IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

BEFORE AMARJIT SINGH, ACCOUNTANT MEMBER
&
SHRI SANDIP SINGH KARHAIL, JUDICIAL MEMBER
ITA No. 1541/Mum/2023
(A.Y. 2009-10)

DCIT, C-1,Kalyan 1st Floor, Mohan Plaza, Mayale Naar, Kalyan(W)- 421301	Vs.	M/s. ASB International Pvt. Ltd. E9, E44, Addl. Ambernath, Industrial Area, Anand Nagar, Ambernath Thane-421506
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: AAACA8424F		
Appellant	**..**	**Respondent**

C.O. No. 65/Mum/2023
(A.Y. 2009-10)

M/s. ASB International Pvt. Ltd. E9, E44, Addl. Ambernath, Industrial Area, Anand Nagar, Ambernath Thane-421506	Vs.	DCIT, C-1,Kalyan 1st Floor, Mohan Plaza, Mayale Naar, Kalyan(W)- 421301
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: AAACA8424F		
Appellant	**..**	**Respondent**

Appellant by :	Shri. Paras Savla
Respondent by :	Shri. Ajay Chandra

Date of Hearing	11.09.2023
Date of Pronouncement	27.09.2023

आदेश / O R D E R

PER AMARJIT SINGH :-

1. The present appeal filed by the assessee is directed against the order passed u/s 250 of the Income Tax Act, 1961 ([hereinafter "the Act"] by the Learned Commissioner of Income Tax (Appeals)-2 [hereinafter 'the CIT(A)'] dated 02.02.2023 for A.Y. 2009-10.

2. The grounds of appeal of the assessee is as under:

"a. On the facts and circumstances of the case and in law, the CIT(A) was justified in holding that the exemption u/s. 10B has to be allowed before the set off of brought forward losses as that would lead to a situation wherein that brought forward loss of 10B unit will be set off against the business income of non 10B units of the assessee or even against the other income of the assessee making that income also exempt which is contrary to the condition that only that profit which is derived by a hundred per cent export oriented undertaking will be eligible for exemption because in such case unabsorbed loss of 10B will extend deduction to non-10B units profits as well to that extent?"

b. On the facts and in circumstances of the case, the CIT(A) erred in granting relief to the assessee by relying on the decision of ITAT Mumbai in the assessee's own case for AY 2005-06 to 2007-08 without considering the fact that for the said assessment years, the department has filed appeal against the order of the Tribunal & the decision of the Hon'ble High Court is pending?"

3. Fact in brief is that return of income declaring total income at ₹ Nil was filed on 29.09.2009. The assessment u/s 143(3) of the Act was completed on 22.03.2013. Subsequently, the case was reopened with reason to believe that income to the amount of ₹ 16,59,94,384/- was escaped assessment. The reassessment u/s 143(3) r.w.s. 147 of the Act was completed on 27.12.2016 while assessing the total income at ₹ 16,59,94,384/-. In the reassessment order the AO held that the claim of deduction u/s 10B of the Act is to be worked out after set off of brought forward business losses and unabsorbed depreciation. In this regard the AO has relied on the assessment order for assessment year 2008-09 and mentioned that business loss and unabsorbed depreciation of earlier years were fully set off by assessment year 2007-08. Therefore, the AO mentioned that no business loss/unobserved depreciation remained to be carry forward to assessment year 2009-10 and according no unobserved depreciation/business loss was allowed to be set off in assessment year 2009-10. On this basis the income under normal computation was assessed at ₹16,59,94,384/-. The assessee has also submitted that the proceedings initiated u/s 147 of the Act were invalid and without any basis and the

assessee stated that no action shall be taken u/s 147 of the Act after the expiry of 4 years from the end of the relevant assessment years unless income has escaped assessment inter alia on account of failure of the assessee to disclose fully and truly all necessary fact for assessment for that assessment year. The assessee submitted that it was not in default for not furnishing any details/information in relation to the claim of tax holiday u/s 10B of the Act. However, the AO has not accepted submission of the assessee and passed the order u/s 143(3) r.w.s 147 of the Act.

