022, inter-alia, allowed the appeal filed by the Assessee and also dealt with merits of the aforesaid issues.

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6. In its appeal, the Revenue has raised following grounds:

"On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:

1. The order of the CIT(A) is opposed to law and facts of the case.

2. (i) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the assessee's appeal by relying on the judgment in the case of Hindustan Unilever Ltd v/s. DCIT 1(1), Mumbai without appreciating the fact that the said decision is not applicable as facts and circumstances of present case are completely different as the A.O. had set-off losses of STP units against profit of STP units;

(ii) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the assessee's appeal by relying on the judgment of Hon'ble Bombay High in the case of Hindustan Unilever Ltd v/s. DCIT 1(1), Mumbai and in process overlooked the crucial fact that the judgment related to set-off of losses of Export Oriented undertaking against normal business income and in the present case, there is profit/ available from STP unit for set-off against the losses pertaining to other STP units.

(iii) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the assessee's appeal by relying on the decision of Hon'ble ITAT Pune Bench in the case of Patni Computer System Ltd. v/s. DCIT, Circle-4 when the department has not accepted the decision and appeal to High Court has been filed u/s.260A;

3.For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the AO restored."

7. The only grievance of the Revenue is against set off of loss of STP units against normal business income, while computing deduction under section 10A of the Act.

8. We have considered the rival submissions and perused the material available on record. As noted above, the assessee's STP units at SEEPZ, Noida and Mohali eligible for deduction under section 10A of the Act suffered losses, while its STP unit at Ashok Plaza, Pune, earned a profit. The said profit was claimed by the assessee under section 10A of the Act and same was allowed vide assessment order passed under section 143(3) of the Act. However, pursuant to revision order passed under section 263 of the Act, Assessing Officer vide order passed under section 143(3) r.w.s. 263 of the Act set off the loss amounting to Rs. 115.25 lakh of STP units against the profit amounting to Rs. 134.14 lakh of STP unit and accordingly, disallowed the deduction claimed under section 10A of the Act to an extent of Rs. 115.25 lakh. The learned CIT(A) vide impugned order allowed the appeal of the assessee following the decisions of the Co-ordinate Bench of Tribunal in CIT v/s Patni Computers Systems Ltd. (19 taxmann.com 180) (Pune ITAT) and Hon'ble jurisdictional High Court in Hindustan Unilever Ltd. v/s DCIT (325 taxmann.com 102), wherein it has been held that after deduction under section 10A of the Act has been allowed in respect of each eligible units, loss of STP unit has to be set off against the normal business income.

9. We find that this issue is now settled in favour of the taxpayer by the decision of Hon'ble Supreme Court rendered in CIT v/s Yokogawa India, [2017] 391 ITR 274 (SC), wherein it has been held that deductions contemplated under section 10A of the Act is qua the profits of eligible undertaking of an assessee on a stand-alone basis and without reference to the other eligible or non-eligible units or undertakings of the assessee. The relevant observations of the Hon'ble Supreme Court are as under:

> *"16. From a reading of the relevant provisions of Section 10A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that,*
>
> > *"The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision."*
>
> *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. Thus, respectfully following the aforesaid decision of Hon'ble Supreme Court, grounds raised by the Revenue are dismissed.

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

ITA no.276/Mum./2013
Assessee's Appeal – A.Y. 2002–03

12. In its appeal, the assessee has raised following grounds:

"1. Based on the facts and circumstances of the case and in law, the learned Commissioner of Income-tax, (Appeals)-6 (CIT(A)) erred in confirming the action of the Assessing Officer (AO) of not granting deduction under section 80HHE by setting off brought forward losses for the purpose of computing business profits under the said section.

2. Based on the facts and circumstances of the case and in law, the learned CIT(A) erred in not directing the Assessing Officer to delete the addition of Rs. 1,77,29,000 u/s 10A."

13. The issue arising in ground no.1, raised in assessee's appeal, is pertaining to deduction under section 80HHE of the Act.

14. The brief facts of the case pertaining to this issue, as emanating from the record, are: The Assessing Officer vide order passed under section 143(3) of the Act allowed the deduction under section 80HHE amounting to Rs. 2,05,57,787. Since, the brought forward business loss of Rs. 12,29,01,688, from previous year was not adjusted against the business income, learned

CIT vide revision order passed under section 263 of the Act set aside the assessment order on this issue treating the same to be erroneous and prejudicial to the interest of the Revenue. Accordingly, vide order passed under 143(3) r.w.s. 263 of the Act, the Assessing Officer reduced the deduction under section 80HHE of the Act to Rs. NIL. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

15. During the course of hearing, learned Authorised Representative submitted that this issue has been adjudicated in favour of the assessee by the Co-ordinate Bench of the Tribunal in appeal against the order passed under section 263 of the Act.

16. On the other hand, learned Departmental Representative vehemently relied upon the orders passed by the lower authorities.

17. We have considered the rival submissions and perused the material available on record. We find that the Co-ordinate Bench of the Tribunal in assessee's own case in M/s Zensar Technologies Ltd. v/s DCIT, in ITA No. 4137/Mum./2007, vide order dated 17/05/2022, has dealt with this issue in-detail on merits and decided the same in favour of the assessee, by observing as under:

> *"6.1. We find that in the assessment order dated 29/12/2004 u/s.143(3) of the Act, the ld. AO had computed the profits eligible for deduction u/s.80HHE of the Act at Rs.7,65,20,042/-. Since, the gross total income of the assessee was only Rs.2,05,57,787/-, the deduction u/s.80HHE of the Act was restricted to the said amount of gross total income. However, while computing the gross*

total income, the brought forward business loss of Rs.12,29,01,688/- from previous year was sought to be adjusted by the ld. AO against the business income. We find that provisions of Section 80HHE of the Act allows deduction of profit derived from the business of export out of India of computer software for providing all technical services outside India in connection with development or production of computer software. It is not in dispute that the assessee is eligible for deduction u/s.80HHE of the Act in the present case. As per Section 80HHE(3) of the Act, the said profit derived shall be the amount which bears to the profits of the business, the same proportion as the export turnover bears to the total turnover. We find from the perusal of the provisions of Section 80HHE of the Act, as per Clause(d) of the explanation below the said Section, the starting point for computation of profits of the business is the profits of the business as computed under the head 'profits and gains of business or profession.' It is pertinent to note that Section 29 of the Act mandate that the business income shall be computed in accordance with the provisions contained in Section 30-43D of the Act. Hence, the profit qualifying for deduction u/s.80HHE of the Act is the profit of the current year. The set off of brought forward business loss is governed by the provisions of Section 72 of the Act and it has no relevance for this purpose. Hence, in our considered opinion, the eligible profits u/s.80HHE cannot be reduced by the brought forward business loss.

6.2. We find that the ld. CIT had held that the profits of the business for the year under consideration has to be reduced by the brought forward losses from earlier year for the purpose of computing profits eligible for deduction u/s.80HHE of the Act. The ld. DR before us placed reliance on the decision of the Hon'ble Madhya Pradesh High Court in the case of Vippy Solvex Products Ltd., vs. CIT reported in 273 ITR 107 and also on the decision of the Hon'ble Supreme Court in the case of Ipca Laboratories vs. DCIT reported in 266 ITR 521, in support of the contentions of the ld. CIT. We find there are two stages of computation of deduction u/s.80HHE of the Act. The first stage is the profits eligible for deduction u/s.80HHE has to be computed in the following formula:-

$$\frac{\text{Profits of the business} \times \text{export turnover}}{\text{Total Turnover}}$$

6.3. As stated supra, profits of the business is to be computed as per Section 29 of the Act which in turn stipulates that business income shall be computed in accordance with the provisions contained in Section 30-43D of the Act. The second phase is the said deduction so computed above is to be restricted to the extent of gross total income as the same is to be allowed from gross total income. In the facts before the Hon'ble Madhya Pradesh High Court, in the second stage of computation, the gross total income was nil and therefore, no deduction u/s.80HHE of the Act was allowed. In the facts before the Hon'ble Supreme Court in Ipca Laboratories referred to supra, the loss from export of trading goods was higher than the profits of self-manufactured goods resulting into net negative income. The Hon'ble Supreme Court was not concerned with brought forward business loss as the issue is arising in the present case. Hence, the deduction u/s.80HHE of the Act was denied. Hence, it could be safely concluded that the two case laws relied upon by the ld. DR does not

advance the case of the Revenue as they are factually distinguishable from the present case.

