

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH
KOCHI**

BEFORE S/SHRI ABRAHAM P GEORGE, AM & GEORGE GEORGE K, JM

**ITA No 138/Coch/2016
(Asst Year 2009-10)**

&

CROSS OBJECTION No.19/Coch/2016

The Asst Commr of Income Tax Circle 1 Alleppy	Vs	M/s The Alleppey Co Ltd TAC House P B No. 2602 Alleppy
(Appellant/Respondent)		(Respondent/Cross Objector)

PAN No.	AABCT2048M
Assessee By	Shri J Krishnan
Revenue By	Sh A Dhanaraj, SR DR
Date of Hearing	16 th May 2017
Date of pronouncement	16 th May 2017

ORDER

PER GEORGE GEORGE K,JM:

This appeal, at the instance of the revenue and the cross objection preferred by the assessee, are directed against the CIT(A)'s order dated 2.2.2016. The relevant assessment year is 2009-10.

2 The grounds raised in the appeal of the revenue read as follows:

"The order of the learned Commissioner of Income tax (Appeals), Kottayam, 10B in so far as the points stated below are concerned, is opposed to law on the facts 10B and in the circumstances of the case.

2. The Ld. Commissioner of Income Tax (Appeals) has erred in deleting the disallowance of deduction of Rs. 23,21,409/- claimed by the assessee u/s 10B of the Act.

3. The Assessing Officer had disallowed the deduction u/s 10B on the ground that the total income of the assessee for the year under consideration was loss.

4. Section 10B of the Act specifically states that deduction can be allowed only from the total income of the assessee.

5. The total income returned by the assessee was 'Nil' and hence, the incorrect claim of deduction u/s 10B resulted in excess business loss to be carried forward to subsequent years. Accordingly, deduction u/s 10B was withdrawn by the Assessing Officer.

6. The Ld. CIT (A) placed reliance on the decision of the Karnataka High Court reported in (2012) 341 ITR 385 which is on a different issue and not applicable to the facts of the present case.

7. The Ld. CIT (A) also did not consider the decision of the jurisdictional High Court in the case of CIT Vs. Patspin India Ltd relied upon by the Assessing Officer.

8. The issue arises out of Revenue Audit Objection and even though the adverse tax effect is below Rs. 10 lakh, the appeal can be filed by the Department in view of clause (c) of para 8 of the CBDT's Instruction No.21/2015 dt. 10-12-2015.

For these and other grounds that may be advanced at the time of hearing, the order of the learned Commissioner of Income tax (Appeals) on the above points may be set aside and that of the Assessing Officer restored."

2 Briefly stated the facts in relation to the case are as follows:

The assessee is a Private Limited company. It is engaged in the business of manufacturing and export of coir products. For the assessment year 2009-10, the return of income was filed on 30.9.2009 declaring loss of Rs.3,23,66,470/-. In the return of income filed, the assessee had claimed deduction u/s 10B of the Act amounting to Rs. 25,61,409/-. The assessment u/s 143(3) of the Act was completed vide order dated 27.12.2011 wherein the loss returned was reduced by Rs. 4,79,200/-. The Assessing Officer, while completing the assessment u/s 143 had allowed deduction u/s 10B of the Act amounting to Rs. 23,21,409/- as against the claim of the assessee of Rs. 25,61,409/-

2.1 Subsequently, notice u/s 148 was issued, for the reason that allowance u/s 10B of the Act was incorrect resulting in excess carry forward business loss of Rs. 23,21,109/-. The assessee objected to the reopening of the assessment. It was submitted that deduction u/s 10B was allowed after due consideration in the original assessment order and therefore, issuance of notice u/s 148 is bad in law. On merit, the assessee relied on the judgment of the Hon'ble Karnataka High Court in the case of CIT vs Yokogava India Ltd reported in 341 ITER 385 (Kar). The Assessing Officer, however, rejected the contentions/objections raised by the assessee and completed the reassessment u/s 143 r.w.s 147 of the Act vide order dated 17.12.2014. The relevant observations of the Assessing Officer in denying the benefit of deduction u/s 10B of the Act read as follows:

(a) Section 10b is read as follows: "(1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export- 10B oriented undertaking from the export of articles or things or computer software for a 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" 10B

The Act specifically states that deduction has to be allowed from the "total income" of the assessee. It is worthwhile to note the definition of "Total Income" as per Section 2(45) of the Income Tax Act. Total Income means the total amount of income referred to in section 5 computed in the manner laid down under this Act. Moreover as per Section 14 for the purposes of charge of income tax and computation of total income, income is classified under five heads. As such an assessee has to compute the income chargeable to tax under the five heads of income and from the income so computed, deductions under Chapter VIA can be made to arrive at the total income. And only from that total income, an assessee can claim deduction under Section 10B

b) In the case of assessee, deduction under Section 10B was made to arrive at the income chargeable to tax under the head "Profits and Gains from Business and Profession". This is totally against the scheme of Section 10B which provides for deduction only from the total income.

c) Reliance is also placed on the decision of Hon'ble High Court of Kerala in the case of CIT v Patspin India Ltd (2011) as reported in 245 ITR 97.

d) The total income is Nil and as such the incorrect allowance of 10B deduction has resulted in excess business "loss to be carried forward to subsequent years. Hence the deduction allowed u/s 10B amounting to Rs.23,21,409 is withdrawn"

3 Aggrieved by the order of the reassessment completed u/s 143 w.r.s 147 the assessee preferred appeal to the first appellate authority. Before the first appellate authority, the assessee challenged the reopening of the assessee. On merit, the assessee relied on the judgment of the Hon'ble Karnataka High Court in the case of Yokogava India Ltd (supra). The CIT(A) allowed the appeal of the assessee on merit and did not adjudicate the issue of validity of reopening of the assessment. The relevant finding of the CIT(A) read as follows:

"The appellant rely on the decision of the Karnataka High Court in CIT vs Yokogava India Ltd (2012) 241 ITR 385(Karn) on the issue of adjustment of income from other heads. Verification of the case law show that the facts and issues involved are similar to the case of assessee, whereas Assessing Officer is relying on the order of the Hon Kerala High Court in the case of CIT vs Patspin India Ltd (2011). Verification shows that the case law quoted by the Assessing Officer is not relevant to the present situation discussed in the instant case. In view of the above, the argument of the assessee is upheld."

4 Aggrieved by the order of the CIT(A), the revenue filed appeal and the assessee filed cross objection challenging the validity of the reopening. The Id DR strongly relied on the reassessment order passed u/s 143 r.w.s147 of the Act. The Id AR, on the other hand submitted that the issue on merit is squarely covered in favour of the assessee by the judgment of the Hon'ble Apex Court reported in 391 ITR 274.

5 We have heard the rival submissions and perused the material on record. The issue for adjudication is whether the brought forward losses/unabsorbed depreciation is to be set off against profit of unit first and thereafter compute deduction u/s 10B of the Act or vice-versa? This issue is no longer *res-integra*. The Hon'ble Karnataka High Court in the case of M/s Yokogawa India Ltd reported in 341 ITR 385 had categorically held that exemption u/s 10B is to be calculated prior to the setting off brought forward losses and unabsorbed depreciation. It was held by the Hon'ble High Court that the profits of the eligible unit, is to be calculated on stand-alone basis. It was further held by the Hon'ble High Court that section 10B being an exemption provision, income of the 10B unit has to be excluded at the source itself before arriving at the gross total income and since this income is not at all to be in the income of the assessee, there is no occasion to set off of brought forward loss of the assessee in respect of its other business against the profits of the exempted units. The above view taken by the Hon'ble Karanataka High Court was upheld by the Hon'ble Apex Court reported in 391 ITR 274. The relevant observations of the Hon'ble Apex Court read as follows:

16. From a reading of the relevant provisions of section 10B, it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to be individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular NO. 794 dated 9.8.200 which states in paragraph 15.6 that,

" The export turnover and the total turnover for the purposes of sections 10B and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, ad this shall not have any material relationship wit the other business of the assessee outside these zones or units for the purposes of this provision."

17 *If the specific provisions of the Act provide (first proviso to Sections 10B(1); 10(1A) and 10B(4) that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (no.794 dated 9.8.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking as to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions of set off and carry forward contained in Section 70, 72, and 74 of the Act would be premature for application. The deductions u/s 10B therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression 'total income of the assessee' in Section 10B has already been dealt with earlier in the overall scenario unfolded by the provisions of section 10B the aforesaid discord can be reconciled by undertaking the expression "total income of the assessee" in section 10B as "total income of the undertaking'.*

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

6 Since the issue on merit is in favour of the assessee, on account of the judgment of the Hon'ble Apex Court, cited supra, we refrain from adjudicating the issue of validity of reopening of the assessment raised in the cross objections filed by the assessee. It is ordered accordingly.

7 In the result, the appeal filed by the revenue as well as the cross objection by the assessee are dismissed.

Order pronounced in the open Court on this 16TH day of May 2017

Sd/-

Sd/-

(ABRAHAM P GEORGE)	(GEORGE GEORGE K)
Accountant Member	Judicial Member

Raj*

Kochi

Dated 16th May 2017

Copy to:

1. Appellant –
2. Respondent –
3. CIT(A)
4. CIT,
5. DR
6. Guard File

By order

Assistant Registrar
ITAT, COCHIN