4. During the course of reassessment proceedings, the AO stated that from A.Y. 2001-02 onward the provisions of section10A of and 10B of the Act have been brought at per with the other section dealing with deductions allowed under chapters VI-A of the Act. From first April 2001 onwards the brought forward losses pertaining to the specified undertaking eligible for deduction u/s 10B of the Act are allowed to be carry forward and set off against the income of such undertakings in the future assessment year. The AO observed that all the brought forward losses and depreciations were first required to be set off against the business profit of the current year before computing

deduction/exemption under the Act. In support of these contentions the AO has referred the decision of the Hon'ble Karnataka High Court in the case of CIT v/s Himatasinike Seide Pvt. Ltd. 286 ITR 255 and decision of the Tribunal in the case of Maruti Ltd. JCIT 2006, 105 TTJ Del 764. Therefore, the AO held that the act of the assessee company in claiming exemption amounting to ₹ 30,17,33,419/- u/s 10B of the Act without first adjusting and setting off the unabsorbed depreciation and/or brought forward business losses is neither logical nor in the spirit of the law. Accordingly, the AO has considered that all the unobserved depreciation was exhausted by A.Y. 2008-09, therefore the amount of ₹ 16,59,94,384/- was added to the total income of the assessee.

5. Aggrieved, the assessee filed appeal before the CIT(A). The CIT(A) has allowed the appeal of the assessee after following the decision of ITAT in the case of assessee itself vide ITA No. 7040 to 7042/Mum/2011 and ITA No. 245/Mum/2011 A.Y. 2005-06 to 2007-08. (A)

6. During the course of appellate proceedings before us. The Ld. Counsel at the outset contended that identical issue on similar

fact have been adjudicated by the ITAT, Mumbai in favour of the assessee in preceding assessment year as under:

1. *ITA No. 7040 to 7042/Mum/2011 & ITA No. 245/Mum/2011 A.Y. 2005-06 to 2007-08.*
2. *ITA No. 7089 and 7090/Mum/2013 A.Y. 2004-05 and 2006-07*
3. *ITA No. 7034 and 7035 Mum/2013 A.Y. 2004-05 and 2006-07 (Department Appeal)*

7. On the other hand the Ld. DR could not controvert that this fact identical issue on similar facts has been adjudicated by the ITAT in favour of the assessee.

8. With the assistance of Ld. Representatives, we have perused the decision of ITAT vide ITA No. 7090/Mum/2013 for A.Y. 2006-07 ASB International Pvt. Ltd. v/s ACIT the relevant operative part of the decision is reproduced as under.

> *11. We have considered the rival submissions and also perused the relevant material on record. It is pertinent to note here that the ld. CIT(A) vide his impugned orders has already held, relying on the decision of Hon'ble Bombay High Court in the case of Black and Veatch Consulting Pvt. Ltd. (supra), that the brought forward business loss cannot be set off against the profit of the eligible unit for computing deduction u/s 10B of the Act and such profit is*

to be determined after set off of brought forward unabsorbed depreciation. The issue relating to set off of brought forward business loss thus has already been decided by the Id. CIT(A) in favour of the assessee holding that the brought forward business loss cannot be set off against profit of the eligible unit for the purpose of computing deduction u/s 10B of the Act. The circular dtd. 16-7-2013 (supra) issued by the CBDT giving its clarification on the issue relating to applicability of Chapter IV of the Act and set off of carry forward of business losses thus is not applicable in the present case which involved the issue only relating to set off of unabsorbed depreciation against the profit of the eligible unit for the purpose of computing deduction u/s 10B of the Act and the reliance of the ld. D.R. on the said circular in support of the case on this issue thus is clearly misplaced.

12. *It is observed that even the issue relating to set off of unabsorbed depreciation was also decided by the Tribunal in favour of the assessee in assessee's own case for A.Y. 2005-06 vide order dated 29-12-2006 relying on the decision of Hon'ble Bombay High Court in the case of Black and Veatch Consulting Pvt. Ltd. (supra) and although the said decision cited on behalf of the assessee was also taken note of by the ld. CIT(A), he declined to follow the same on the ground that the Hon'ble Bombay High Court in the case of Black and Veatch Consulting Pvt. Ltd. (supra)*

had not considered the issue relating to set off of unabsorbed depreciation which is governed by the provisions of section 32(2) of the Act. In this regard, the Id. Counsel for the assessee has cited not only the decision of Tribunal in the case of Valueprocess Technologies (I) (p) Ltd. (supra) but even the subsequent decision of Hon'ble Bombay High Court in the case of M/s Ganesh Polychem Ltd. (supra) wherein it is held, following the decision of Hon'ble Bombay High Court in the case of Black and Veatch Consulting Pvt. Ltd. (supra), that the brought forward unabsorbed depreciation and losses of the unit, the income of which is not eligible for deduction u/s 10A of the Act, cannot be set off against the current profit of eligible unit for computing deduction us/ 10B of the Act. In our opinion, the issue relating to set off of brought forward unabsorbed depreciation against the profit of the eligible unit for computing deduction u/s 10B of the Act thus is also covered by the decision of Hon'ble Bombay High Court in the case of Black and Veatch Consulting Pvt. Ltd. (supra) and in the case of M/s Ganesh Polychem Ltd. (supra) and respectfully following the same, we direct the A.O. to allow the claim of the assessee for deduction u/s 10B of the Act on the profit of the eligible unit without setting off the brought forward unabsorbed depreciation. The impugned orders of the Id. CIT(A) on this issue are accordingly reversed and the A.O. is directed to allow the

deduction u/s 10B of the Act as claimed by the assessee. Ground No. 2 to 6 of the assessee's appeal for A.Y. 2004-05 and all the grounds of the assesse's appeal for A.Y. 2006-07 are accordingly allowed.

13. As a result of our decision rendered in assessee's appeal for A.Y. 2004- 05 allowing its claim for deduction u/s 10B of the Act entirely, the preliminary issue raised by the assessee in ground No. 1 challenging the validity of the reopening of the assessment u/s 147/148 of the Act has become anfractuous and we do not consider it necessary or expedient to adjudicate upon the same.

9. We have also perused the decision of ITAT for A.Y. 2005-06 and in ITA No. 7040/Mum/2011 the relevant operative part of the decision is reproduced as under:

5. "This issue is to be decided in favour of assessee and against the Revenue, in view of the judgment of the jurisdictional High Court in the case of CIT v. Black & Veach Consulting Pvt. Ltd (ITA No.1237 of 2011) as well as the judgment of the Hon'ble Karnataka High Court in the group of cases ACIT vs. M/s Yokogawa India Ltd and others vide order dated 9th August, 2011.

6. The Hon'ble High Court of Bombay in ITA No.1237 of 2011 dated 9th April, 2012 considered the following question:

"(A) Whether on the facts and circumstance of the case and law, the ITAT was correct in holding that the brought forward unabsorbed depreciation and losses of the unit, the income

which is not eligible for deduction under section 10A of the Act cannot be set off against the current profit of the eligible unit for computing the deduction under section 10A of the I.T. Act."

7. The Hon'ble High Court held as under:

"2. The Assessing Officer, during the course of the order of assessment under Section 143(3) observed as follows

"Under the scheme of the Act, the profits of the unit eligible for deduction under Section 10A of the Act, would form part of the income computed under the head Profits and gains of business and profession'. However, in order same does not suffer tax, deduction will have to be made in respect thereof while computing the income under the head Profits and gains of business and profession. In other words, the deduction in respect of the profits eligible under Section 10A of the Act is required to be made at the stage of computing the income under the head 'Profits and gains of business or profession"."

Nonetheless, while computing the total income of the assessee the Assessing Officer took the net profit as per the profit and loss account and after, inter alia, making certain disallowances and allowances, arrived at the total business income at Rs.86.07 lakhs. A set off was effected of the brought forward business loss of AY 2003-04 and AY 2004-05 upon which the Assessing Officer came to the conclusion that there was nil income which would qualify for deduction under Section 10A. The CIT (A) held that the Assessing Officer was justified in adjusting the brought forward losses of earlier years before arriving at the gross total income, for allowing a deduction under Section 10B. In appeal, the Tribunal has relied upon a decision of its Special Bench in the case of Scientific Atlanta Vs. ACIT 129 TTJ 273. in which it has been

emphasized that the provision contained in Section 10A is not an exemption but a deduction under Chapter III. Following that decision, the Tribunal held that the deduction under Section 10A in respect of the allowable unit under Section 10A has to be allowed before setting off brought forwarded losses of a non 10A unit.

3. Section 10A is a provision which is in the nature of a deduction and not an exemption. This was emphasized in a judgment of a Division Bench of this Court while construing the provisions of Section 10B in Hindustan Unilever Ltd Vs. Deputy Commissioner of Income Tax 2.

(2010) 325 ITR 102 at Para 24. The submission of the Revenue placed its reliance on the literal reading of Section 10A under which a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive Assessment Years is to be allowed from the total income of the assessee. The deduction under section 10A, in our view, has to be given effect to at the stage of computing the profits and gains of business. This is anterior to the application of the provisions of Section 72 which deals with the carry forward and set off of business losses. A distinction has been made by the Legislature while incorporating the provisions of Chapter VI-A. Section 80A(1) stipulates that in computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of the Chapter, the deductions specified in Sections 80C to 80U. Section 80B(5) defines for the purposes of Chapter VIA "gross total income to mean the total income computed in accordance with the provisions of the Act, before making any deduction

under the Chapter. What the Revenue in essence seeks to attain is to telescope the provisions of Chapter VI-A in the context of the deduction which is allowable under Section 10A, which would not be permissible unless a specific statutory provision to that effect were to be made. In the absence thereof, such an approach cannot be accepted. In the circumstances, the decision of the Tribunal would have. to be affirmed since it is plain and evident that the deduction under Section 10A has to be given at the stage when the profits and gains of business are computed in the first instance. So construed, the appeal by the Revenue would not give rise to any substantial question of law and shall accordingly stand dismissed. There shall be no order as to costs".

8. *On similar question, the Hon'ble Karnataka High Court in the batch of cases of ACIT vs. M/s Yokogawa India Ltd and others vide order dated 9th August, 2011 examined this issue elaborately and decided as under:*

"1st Substantial question of law

9. The benefit of tax holiday was originally enacted as an absolute exemption under Chapter III of the Income-tax Act, 1961. It remained as exemption for almost two decades. The heading of Chapter III under which the relevant provisions were placed is titled as "Incomes which do not form part of the total income. The second heading read as "Special conditions in respect of newly established industrial undertakings in free trade zones". Section 10 begins as "In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not he included, whereas section 10A as originally enacted provided that the profits and gains of the eligible undertaking shall not be

included in the total income of the assessee. The Finance Act, 2000, recast section 10A. It came into effect from April 1, 2001. The second heading continues with a marginal change by way of addition of the word "etc." to read as 'Special provisions in respect of newly established undertakings in a free trade zone, etc". The new section provides for deduction of profits and gains of eligible undertaking from the total income of the assessee.

10. Section 10B which is also substituted by the Finance Act, 2000, and which came into effect from April 1, 2001, deals with the special provisions in respect of newly established 100 per cent export oriented undertakings. 11. Section 10A reads as under:

"10A. Special provision in respect of newly established undertakings in free trade zone, etc.-(1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the under-taking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee:

Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section, as it stood immediately before its substitution by the. Finance Act, 2000, the undertaking shall be entitled to deduction referred to in this sub-section only for the unexpired period of the aforesaid ten consecutive assessment years:

Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment years referred to in this sub-section shall be reckoned the assessment year relevant to the previous in which the undertaking began to manufacture or pro- duce such articles or things or computer software in such free trade zone or export processing zone:

Provided also that for the assessment year beginning on the 1st day of April, 2003, the deduction under this shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software:

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, 2012, and subsequent years.

(4) For the purposes of sub-sections (1) and (1A), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the under-taking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking..

(6) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of

any previous year, relevant to any subsequent assessment year,

(i) section 32, section 32A, section 33, section 35 and clause (ix) of sub-section (1) of section 36 shall apply as if every allowance or deduction referred to therein and relating to or allowable for any of the relevant assessment year (ending before the 1st day of April, 2001), in relation to any building, machinery, plant or furniture used for the purposes of the business of the undertaking in the previous year relevant to such assessment year or any expenditure incurred for the purposes of such business in such previous year had been given full effect to for that assessment year itself and accordingly sub-section (2) of section 32, clause (ii) of sub-section (3) of section 32A, clause (ii) of sub-section (2) of 33, sub-section (4) of section 35 or the second proviso to clause (ix) of sub A-section (1) of section 36, as the case may be, shall not apply in relation to any such allowance or deduction:

(ii) no loss referred to in sub-section (1) of section 72 or sub-section (1) or sub-section (3) of section 74, in so far as such loss relates to the business of the undertaking, shall be carried forward or set off where such loss relates to any of the relevant assessment years ending before the 1st day of April, 2001;

(ii) no deduction shall be allowed under section 80HH or section 80HHA or section 80-1 or section 80-IA or section 80-IB in relation to the profits and gains of the undertaking; and

(iv) in computing the depreciation allowance under section 32, the written down value of any asset used for the purposes of the business of the undertaking shall be computed as if the assessee had claimed and been actually allowed the

deduction in respect of depreciation for each of the relevant assessment year.....

Explanation 2.....

(ii) convertible foreign exchange' means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder or any other corresponding law for the time being in force;

(iii) electronic hardware technology park' means any park set up in accordance with the Electronic Hardware Technology Park (EHTP) Scheme notified by the Government of India in the Ministry of Commerce and Industry;"

12. A literal reading of the above provision requires deduction from the total income. There can be a deduction in computing the total income. How-ever, there cannot be deduction from the total income which is the final result of the computation process. The language adopted in section. 10A is different from the one adopted in section 80A. Section 10A provides for deduction from the total income. In the scheme of the Act, while various deductions are allowed in computing the total income, once the total income is computed, no further adjustment to the total income is envisaged. The scheme of the Act provides for deduction in computing the total income but no mechanism for any deduction from the total income already computed is provided under the Act. Once the total income is computed, the next step is determination of tax by applying the applicable rates on the total income.

13. Section 2(45) defines "total income" to mean the total amount of income referred to in section 5 and computed in the

manner laid down in the Income-tax Act. Section 5 the scope of total income and it is subject to the provisions of the Income-tax Act. Section 14 provides that "save as otherwise provided by the Income-tax Act, all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the following heads of income". Therefore, the total income in its strict sense requires computation for the purpose of levy of tax. The computation of total income begins only with Chapter IV and as section 10A is covered in Chapter III, the phrase "total income" used in section 10A cannot be understood in the same sense as in section 2(45).

14. The phrase "total income" has been used in the Income-tax Act in several places with different connotations and shades. The phrase "total income" used in section 10A is one such variant. The phrase need not necessarily mean the total income as computed in accordance with the provisions of the Act. The relief under this section is with reference to the STP undertakings and not to the assessee. In other words, the relief travels with the undertaking irrespective of who owns the same. The computation of relief as provided in section 10A(4) is also with reference to the under-taking. A business might have several undertakings and section 28 does not envisage computation of income of each such undertaking. In other words, the profits of the business of the undertaking cannot be computed in isolation. The profits are computed under the head "Profits and gains of business or profession", as under the above head, the income from business as a whole has to be computed. The phrase "total income" used in section 10A(1) is, therefore, to be understood as the total income of the STP unit. This is clear from the first proviso to

section 10A(1) which makes a reference to the total income of the undertaking and not to the total income of the assessee. The definition of any term given in section 2 will apply only when the context does not otherwise require. The placement, language and setting of section 10A cannot mean the total income computed in accordance with the provisions of the Act. such a phrase in the context of section 10A, means profits and gains of the STP under-taking as understood in its commercial sense.

15. Chapter IV deals with the computation of total income under various heads of income. Section 14 provides for classification of income under various heads of income for the purposes of charge of income-tax and computation of total income. The purpose of classification of any income under any head of income is to compute the same. The twin conditions of section 14 are that income is subject to charge of income-tax and is includible in the total income. As the relief under section 10A is in the nature of exemption although termed as deduction and the said relief is in respect of commercial profits, such income is neither subject to charge of income-tax nor includible in the total income. Therefore, the twin provisions of section 14 are not existing in the case of income of STP under-taking and accordingly such income is not liable to be computed under Chapter IV. Therefore, the correct view would be that the relief under section 10A will have to be given before Chapter IV. The deduction shall be given first and process of computation of "profits and gains of business or profession" begins thereafter. This proposition is in line with the form of return. Allowing deduction at the earliest stage of

business income computation almost blurs the difference between the commercial profits and tax profits.

16. The substituted section 10A continues to remain in Chapter III. It is titled as "Incomes which do not form part of total income". It may be noted that when section 10A was recast by the Finance Act, 2001, Parliament was aware of the character of relief given in Chapter III. Chapter III deals with incomes which do not form part of total income. If Parliament intended that the relief under section 10A should be by way of deduction in the normal course of computation of total income, it could have placed the same in Chapter VI-A which houses the sections like 80HHC, 80-IA, etc. Parliament was aware of the various restricting and limiting provisions like section 80A and section 80AB which was in Chapter VI- A which do not appear in Chapter III. The fact that even after its recast, the relief has been retained in Chapter III indicates that the intention of Parliament it is to be regarded as an exemption and not a deduction. The Act of Parliament in consciously retaining this section in Chapter III indicates its intention that the nature of relief continues to be an exemption. Chapter VII deals with the incomes forming part of the total income on which no income-tax is payable. These are the incomes which are exempted from charge, but are included in the total income of the assessee. Parliament, despite being con-versant with the implications of this Chapter, has consciously chosen to retain section 10A in Chapter III.

17. If section 10A is to be given effect to as a deduction from the total income as defined in section 2(45), it would mean that section 10A is to be considered after Chapter VI-A deductions have been exhausted. The deductions under

Chapter VI-A are to be given from out of the gross total income. The term "gross total income" is defined in section 80B(5) to mean the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter. As per the definition of gross total income, the other provisions of the Act will have to be first given effect to. There is no reason why reference to the provisions of the Act should not include section 10A. In other words, the gross total income would be arrived at after considering section 10A deduction also. There-fore, it would be inappropriate to conclude that section 10A deduction is to be given effect to after Chapter VI-A deductions are exhausted.

18. It is after the deduction under Chapter VI-A that the total income of an assessee as arrived at. Chapter VI-A deductions are the last stage of giving effect to all types of deductions permissible under the Act. At the end of this exercise, the total income is arrived at. Total income is thus, a figure arrived at after giving effect to all deductions under the Act. There cannot be any further deduction from the total income as the total income is itself arrived at after all deductions.

19. From the aforesaid discussion it is clear that the income of the section 10A unit has to be excluded before arriving at the gross total income of the assessee. The income of the section 10A unit has to be deducted at source itself and not after computing the gross total income. The total income used in the provisions of section 10A in this context means the global income of the assessee and not the total income as defined in section 2(45). Hence, the income eligible for exemption under section 10A would not enter into computation as the same has to be deducted at source level.

2nd substantial question of law

20. Prior to the introduction of sub-section (6) of sections 10A and 10B of the Finance Act, 2000, which came into effect from April 1, 2001, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year. Sub-section (2) of section 32, clause (u) of sub-section (3) of section 32A. Clause (ii) of sub section (2) of section 33 and sub-section (4) of section 35 of the Act or the second proviso to clause (ix) of sub-section (1) of section 36 shall not be applicable in relation to any such allowance or deduction. Similarly, no loss as referred to in sub-section (1) or in section 72 or sub-section (1) or sub- section (3) of section 74 in so far as such loss relates to the business of the undertaking was permitted to be carried forward or set off where such loss relates to any of the relevant assessment years.

21. It is in this background the Finance Act, 2003, was introduced by inserting the words "the year ending up to the first day of April, 2001, for that in clauses (i) and (ii) of sub A-section (6) restricting the disallowance only up to the first day of April, 2001, and granting the benefit, of those provisions even in respect of units to which sections 10A and 10B is applicable. The Finance Act, 2003, amended this sub- section with retrospective effect from April 1, 2001, by lifting the embargo in the aforesaid clauses in respect of depreciation and business loss relating to the assessment year 2001-02 onwards. The amendment indicates the legislative intention of providing the benefit of carry forward of depreciation and

business loss relating to any year of the tax holiday period to be set off against income of any year post-tax holiday. This is supported by Circular No. 7 of 2003 wherein the Board has stated that the purpose of amendment is to entitle an assessee to the benefit of carry forward of depreciation and loss suffered during the tax holiday period. The circular dated September 5, 2003, reads as under ([2003] 263 ITR (St.) 62, 77):

> *"20. Providing for carry forward of business losses and unabsorbed depreciation to units in special economic zones and 100 per cent export oriented units:*
>
> *20.1 Under the existing provisions of sections 10A and 10B, the undertakings operating in a special economic zone (under section 10A) and 100 per cent export oriented units (EOU's) (under section 10B) are not permitted to carry forward their business losses and unabsorbed depreciation*
>
> *20.2 With a view to rationalize the existing tax incentives in respect of such units sub A-section (6) in sections 10A and 10B has been amended to do away with the restrictions on the carry forward, of business losses and unabsorbed depreciation.*
>
> *20.3 The amendments have been brought into effect retrospectively from April 1, 2001, and have been made applicable to business losses or unabsorbed depreciation arising in the assessment year 2001-02 and subsequent years."*

22. It is interesting to note that such relaxation has not been made in section 10C which provides for exemption in respect of profits of certain under-takings in north eastern region. This makes clear the legislative intention of providing relaxation

wherever it deems fit and in the present case, such relaxation has been made in section 10A but not in section 10C.

23. It is to be noted that the aforesaid amendment read with the Board circular does not militate against the proposition that the benefit of relief under this section is in the nature of exemption with reference to the commercial profits. However, in order to give effect to the legislative intention of allowing the carry forward of depreciation and loss suffered in respect of any year during the tax holiday for being set off against income post-tax holiday, it is necessary that the notional computation of business income and the depreciation as per the provisions of the Act should be made for each year of the tax holiday period. While so computing, attention will have to be given to the provisions sections 70, 71, 72 and section 32(2). The amount of depreciation and business loss remaining unabsorbed at the end of the tax holiday period should be determined so that the same may be set off against the income post-tax holiday period.

24 Chapter VI deals with the aggregation of income and set off or carry for-ward of loss. Section 72(1) deals with the carry forward and set off of business loss which reads as under:

> *72.(1) Where for any assessment year, the net result of the computation under the head 'Profits and gains of business or profession' is a to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the of section 71, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward, to the following assessment year, and-*

(i) it shall be set off against the profits and gains, if any, of business or profession carried on by him and assessable for that assessment year;

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on:

Provided that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such business is re-established, reconstructed or revived by the assessee, so much of the loss as is attributable to such business shall be carried forward to the assessment year relevant to the previous year in which the business is so re-established, reconstructed or revived, and-

(a) it shall be set off against the profits and gains, if any, of that business or any other business carried on by him and assessable for that assessment year; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re-established, reconstructed or revived continues to be carried on by the assessee, be carried forward to the following assessment year and SO on for seven assessment years immediately succeeding."

25. In fact, the Bombay High Court in the case of Hindustan Unilever Ltd. v. Deputy CIT [2010] 325 ITR 102 (Bom) interpreting section 10B as amended held as under:

" section 10B as it stands is not provision in the nature of an exemption but provides for a deduction. Section 10B was

substituted by the Finance Act of 2000 with effect from April 1, 2001. Prior to the substitution of the provision, the earlier provision stipulated that any profits and gains derived by an assessee from a 100 per cent. export oriented undertaking, to which the section applies shall not be included in the total income of the assessee. The provision, therefore, as it earlier stood was in the nature of an exemption. After the substitution of section 10B by the Finance Act of 2000, the provision as it now stands provides for a deduction of such profits and gains as are derived by a 100 per cent export oriented undertaking from the export of articles or things or computer software for ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce. Consequently, it is evident that the basis on which the assessment has sought to be reopened is belied by a plain reading of the provision. The Assessing Officer was plainly in error in proceeding on the basis that because the income is exempted, the loss was not allowable. All the four units of the assessee were eligible under section 10B. Three units had returned a profit during the course of the assessment year, while the crab stick unit had returned a loss. The assessee was entitled to a deduction in respect of the profits of the three eligible units while the loss sustained by the fourth unit could be set off against the normal business income. In these circumstances, the basis on which the assessment is sought to be reopened is contrary to the plain language of section 10B.

"The principle equally applies to a case falling section 10A of the Act.

26. The Madras High Court in the case Madras Machine Tools Manufacturers Ltd. v. CIT reported in [1975] 98 ITR 119 (Mad) has explained the difference between a company and an undertaking which is owned or run by such company. It was held as under (page 127):

A company may own or run many undertakings, some of which may be entitled to the benefit of section 84 and others may not be so entitled. It is not, therefore, possible to equate the undertaking with the company. When a company owns more than one the application of section 84 has to be with respect to the particular undertaking and not to the company in general. When we apply section 84 to a particular undertaking it has to be seen when that undertaking commenced the manufacture or production of articles. It is true that the word 'undertaking' has not been defined under the Income-tax Act. But in common parlance it is taken as a concern started or formed for a specific purpose or a project engaged in. In this case though the objects of the company as set out in its articles of association cover a variety of objects, the object of the undertaking is only to manufacture lathes and bench grinders as is clear from the licence issued to the company under the Industries (Development and Regulation) Act, 1951."

27. Form No. 1 read with rule 12 of the Income-tax Rules, 1962, provides for return of income and return of fringe benefits.

28. In Schedule 9 at column No. 7 it is clearly mentioned the amount claimed/deductible under section 10A/10AA/10B or 10BA. Dealing with the scheme of the form it is stated that the scheme of this form follows the scheme of the law as outlined above in its basic form and with reference to Schedules 1, 9, 3 and 13 it is stated that "fill out Schedule 9 if you are claiming deduction under section 10A, 10AA, 10B 10BA in respect of some

specific business". Item 7 of Schedule 1 is to eliminate such income from computation of profits and loss and no separate declaration under section 10A(8) or 10B(8) if any is required to be made.

29. After making all such computations the assessee would be entitled to the benefit of set off or carry forward of loss as provided under section 72 of the Act. That is the benefit which is given to the assessee under the Act irrespective of the nature of business which he is carrying on. The said benefit is available even to undertakings under section 10B of the Act. The expression "deduction of such profits and gains as derived by an under-taking shall be allowed from the total income of the assessee", has to be understood in the context with which the said provision is inserted in Chapter III of the Act. Sub-section (4) of section 10A clarifies this position. It provides that the profits derived from export of articles or things from computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking. Therefore, it is clear that though the assessee may be having more than one undertaking for the purpose of section 10A it is the profit derived from export of articles or things or computer software from the business of the undertaking alone that has to be taken into consideration and such profit is not to be included in the total income of the assessee. It is only after the deduction of the said profits and gains, the income of the assessee has to be computed.

30. The provisions of this sub-section will apply even in the case where an assessee has opted out of section 10A by

exercising his option under sub-section (8). As discussed, it is permissible for an assessee to opt in and opt out of section 10A. In the year when the assessee has opted out, the normal provisions of the Act would apply. The profits derived by him from the STP undertaking would suffer tax in the normal course subject to various provisions of the Act including those of Chapter VI-A. If in such a year, the assessee has suffered losses, such losses would be subject to inter source and inter head set off. The balance, if any, thereafter can be carried forward for being set off against profits of the subsequent assessment years in the normal course. Unabsorbed depreciation also merits a similar treatment.

31. As the income of the section 10A unit has to be excluded at source itself before arriving at the gross total income, the loss of the non-section 10A unit cannot be set off against the income of the section 10A unit under section 72. The loss incurred by the assessee under the head "Profits and gains of business or profession" has to be set off against the profits and gains, if any, of any business or profession carried on by such assessee. Therefore, as the profits and gains under section 10A is not be included in the income of the assessee at all, question of setting off the loss of the assessee of any profits and gains of business against such profits and gains of the undertaking would not arise. Similarly, as per section 72(2), unabsorbed business loss is to be first set off and thereafter unabsorbed depreciation treated as current year's depreciation under section 32(2) is to be set off. As deduction under section 10A has to be excluded from the total income of the assessee the question of unabsorbed business loss being set off against such profit and gains of the undertaking would not arise. In that view of the matter, the approach of the assessing authority was quite contrary to the aforesaid statutory

provisions and the Appellate Commissioner as well as the Tribunal were fully justified in setting aside the said assessment order and granting the benefit of section 10A to the assessee Hence, the main substantial question of law is answered in favour of the assessees and against the Revenue"

9. *Since the provisions of section 10A and 10B are similar in nature and as the jurisdictional High Court decided the issue while considering the provisions of section 10B also respectfully following the above, we uphold the contention of assessee that carry forward business losses and depreciation cannot be set off to the profits of the undertaking while working the claim u/s 10B. Therefore, AO is directed to do the needful in light of the above principles laid down. Ground No. 1 is accordingly allowed.*

10. After considering the findings of the coordinate benches of the ITAT Mumbai, the case of the assessee is squarely covered by the different decisions of ITAT as cited above in the case of the assessee itself, therefore, following the decision of ITAT (Supra) we do not find any infirmity in the decision of the Ld. CIT(A). Accordingly, the appeal of the revenue is dismissed.

CO. No. 65/Mum/2023 A.Y. 2009-10

Regarding the cross objection.

11. The assessee has filed cross objection for challenging the validity of the reopening of assessment u/s 147 and 148 of the Act, the

ITAT vide ITA No. 7089 has dealt with the similar ground of appeal of the assessee vide para 13 as under.

"13. As a result of our decision rendered in assessee's appeal for A.Y. 2004- 05 allowing its claim for deduction u/s 10B of the Act entirely, the preliminary issue raised by the assessee in ground No. 1 challenging the validity of the reopening of the assessment u/s 147/148 of the Act has become infractuous and we do not consider it necessary or expedient to adjudicate upon the same."

12. Following the decision of ITAT (supra), since we have adjudicated the claim of deduction u/s 10B of the Act on merit in favour of the assessee, therefore, the cross objection filed by the assessee in respect of reopening assessment has became infructuous and we do not consider it necessary to adjudicate the same and the same is left open.

13. In the result the appeal of the revenue stand dismissed. Order Pronounced in Open Court on 27.09.2023

Sd/-	Sd/-
(SANDEEP SINGH KARHAIL) JUDICIAL MEMBER	(AMARJIT SINGH) ACCOUNTANT MEMBER

Place: Mumbai
Date 27.09.2023
ANIKET SINGH RAJPUT/ STENO

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

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