6.4. We find that the issue in dispute is squarely addressed by the decision of the Hon'ble Supreme Court in the case of Reliance Energy Ltd., in Civil Appeal No.1327 of 2021 with Civil Appeal No.1328 of 2021; Civil Appeal No.1329 of 221; Civil Appeal No.2537 of 2015; Civil Appeal No.1408 of 2021; Civil Appeal No.1508 and Civil Appeal No.1509 of 2021 dated 28/04/2021. We find that the facts of the case and the issue in dispute which went before the Hon'ble Supreme Court has been duly addressed in para 3 & 4 of the said decision. In that case, the Hon'ble Supreme Court was concerned with the deduction u/s.80IA of the Act. Based on the interpretation of Section 80IB and 80IA of the Act, it was held that in para 12 & 13 thereon that the profit eligible for deduction would be net profit made by the assessee from the eligible business and such deduction is to be allowed from gross total income. We find that similar view has been taken by the Hon'ble Jurisdictional High Court in the following cases:-

a) CIT vs. Tridoss Laboratories reported in 328 ITR 448
b) V.M.Salgaocar & Brothers (P) Ltd., vs. ACIT reported in 81 taxmann.com 357.
c) CIT vs. Eskay Knit (India) Pvt. Ltd., in Income Tax Appeal No.184 of 2007 dated 25/03/2010.
d) CIT vs. J.B.Boda & Co., Pvt. Ltd., in Income Tax Appeal No.3224 of 2009 dated 18/10/2010.

6.5. In the instant case, we find that if the set off of brought forward business loss was not taken into account, the assessee would have been entitled to deduction of the entire amount of profit eligible for deduction u/s.80HHE of the Act of Rs.7,65,2,042/-. But since the deduction under 80HHE of the Act is restricted to gross total income and such gross total income is to be computed after setting off the brought forward business losses, the assessee's claim of deduction got reduced. Hence, there cannot be any error in the ld. AO allowing deduction under 80HHE of the Act in the instant case. Hence no adjustment is warranted in the instant case as proposed by the ld. CIT.

6.6. We further find that the ld. DR vehemently placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of Rohan Dyes and Intermediates Ltd., vs. CIT reported in 142 Taxman 503. In this case, the first issue which arose before the Hon'ble Court was similar to that as arose in the case of Ipca Laboratories Ltd., referred to supra coupled with further issue that if the combined net profit from the self-manufactured export and the trading export was the loss, then the deduction in respect of export incentives was to be allowed without setting off such net loss. We find that in this case also, the issue as arising in the present case of the assessee before us i.e. the computation of profit eligible for deduction by setting off brought forward business loss, did not arise for consideration and therefore, the decision rendered in Rohan Dyes and Intermediates Ltd., also becomes factually distinguishable with that of the assessee case. Accordingly, we hold that the ld. CIT grossly held in holding with the profits of the business for the year under consideration has to be reduced by the brought forward losses from

earlier year for the purpose of computing profit eligible deduction u/s.80HHE of the Act. Accordingly, the ground No.2(a), 2(b) by the assessee are allowed."

18. The learned Departmental Representative could not show us any reason to deviate from the aforesaid order. Thus, respectfully following the order passed by the Co-ordinate Bench of the Tribunal in assessee's own case cited (supra), we uphold the plea of the assessee and allow ground no.1 raised in assessee's appeal.

19. The issue arising in ground no.2, raised in assessee's appeal, is pertaining to computation of deduction under section 10A of the Act vis-à-vis the transfer pricing adjustment.

20. The brief facts of the case pertaining to this issue, as emanating from the record, are: The learned CIT vide order passed under section 263 of the Act observed that the payment received by the assessee for providing software personnel to its USA clients cannot be considered for deduction under section 10A of the Act. Accordingly, vide order passed under section 143(3) r.w.s. 263 of the Act, the Assessing Officer disallowed an amount of Rs. 1,77,29,000 being excess deduction under section 10A of the Act. In appeal before the learned CIT(A), assessee submitted that no deduction under section 10A of the Act has been allowed in respect of transfer pricing adjustment by the Assessing Officer vide order passed under section 143(3) of the Act and thus, the impugned addition amounts to double addition in the present case. The learned CIT(A) vide impugned order directed the Assessing

Officer to verify the records and delete the addition in case of double addition.

21. Having considered the submissions and perusal of material available on record, we direct the Assessing Officer to comply with the directions of the learned CIT(A) on this issue and delete the addition in case of double addition after necessary verification. As a result, ground no.2 is allowed for statistical purpose.

22. In the result, appeal by the assessee is allowed for statistical purpose.

Order pronounced in the open Court on 14/09/2022

Sd/-	**Sd/-**
G.S. PANNU	**SANDEEP SINGH KARHAIL**
PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 14/09/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai