आयकर अपीलीय अधिकरण,'एक-सदस्य' न्यायपीठ,मुंबई।

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

श्री जोगिन्दर सिंह, न्यायिक सदस्य, के समक्ष

Before Shri Joginder Singh, Judicial Member,

ITA No.4620/Mum/2015
Assessment Year:2011-12

DCIT-10(3)(2), Room No.217, Aayakar Bhavan, M.K. Road, Mumbai-400020	**बनाम**/ Vs.	M/s Phoenix Mecano (I) Pvt. Ltd. 306, Marol Bhavan, Makwana Road, Andhri (East), Mumbai
राजस्व / Revenue		निर्धारिती / Assessee
		P.A. No.AAACP2452L

निर्धारिती **की ओर से /** Assessee by	Shri Sharad A. Shah
राजस्व **की ओर से** / Revenue by	Shri Ajay Pratap Singh-DR

सुनवाई की तारीख **/ Date of Hearing**	**03/08/2016**
आदेश की तारीख /**Date of Order:**	**12/08/2016**

आदेश / O R D E R

The Revenue is aggrieved by the impugned order dated 20/05/2015 of the Ld. First Appellate Authority, Mumbai. The only ground raised in this appeal, by the

Revenue, is with respect to the learned CIT(A) holding that deduction claimed u/s 10B of the Income Tax Act, 1961 (hereinafter the Act) is an exemption, thus do not form part of the total income and further the learned CIT(A) not following the direction contained in the order of CIT vs Black & Veatch Consulting Pvt. Ltd. 348 ITR 72 (Bom.), Hindustan Lever Ltd. vs DCIT 325 ITR 102 and CIT vs Galaxy Surfacatants Ltd. 343 ITR 108 and circular number 07/DV/2013 dated 16-07-2013 .

2. During hearing, the ld. DR, Shri Abhishek Sharma advanced identical arguments as contained in the grounds, raised by the Revenue. The crux of the argument is in support to denial of deduction and consequent stand taken in the assessment order.

2.1. On the other hand, the ld. counsel for the assessee, Shri Sharad A Shah, defended the conclusion, arrived at in the impugned order passed by learned CIT(A)by placing reliance upon the decision in the case of KEI Industries Ltd. 373 ITR 574 (Del.).

2.2. I have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee is engaged in the business of electrical components, polyester polycarbonate and aluminium enclosures, specialized motors and aluminium profiles etc and declared loss of Rs.33,55,143/- in its return of income filed on 30/09/2010. The assessee had

profit of Rs.2,38,49,196/- from the eligible unit and loss of Rs.33,55,143/- from non-eligible unit and assessee sought to carry forward the loss from ineligible unit without set off against profit of eligible unit , and consequently claiming deduction of entire profit from eligible unit u/s. 10B of the Act. The said claim of the assessee was denied by the ld. Assessing Officer. On appeal, before the Ld. Commissioner of Income Tax (Appeal), the claim of the assessee was allowed. The Revenue is aggrieved and is in appeal before this Tribunal.

2.3. The only question is to be adjudicated by this Tribunal is whether loss from non-eligible unit can be set off against the profit of eligible unit or whether only profit of eligible unit is to be considered for computation of deduction u/s 10B of the Act. It is noted that the assessee has considered profit from eligible unit for computing the deduction u/s 10B. Considering the totality of facts, I find that the assessee made export sales as well as domestic sales. While calculating the deduction u/s 10B of the Act, the assessee reduced domestic sales from total sales and thus claimed proportionate profit on export sale as full deduction u/s 10B of the Act which was claimed without adjusting loss from ineligible unit. I am of the view that deduction u/s 10A/10B, has to be given effect at the stage of computing the profit & gains of the business under the head 'income from business or profession' which shall be arrived at after adjusting loss of ineligible

unit with the profit of the eligible unit i.e. giving effect to the provisions of Section 70 and 71 of the Act. Section 80A(1) stipulates that while computing the total income of the assessee, there shall be allowed from the gross total income, in accordance with and subject to the provisions of the chapter, the deduction specified in section 80C to 80U. Section 80B(5) defines the purposes of section 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. The deduction u/s 10B, in my view, has to be given effect to at the stage of computing the profit & gains of the business. Admittedly, there were divergent views among the Courts. The matter was clarified by Circular No.07/DV/2013 dated 16/07/2013 which is reproduced below :

CIRCULAR NO. 7/DV/2013 [FILE NO.279/MISC. /M-116/2012

SECTION 10A, READ WITH SECTIONS 10AA & 10B OF THE INCOME-TAX ACT, 1961 - FREE TRADE ZONE - CLARIFICATION ON ISSUES RELATING TO APPLICABILITY OF CHAPTER IV OF THE ACT AND SET OFF AND CARRY FORWARD OF BUSINESS LOSSES

CIRCULAR NO. 7/DV/2013 [FILE NO.279/MISC./M-116/2012-ITJ], DATED 16-7-2013

It has been brought to the notice of the Board that the provisions of 10A/10AA/10B/10BA of the Income-tax Act, with regard to applicability of Chapter IV of the Act and set off and carry forward of losses, are being interpreted differently by the Officers of the Department as well as by different High Courts.

2. The two sections 10A and 10B of the Act were initially placed on statute in 1981 and 1988 respectively, and continued with some modifications and amendments till 31.03.2001. Section 10A as inserted by Finance Act, 1981 read as under:

"10A. *Special provision in respect of newly established industrial undertakings in the free trade zones*.—(1) Subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which this section applies shall not be included in the total income of the assessee."

2.1 Similarly section 10B as inserted by Finance Act, 1988 read as under:

"10B. *Special provision in respect of newly established hundred per cent export oriented undertakings*.—Subject to the provisions of this section, any profits and gains derived by an assessee from a hundred per cent export oriented undertaking (hereafter in this section referred to as the undertaking) to which this section applies shall not be included in the total income of the assessee."

3. Vide Finance Act, 2000 sections 10A and 10B of the Act were substituted. Section 10A as substituted by Finance Act, 2000 reads as under:

"10A. (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 undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed form the total income of the assessee...."

3.1 Similarly, section 10B as substituted by Finance Act, 2000 reads as under:

"10B. (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export-oriented 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 undertaking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee..."

3.2 The effect of the substitution of sections 10A and 10B of the Act has been elaborated in Circular No. 794 dated 9.8.2000 which clearly provides that the new provisions provide for deduction in respect of profits and gains derived by an undertaking from export of articles or things or computer software.

4. Sub-section (6) of sections 10A and 10B were amended by Finance Act, 2003 with retrospective effect from 1-4-2001. Circular No. 7/2003, dated 5-9-2003 explains the amendments brought by Finance Act, 2003. The relevant paragraph is reproduced below:

"20. Providing for carry forward of business losses and unabsorbed depreciation to units in Special Economic Zones and 100% 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% 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-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 1-4-2001 and have been made applicable to business losses or unabsorbed depreciation arising in the assessment year 2001-02 and subsequent years."

5. From the above it is evident that irrespective of their continued placement in Chapter III, sections 10A and 10B as substituted by Finance Act, 2000 provide for deduction of the profits and gains derived from the export of articles or things or computer software for a period of 10 consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such article or thing or computer software. The deduction is to be allowed from the total income of the assessee. The term 'total income' has been defined in section 2 (45) of the IT Act and it means the total amount of income referred to in section 5, computed in the manner laid down in the Income-tax Act.

5.1 All income for the purposes of computation of total income is to be classified under the following heads of income and computed in accordance with the provisions of Chapter IV of the Act-

- Salaries
- Income from house property
- Profits and gains of business and profession
- Capital gains
- Income from other sources

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.

5.3 If after aggregation of income in accordance with the provisions of sections 70 and 71 of the Act, the resultant amount is a loss (pertaining to assessment year 2001-02 and any subsequent year) from eligible unit it shall be eligible for carry forward and set off in accordance with the provisions of section 72 of the Act. Similarly, if there is a loss from an ineligible unit, it shall be carried forward and may be set off against the profits of eligible unit or ineligible unit as the case may be, in accordance with the provisions of section 72 of the Act.

6. The provisions of Chapter IV and Chapter VI shall also apply in computing the income for the purpose of deduction under sections 10AA and 10BA of the Act subject to the conditions specified in the said sections."

2.4. Section 10A and 10B of the Act were initially placed on statute in 1981 and 1988 respectively and continued with some modifications and amendments till 31/03/2001. Section 10A as inserted by Finance Act 1981, reads as under:-

"Section 10A. Special provision in respect of newly established industrial undertakings in the free trade zones.-(1) Subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which this section applies shall not be included in the total income of the assessee."

2.5. Similarly section 10B as inserted by Finance Act, 1988 read as under:

"10B: Special provision in respect of newly established hundred percent export oriented undertakings. - Subject to the provisions of this section, any profits and gains derived by an assessee from a hundred per cent export oriented undertaking (hereafter in this section referred to as the undertaking) to which this section applies shall

not be included in the total income of the assessee. "

2.6. Vide Finance Act, 2000 section 10A and 10B of the Act were substituted. Section 10A as substituted by Finance Act, 2000 reads as under:-

> *"Section 10A. (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 undertaking 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 "*

2.7. Similarly, section 10B as substituted by Finance Act, 2000 reads as under:-

> *"10B. (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export-oriented 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 undertaking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee .... "*

2.8. The effect of the substitution of section 10A and 10B of the Act has been elaborated in Circular No. 794 dated 09/08/2000 which clearly provides that the new provisions provide for deduction in respect of profits and gains "derived by" an undertaking from export of articles or things or computer software.

2.9. Sub-sections (6) of sections 10A and 10B

were amended by Finance Act, 2003 with retrospective effect from 1.4.2001 Circular no.7/2003 dated 05/09/2003 explains the amendments brought by Finance Act, 2003. The relevant paragraph is reproduced below:

> *"20. Providing for carry forward of business losses and unabsorbed depreciation to units in Special Economic Zones and 100% 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% 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- 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 1-4-2001 and have been made applicable to business losses or unabsorbed depreciation arising in the assessment year 2001-02 and subsequent years."*

2.10. From the above it is evident that irrespective of their continued placement in Chapter III, section 10A and 10B as substituted by Finance Act, 2000 provide for deduction of the profits and gains derived from the export of articles or things or computer software for a period of 10 consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such article or thing or computer software. The deduction is to be allowed from the total income of the assessee.

The term 'total income' has been defined in section 2 (45) of the IT Act and it means the total amount of income referred to in section 5, computed in the manner laid down in the Income-tax Act,1961.

2.11. In computing the total income of the assessee both profits as well as losses will have to be taken into consideration. Section 80-AB is relevant. It reads as follows:

> *"80-AB. Where any deduction is required to be made or allowed under any section included in this Chapter under the heading 'C'. Deductions in respect of certain incomes in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provision of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income*."
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> **(Emphasis supplied)**

2.12. Section 80-B(5) is also relevant, which provides that "gross total income" means total income computed in accordance with the provisions of the Income Tax Act,1961.

2.13. Section 80-AB is also in Chapter VI-A, which starts with the words "where any deduction is required to be made or allowed under any section included in this

Chapter". Section 80-AB further provides that "notwithstanding anything contained in that section". Thus Section 80-AB has been given an overriding effect over all other sections in Chapter VI-A. Decisions of the Bombay High Court in CIT v. Shirke Construction Equipment Ltd. (2000 (246) ITR 429) and the Kerala High Court in CIT v. T.C. Usha (2003 (132) Taxman 297) to the contrary cannot be said to be the correct law . (The Hon'ble Apex Court held in JEYAR CONSULTANT VS CIT in Civil Appeal No.8912 of 2003, order dated 01/04/2015) . Thus, section 80-AB makes it clear that the computation of income has to be in accordance with the provisions of the Act. If income has to be computed in accordance with the provisions of the Act, then not only profits but also losses have to be taken into consideration.

2.14. The Hon'ble jurisdictional High Court in Hindustan Unilever Ltd. vs DCIT (2010) 325 ITR 102 (Bom.); (2011) 237 CTR 287 (Bom.) held that section 10B, as it now stands, is not a provision in the nature of exemption but provides for a deduction and the loss sustained by the unit eligible for deduction u/s 10B could be set off against the normal business income and therefore, the assessment could not be reopened on the ground that loss of that unit was wrongly set off against the normal business income of the assessee. The Hon'ble Bombay High Court in the case of CIT v Galaxy Surfactants Limited reported in 343 ITR 108 has also

taken similar view that loss of the EOU unit is to be allowed to be set off against the profits of the other units as under:-

> **"5.** At the outset, while dealing with the submission which has been urged on behalf of the Revenue, it must be noted that Section 10B when it was originally introduced by the Finance Act, 1988, with effect from 1 April 1989, provided for an exemption of the profits and gains derived by the assessee from a hundred percent export oriented undertaking. The earlier provision specifically stipulated that profits and gains derived by an assessee from a hundred percent export oriented undertaking to which the section applies shall not be included in the total income of the assessee. Section 10A as at present stands, came to be substituted by the Finance Act, 2000 with effect from 1 April 2001. The section as it now stands, is not a provision for exemption, but a provision which enables an assessee to claim a deduction. As it now stands, the section contemplates a deduction of such profits and gains as are derived by a hundred per cent export oriented undertaking from the export of articles and 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 undertaking begins to manufacture or produce such articles or things or computer software, as the case may be. The deduction has to be allowed from the total income of the assessee. In *Hindustan Lever Ltd.* v. *Dy. CIT* [2010] 325 ITR 102 / 191 Taxman 119 (Bom.) a Division Bench of this Court considered the provisions of Section 10B, while considering a petition challenging the action of the Assessing Officer in purport to reopen the assessment under Section 148. The Division Bench noted that upon the substitution of the provision by the Finance Act, 2000, Section 10B was no longer a provision for exemption, but a provision for deduction. The Division Bench observed as follows:
>
> "Plainly, section 10B as it stands is not a 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."

This decision of the Division Bench has been followed by another Division Bench of this Court in the case of *CIT* v. *Patni Computers Systems Ltd.* [IT Appeal 2177 of 2010, dated on 1-7-2011].

6. Quite apart from the fact that the issue stands covered against the Revenue by the view taken by the Division Benches in the aforesaid two cases, even as a matter of first principle, we find no justification in the submission which has been urged on behalf of the Revenue. Section 70 provides for a setting off of a loss from one source falling under any head of income (other than capital gains) against income from any other source under the same head. Section 71 provides for the setting off of a loss sustained with reference to one head of income against income from another head (save and except for capital gains). Under Section 72, a provision has been made for carry forward and setting off of a loss sustained against the head of profits and gains of business or profession. Under Section 72, where a loss which has been sustained under the head of profits and gains of business or profession cannot be set off against income under any head of income under Section 71 so much of the loss as has not been set off or the entire loss where there is no income under any other head can be carried forward in the manner which is indicated in the provision. Section 72 which provides for a carry forward of a business loss comes into operation only when the provisions of Sections 70 and 71, as the case may be, are exhausted. There is no provision in Section 10B by which a prohibition has been introduced by the Legislature in setting off of a loss which is sustained from one source falling under the head of profits and gains of business against income from any other source under the same head. On the other hand, there is intrinsic material in Section 10B to indicate that such a prohibition was not within the contemplation of the Legislature. Sub-section (7) of Section 10B provides that the provisions of sub-section (8) and subsection (10) of Section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in the section as they apply for the purposes of an undertaking referred to in Section 80-IA. Section 80-IA contains a specific provision in sub-section (5) to the following effect :

"(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1)apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

A similar provision corresponding to sub-section (5) of Section 80-IA is to be found in sub-section (6) of Section 80-I. Under sub-section (5) of Section 80-IA which begins with overriding non-obtante provisions, profits and gains of an eligible business to which sub-section (1) applies are for the purposes of determining the quantum of deduction to be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year. A provision akin to sub-section (5) of Section 80-IA or for that matter akin to sub-section (6) of Section 80-I has not been introduced by the Legislature when it enacted Section 10B. The fact that unabsorbed depreciation can be carried forward to a subsequent year does not militate against the entitlement of the assessee to set off a loss which is sustained by an eligible unit against the income arising from other units under the same head of profits and gains of business or profession. The Legislature not having introduced a statutory prohibition, there is no reason to deprive the assessee of the normal entitlement which would flow out of the provisions of Section 70.

7. In this view of the matter, for the reasons which we have already indicated earlier, we follow the earlier decision of a Division Bench of this Court on this aspect. Consequently, no substantial question of law would arise in the appeal. The Appeal is accordingly dismissed.

2.15. However, Hon'ble Delhi High Court in CIT vs KEI Industries Ltd. (2015) 373 ITR 574 (Del.) concluded that the assessee, who enjoys the tax holiday u/s 10A should not enjoy any other tax concession. Thus, the tax exempt income of the assessee, eligible u/s 10B could not have been set off against the loss from the tax liable income.

2.16. However, we are bound by the decisions of Hon'ble jurisdictional High Court in the cases cited by me as above. My above view and decision in this appeal is fortified by the Hon'ble Apex Court decision in Jeyar Consultant & Investment Pvt. Ltd. vs CIT (Civil Appeal No.8912 of 2003) vide order dated 01/04/2015 reported in [2015] 57 taxmann.com 85 (SC) although given in context of Section 80HHC of the Act , and also by the decision of Hon'ble Supreme Court in Civil Appeal NO.1501 of 2008 vide order dated 19/09/2013 reported in (2014)48taxmann.com 357(SC) , wherein, Hon'ble Supreme Court has in Himatsingike Seide Ltd. vs CIT approved the decision of Hon'ble Karnataka High Court in the case of CIT vs Himatasingike Seide Ltd. reported in (2006) 156 Taxman 151 (Karn.) which was although rendered under the un-amended provision of Section 10B wherein Hon'ble Karnataka High Court has held as under:

> **"6.** Section 10B is a special provision in respect of the newly established 100 per cent export oriented undertaking. It provides for a tax deduction on the turnover on account of 100 per cent export oriented undertaking. In the case on hand, the appellant has submitted a computation of total income and for the said computation, he has taken the net profit, disallowance, entertainment of expenses, donation interest accrued but not due depreciation etc. He has arrived at a figure of Rs. 11,17,87,315. He has claimed the entire amount as an exemption under section 10B of the Act. The same has been accepted by the department. However, he has derived business income from other sources. The said amount works out to Rs. 41,09,479. Even for this income from other business sources, he has chosen to take unabsorbed depreciation of assessment year 1988-89. Totally the very amount thereby he has shown as taxable income *nil* for the relevant assessment year. The Assessing Officer has chosen to accept the same. The Commissioner of Income-tax noticing the *nil* income issued a notice under section 263 of the Income-tax Act, obtained

reply and thereafter, he comes to a conclusion that the Assessing Officer failed to apply the provisions of sections 29 to 43 especially section 32(2) and sub-section (3) of section 32A in the case on hand. He was of the view that the orders are erroneous and prejudicial to the interest of the revenue, insofar as the exemption under section 10B was allowed on an inflated amount without deducting the unabsorbed depreciation and unabsorbed investment allowance in the case on hand. When the matter was taken to the Tribunal, the Tribunal in its order states that there is no force in the argument that while other income is available for subscription of earlier year's depreciation brought forward to this year, the said depreciation will have to be adjusted against the profits and gains of the export oriented undertaking for allowing exemption in respect of such profits and gains.

7. At this stage, we should notice the definition of total income in terms of section 2(*45*) of the Income-tax Act. Total Income has been defined as the total amount of income referred to in section 5, computed in the manner laid down in this Act.

Section 4 provides for charge of Income-tax Act.

Section 5 provides for scope of total income.

Sub-section (1) of section 5 says that subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

"(*a*)is received or is deemed to be received in India in such year by or on behalf of such person; or

(*b*)accrues or arises or is deemed to accrue or arise to him in India during such year or;

(*c*)accrues or arises to him outside India during such year :

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India."

Chapter III provides for incomes which do not form part of total income.

Chapter IV provides for computation of total income.

Section 32 of the Income-tax Act provides for deduction on depreciation.

Section 32(2) provides for adjustment for subsequent years. If we see section 10B, it provides for exemption of payment of tax with reference to profits and gains derived by 100 per cent export oriented undertaking. To arrive at a profit and gain, one has to necessarily take into consideration the total income in terms of the Act. To arrive at the income one has to take into consideration, the various additions and deletions in terms of the Act. In fact, the

petitioner knowing fully has chosen to take into consideration the allowability of depreciation for the purpose of calculation of total income. But curiously an argument has now been advanced that exemption in terms of section 10B could also be on commercial basis not necessarily in terms of the calculation. We do not accept this submission. Section 10B cannot be read in isolation of other provisions. It is only an exemption provision. Exemption cannot be fanciful and it has some rational with other provisions of the Act. There- fore, a combined reading of the definition of exemption, total income-tax liability deductibility etc., one has to come to a conclusion that calculation as far as possible is to be in terms of the Income-tax Act. That is exactly what has been done by the assessee. Having calculated in a particular manner, now it does not lie in the mouth of the assessee to contend contra in these proceedings. It cannot be argued that calculation so provided is on a mistaken basis or that could be on commercial basis. We are not prepared to accept this argument advanced by the assessee. Exemption also has to be scrutinized by the Department as otherwise there is every chance of exemption being misused by an assessee. It may be true that even after taking into consideration, the unabsorbed depreciation, the assessee may get exemption but nonetheless he cannot take only a portion of depreciation just to suit his income for the purpose of *nil* liability and adjust the balance of unabsorbed depreciation for other business income once again to show *nil* liability. When the unabsorbed depreciation could have been taken for arriving an exempted income, the assessee cannot play with the figures for the purpose of showing *nil* liability as has been done in the case on hand. The intention of the Legislature is only to provide 100 per cent exemption for export income and not for other income. The petitioner by dividing depreciation contrary to section 32 has virtually taken exemption from payment of tax even for other business income in the case on hand. That cannot be allowed as rightly ruled by the Commissioner. The allowance of the depreciation by the Tribunal, in our view, is prejudicial to the interest of revenue as argued by the Department. The Tribunal has taken a narrow view of the matter without taking into consideration, the laudable object of exemption and at the same time providing for tax liability towards other liability. The interpretation has to be meaningful and acceptable and it cannot be against the intention of the legislation. Legislation never wanted the entire income to be exempted by taking advantage of section 10B of the Act. The approach of the Tribunal to our mind is incorrect and, hence, we find substance in the argument of the revenue.

8. Several case laws have been placed before us by the parties concerned.

9. *Distributors (Baroda) (P.) Ltd.* v. *Union of India* [1985] 155 ITR 120 (SC) deals with section 80AA of the Income-tax Act. In

the said judgment, the Supreme Court has ruled that insofar as sub-section (1) of section 80M of the Income-tax Act is concerned, the deduction required to be allowed under that provision is liable to be calculated with reference to the amount of dividend computed in accordance with the provisions of the Act and forming part of the gross total income and not with reference to the full amount of dividend received by the assessee.

10. In case of *Cambay Electric Supply Industrial Co. Ltd.* v. *CIT* [1978] 113 ITR 84 (SC), the Court considered as under :

"The question which arose in *Cambay Electric Supply Co.'s* case (113 ITR 84) was whether unabsorbed depreciation and unabsorbed development rebate were liable to be deducted in arriving at the figure of profits and gains exigible to deduction of 8 per cent contemplated in sub-section (1) of section 80E. The argument of the assessee was precisely the same as the one advanced in the present case, namely, that the words 'such profits and gains' in the latter part of sub-section (1) of section 80E were intended to refer only to the category of profits and gains referred to in the earlier part of that provision, namely, 'profits and gains attributable to the business of generation or distribution of electricity or any other form of power or of construction, manufacture or production of any one or more of the articles or things specified in the list in the Fifth Schedule' and not to the quantum of the profits and gains included in the total income, so that the profits and gains exigible to the deduction of 8 per cent were the profits and gains attributable to the specified business in their entirety and not the profits and gains as computed in accordance with the provisions of the Act. The assessee contended that, in the circumstances, unabsorbed depreciation and unabsorbed development rebate were not liable to be deducted from the profits and gains attributable to the specified business for arriving at the figure exigible to the deduction of 8 per cent. This argument of the assessee was rejected by the court and the court held that the profits and gains exigible to the deduction of 8 per cent were profits and gains computed in accordance with the provisions of the Act and forming part of the total income and hence unabsorbed depreciation and unabsorbed development rebate were liable to be excluded from the profits and gains attributable to the specified business in arriving at the figure exigible to 8 per cent deduction."

11. In the case of *CIT* v. *Virmani Industries (P.) Ltd.* [1995] 216 ITR 607 (SC), the Court considered the issue of unabsorbed depreciation in terms of section 32(2) of the Income-tax Act.

12. The Rajasthan High Court in the case of *CIT* v. *Sun Stone Engg. Industries (P.) Ltd.* [1996] 220 ITR 182 , has ruled that

"...For the purpose of determination of the relief under section 80HH of the Act, the gross total income of the assessee has to be

worked out after deducting unabsorbed loss and unabsorbed depreciation and the income eligible for deduction under section 80HH will be the net income as computed in accordance with the provisions of the Act...." (p. 182)

The Rajasthan High Court again in the case of *CIT* v. *Surendra Textiles* [2002] 258 ITR 387 ruled that :

"The gross total income of the assessee has to be worked out after deducting unabsorbed loss and unabsorbed depreciation and the income eligible for deduction under section 80HH of the Income-tax Act, 1961, will be the net income as computed in accordance with the provisions of the Act and not the gross income." (p. 387)

13. The Bombay High Court in the case of *Indian Rayon Corpn. Ltd.* v. *CIT* [2003] 261 ITR 98 has considered the depreciation in the matter of special deduction. In the said case, the following reference was made :

"...Whether on the facts and circumstances of this case, the Tribunal was justified in coming to the conclusion that depreciation allowance ought to be deducted while computing the total income for the purposes of deduction under section 80HH."

The Bombay High Court noticed the case of *Cambay Electric Supply Industrial Co. Ltd.* v. *CIT* [1978] 113 ITR 84 (SC). After noticing the Bombay High Court ruled as under:

"The scheme of sections 4 and 5 of the Income-tax Act does indicate that income-tax is a tax in respect of income computed as per the provisions of the Act. There is a distinct dichotomy between cases of computation of normal income under the Act *de hors* Chapter VI-A and computation of taxable income where the assessee claims the benefit of deduction under Chapter VI-A because the Legislature has intended that these special deductions should be restricted to the profits derived from a newly established undertaking."

The Court ruled ultimately reading as under:

"That Chapter VI-A, for the purposes of computing such deductions, constituted a separate code by itself. In order to compute the total taxable income of the assessee, deductions computed under section 80HH have to be reduced from the gross total income of the assessee. The question basically in this matter is concerning computation of deduction under Chapter VI-A in which section 80HH falls. Profits and gains of a newly established undertaking, therefore, have got to be computed as per the provisions of section 29 to section 43A and if the assessee claims relief under Chapter VI-A of the Act, then it is not open to the assessee to disclaim depreciation allowance. This is because Chapter VI-A is an independent code by itself for computing these special types of deductions. In other words, one must first calculate the gross total income from which one must deduct a percentage of incomes contemplated by Chapter VI-A. That such

special incomes were required to be computed as per the provisions of the Act, *viz.,* section 29 to section 43A, which included section 32(2). Therefore, one cannot exclude depreciation allowance while computing profits derived from a newly established undertaking for computing deductions under Chapter VI-A. Therefore, the appellant's claim for allowance of deduction under section 80HH, without taking into consideration the current depreciation will have to be rejected." (p. 107)

14. All these judgments would support the argument that calculation cannot be at the whims and fancies of an assessee for exemption of tax. It has to be in accordance with the provisions of the Act.

15. *CIT* v. *H.MT. Ltd.* [1993] 199 ITR 235 (Kar.) is pressed into service by Sri Parthasarathi, learned counsel. We have carefully gone through the said judgment. In the said judgment, the Division Bench of the High Court has no doubt ruled that computation of profits and gains of new unit may be made without deducting depreciation and investment allowance. But the facts of the present case stand on a different footing compared to the facts in the case on hand. The petitioner has chosen to calculate depreciation in such a way that he has chosen *nil* liability.

16. He also relies on *Second ITO* v. *Stumpp, Schuele & Somappa (P.) Ltd.* [1977] 106 ITR 399 (Kar.). In the said case, it is stated that section 2(9) of the Act provides that the words and expressions used in the Act, but not defined in it and defined in the Income-tax Act, shall have the meanings respectively assigned to them in the Income-tax Act. The Court ruled that the basic material for the computation of surtax is the total income as computed under the Income-tax Act. Adjustments in that total income have to be made as specified in Schedule I. There is no provision in Schedule I for making any adjustment in respect of relief under sections 80-I and 80J. The expression "part of income, profits and gains not includible in the total income" in rule 4 of the second Schedule cannot be construed or understood as referring to deductions, allowances etc., made under the Income-tax Act for purposes of computation of total income. The contention of the Commissioner could, therefore, not be accepted. A reading of the said judgment would show that it was rendered in totally different circumstances.

17. Taking into consideration, various aspects of the matter including the object of providing exemption in our view, the Commissioner is fully justified in holding that the assessee is not justified in showing *nil*return. We therefore, deem it proper to answer the questions of law in favour of the revenue. Consequently, the order of the Tribunal has to be set aside and the order of the Commissioner has to be accepted. No costs."

2.17. Keeping in my foregoing discussions and reasoning as set out above in preceding para's of this order, I hereby reiterate and conclude that deduction u/s 10A/10B, has to be given effect at the stage of computing the profit & gains of the business under the head 'income from business or profession' which shall be arrived at after adjusting loss of ineligible unit with the profit of the eligible unit i.e. giving effect to the provisions of Section 70 and 71 of the Act. This view is consistent with the circular no. 7/DV/2013 [FILE NO.279/MISC./M-116/2012] dated 16-07-2013 as well interpretation accorded to Section 10B of the Act by the Hon'ble jurisdictional High Court decisions in the case of Hindustan Unilevers Limited v. DCIT (2010) 325 ITR 102(Bom) and CIT v. Galaxy Surfactants Limited(supra) , which proposition of law is laid down by Hon'ble Apex Court in Jeyar Consultant & Investment Pvt. Ltd. vs CIT (Civil Appeal No.8912 of 2003) vide order dated 01/04/2015 reported in [2015] 57 taxmann.com 85 (SC) although given in context of Section 80HHC of the Act , and also by the decision of Hon'ble Supreme Court in Civil Appeal NO.1501 of 2008 vide order dated 19/09/2013 reported in (2014)48taxmann.com 357(SC) , wherein, Hon'ble Supreme Court has in Himatsingike Seide Ltd. vs CIT approved the decision of Hon'ble Karnataka High Court in the case of CIT vs Himatasingike Seide Ltd. reported in (2006) 156 Taxman 151 (Karn.) which was although rendered under the un-amended provision of Section 10B of the Act . Thus, I am of the

considered view that consequent to amended provisions section 10B makes it clear that it is a deduction and not exemption , and the computation of income has to be in accordance with the provisions of the Act, therefore, not only profits but also losses from the business have to be taken into consideration while computing deduction u/s 10B of the Act. Thus, it is held that losses incurred in the non-eligible business by the assessee are to be set off against the profit of eligible units of the assessee to arrive at the deduction u/s 10B of the Act. I order accordingly.

In the result, appeal of the Revenue is allowed.

This order was pronounced in the open court on 12/08/2016

Sd/-
(Joginder Singh)
न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 12/08/2016
Shekhar, P.S/निजी सचिव

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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