

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “F”, MUMBAI
BEFORE SHRI PAWAN SINGH (JM) AND
SHRI S. RIFAUR RAHMAN (AM)
ITA No. 5984/Mum/2017(Assessment year: 2011-12)

Famy Care Pvt Ltd, 3 rd Floor, Brady House, 12/14, Veer Nariman Road, Fort, Mumbai-400001 PAN:AAACF 0632Q	V/s	ACIT, Circle-2(1)(2), Mumbai
APPELLANT		RESPONDEDNT

Appellant by	Sh A.K. Ghosh & Ms. Hema Kataria AR's
Respondent by	Sh. Sushil Kumar Poddar CIT-DR
Date of hearing	04.12.2019
Date of pronouncement	11.12.2019

ORDER

PER PAWAN SINGH JUDICIAL MEMBER;

1. This appeal under section 253 of Income-tax Act (Act) by assessee is directed against the order of learned Commissioner of income –tax (Appeals) - 3, Mumbai dated 6th July 2017, which in turn arise from the assessment order passed under section 143(3) on 29th March 2015 for assessment year 2011- 12. The assessee has raised following grounds of appeal;
 - (i) On the facts and in the circumstances of the appellant's case and in law the ld. CIT(A) erred in confirming AO's action of setting of loss of ₹ 11,63,21,868/- of ineligible units against the profit of eligible units under section 10AA & 10 B.
 - (ii) On the facts and circumstances of the case ld CIT(A) erred in confirming the AO's action of setting of unabsorbed appreciation of earlier years against the profit of eligible units amounting to ₹ 4,03,23,795/-.

- (iii) On the facts and the circumstances of the case Id CIT (A) erred in confirming the AO's action of allowable deduction/exemption under section 10 AA and 10 B amounting to ₹ 94,78,27,276/- as against the claim of appellant amounting to ₹ 110,22,64,922/-.

2. Facts in brief as gathered from the orders of lower authorities are that assessee is a company engaged in the business of manufacturing of Copper-T, Oral Contraceptive Pills, Injectables, Tubal Rings, Wind Mills for Power Generation, Textiles, Research & Development in a separate Unit, filed its return of income for assessment year 2011-12 on 30th September 2011 declaring Nil income and loss of Rs. 10.11 crore. The return of income was revised on 30.03.2012 and again on 31.03.2012 declaring loss Rs. 11,42,31,627/-. The case was selected for scrutiny and after serving statutory notices under section 143(2) and 142 (1), the assessing officer completed the assessment under section 143 (3) on 29th March 2015. The assessing officer while making the assessment noted that in the computation of income assessee has claim income from eligible units for deduction under section 10B and 10AA as exempt and has not included the same in the computation of income. The assessee has not set off the loss of ineligible unit of Rs. 11.43 crore with the income of eligible unit of Rs. 110.22 crore. The assessee was asked to justify as to why the profit and gains from eligible unit should not be set off with the loss of ineligible units. The assessee filed its reply vide reply dated 18th December 2014, making detailed submission. In the reply, the assessee stated that the deduction under section 10B and 10AA should be allowed without setting off any

brought forward losses, the assessee also relied upon the decision of the jurisdictional High Court in CIT vs Black & Veatch Consulting Pvt. Limited (348 ITR 72) and submitted that the decision of judicial High Court will prevail upon the CBDT circular dated 28th August 2012. The assessee specifically contended that the loss of ineligible unit should not be set off against the income of eligible unit in view of the decision of Karnataka High Court in case of CIT Vs Yokogawa Ltd (341 ITR 385) and the Hon'ble Delhi High Court in case of CIT vs TEI Technologies (25 Taxmann.com 5).

3. The reply of assessee was not accepted by assessing officer by taking his view that CBDT circular No. 7/DV/2013 dated 16th July 2017 provides for deduction under section 10A/10AA/ 10B and not exemption. The deduction is to be allowed after giving effect to the provision of section 70 and 71 of the Act. Further the assessing officer referred the office memorandum dated 28th August 2012 issued by CBDT stating that the Departmental view therein in circular shall not be operative in the area falling in the jurisdiction of the relevant High Courts. After referring the decision of Mumbai Tribunal in G. Jewels craft Vs ITO in ITA No. 5087/Mumbai/2012, the assessing officer held that unabsorbed depreciation shall form part of current year depreciation and the same is required to be deducted before allowing deduction under section 10 AA and 10B.

4. On appeal before CIT(A), the assessee filed detailed submission and repeated the same submission as submitted before the assessing officer. The learned CIT(A) after considering the submission of assessee affirmed the action of assessing officer. Thus, further aggrieved by the order of Id. CIT(A), the assessee has filed present appeal before us.
5. We have heard the submission of the learned authorised representative (AR) of the assessee and Id. departmental representative (DR) for revenue and perused the material available on record. The Id. AR for the assessee submits that the assessee company has two 100% export oriented units ["EOU-I and EOU-II"] and a Special Economic Zone Unit ("SEZ") located at Vapi and Ahmedabad respectively in the state of Gujarat. In relation to these units the assessee has claimed exemption u/s 10B and 10AA of the Act respectively. The EOU unit I, is in operation from A Y 2004-05 and EOU II, is in operation from AY 2005-06 and profit of both these units which is exempt under section 10B of the Act has been consistently claimed by the assessee. The SEZ unit is in operation from FY 2009-10 (AY 2010-11) and profit of this unit is also exempt under section 10AA of the Act. For the year under consideration, deduction claimed u/s 10B for EOU-I was Rs. 56,70,94,902/- whereas nothing was claimed for EOU-II. Further, deduction u/s 10AA for SEZ unit was claimed at Rs. 53,51,70,020/- and the same were 'not included' in the computation of income. The assessing officer rejected the treatment of 'not including' the income from

eligible units in the computation of income by taking view that the loss from ineligible units has to be set off against the income of eligible units. The assessing officer further concluded that the unabsorbed depreciation shall form part of the current year depreciation and the same is required to be deducted before allowing deduction u/s 10AA and 10B. Thus, the assessing officer set-off the losses and unabsorbed depreciation totalling to Rs. 15,46,76,609/- from the total profits of the units eligible u/s 10AA and 10B of the Act of Rs.110,22,64,922/- thereby resulting in deduction of only of Rs. 94,78,27,276/- under section 10AA and section 10B of the Act. The Id. AR for the assessee submits that this position is now settled by the decision of the Hon'ble Supreme Court in the case of CIT v. Yokogawa India Ltd. (Civil Appeal no. 849812013). To strengthen her submissions the Id AR for the assessee also relied on the following decisions;

- CIT Vs Black & Veatech Consulting Pvt Ltd (348 ITR 72 Bom),
- Changepond Technologies P Ltd Vs ACIT (22SOT 22) Chennai,
- Patspin India Ltd Vs CIT (38 SOT 369) Chennai,
- Scientific Atlanta India Technology P Ltd Vs ACIT (38 SOT 252) Chennai,
- Genstener Duplicators Pvt Ltd Vs CIT (117 ITR 1) SC,
- CIT Vs Himatsinghike Seide Ltd (286 ITR 255 Knt),
- G Jwelecraft Ltd Vs CIT (ITA No. 5087/Mum/2012 and
- CBDT Circular No. 279/Misc/M/-116/2012-ITJ dated 16.07.2013.

6. On the other hand the Id. DR for the revenue supported the order of the lower authorities. The Id. DR for the revenue further submits that as per section 5 of Income Tax Act, all income of the assessee has to be computed from whatever sources derived or accrue by the assessee or deem to be

received during the year. Thus, overall business income of the assessee has to be computed. The assessing officer has computed the income in accordance with the directions of CBDT Circular No. 7/DV/2013 dated 16.07.2013. The ld. DR prayed for dismissal of the appeal.

7. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. The assessing officer while passing the assessment order not included the income of eligible units in the computation of income by taking view that loss from ineligible unit has to be set off against the income of eligible units. Further, the unabsorbed depreciation was also made a part of current year depreciation and was deducted before allowing deduction under section 10AA & 10B of eligible units. The ld. CIT(A) confirmed the action of Assessing Officer by referring the CBDT Circular dated 16.07.2013 by taking view that the CBDT Circular is binding on the officers of the department, being Apex body in Administrative Tax Law and that Assessing Officer has correctly applied the contents of aforesaid Circular.
8. The Hon'ble Supreme Court in CIT vs. Yokogawa India Ltd. (supra) while considering the similar question of law held as under:

"16. From a reading of the relevant provisions of Section 10A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is

also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that, "The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision. "

17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No. 794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 101 the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'

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

9. Further, the Hon'ble jurisdictional High Court in Black & Veatch Consulting Pvt. Ltd. (supra) while confirming the view of Tribunal in the said case, held as under:

"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 VIA. Section 80A(l) 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 VIA 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. "

10. Further, the Co-ordinate Bench of Chennai Tribunal while adjudicating the similar ground of appeal in *Changepond Technologies (P.) Ltd. vs. ACIT* (supra) held as under:

"In our view the Commissioner (Appeals) is not correct in setting off of carried forward losses before giving the deduction under section 10A. As held by the Bangalore Bench of the Tribunal in the case of *Webspectrum Software P. Ltd.* (supra) there is 110 provisions in the Act by which the deduction should be restricted to the total income of the assessee computed under the provisions of the Act before allowing such deduction. Wherever the Legislature intends so to restrict the deduction, the same is provided in the Act itself. Therefore, there is no scope for any interpretation that the profits and gains of the specified undertaking should be computed under the normal course as per the provisions of the Act and not

under the special provisions of section 10A. Accordingly the deduction under section 10A is not to be restricted to the total income of the assessee computed before allowing the deduction under section 10A, since the deduction is given on the profit and gain derived from the export activity and not on the total income as computed under the provisions of the Act. Therefore, the only interpretation which is applicable in respect of section 10A is that the deduction of the unit qualifying for deduction is to be given to the extent of income computed in respect of the said unit. Keeping in view the above discussion we are of the view that the Commissioner (Appeals) was not justified in holding that the total income of the assessee for any relevant assessment year is required to be computed after taking into consideration the carried forward losses incurred after 1-4-2001 and after setting off the loss if there is any positive income is left the same is exempted under section 10A. "

11. The Hon'ble Delhi High Court in a recent decision in Cosmo Films Ltd. vs. Central Board of Direct Taxes [2019] 108 taxmann.com 49 (Del.) while considering the contention of assessee in that case that software of department did not permit the assessee's claim under section 10AA without setting off the loss of ineligible unit and as a result entire loss of ineligible unit get set off against the eligible unit, though the net loss of ineligible unit were to be carried forward was thus brought to down 'Nil'. The Hon'ble High Court by following the decision of Hon'ble Supreme Court in CIT vs. Yokogawa India Ltd. (supra) directed that computation of profit and gain of eligible unit for grant of deduction under section 10AA would be independent of computation of profit & gain of ineligible unit and the assessee was permitted to carry forward the losses of its ineligible unit.

12. Considering the aforesaid legal position, the grounds of appeal raised by assessee are allowed and the Assessing Officer is directed to allow the carry forward losses and unabsorbed depreciation of ineligible units without setting off against the income of eligible units. The submissions of the Id. DR for the revenue that as per section 5 of Income Tax Act that all income of the assessee has to be computed from whatever sources derived or accrue by the assessee or deem to be received during the year. Section 5 of the income tax provides the scope of total income of a person, which is subject to the provisions of the Act, obviously subject to the various chapter of the Act. Thus, the contention of the Id DR that that all income of the assessee has to be computed from whatever sources derived or accrue by the assessee or deem to be received during the year, in our view, has no force, unless the exemption or deductions as provided under the Act is not granted to a person.

13. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 11/12/2019.

Sd/-

S. RIFAUR RAHMAN
ACCOUNTANT MEMBER

Mumbai, Date: 11.12.2019

SK

Copy of the Order forwarded to :

1. Assessee
3. The concerned CIT(A)

Sd/-

PAWAN SINGH
JUDICIAL MEMBER

2. Respondent
4. The concerned CIT

5. DR “F” Bench, ITAT, Mumbai

6. Guard File

**BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai**