

IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH 'E' BENCH

**BEFORE SHRI B.R.MITTAL(JUDICIAL MEMBER) AND  
SHRI RAJENDRA (ACCOUNTANT MEMBER)**

ITA No.6903/Mum/2011: Assessment Year: 2008-09  
ITA No.609/Mum/2012: Assessment Year: 2009-2010

Genesys International Corpn. Ltd., 73-A, SF-III, SEEPZ, Andheri(E),Mumbai-400 096 PA No.AAACA 4528 L	Vs.	ACIT, Circle 8(1), Aayakar Bhavan, M.K. Road, Mumbai.
(Appellant)		(Respondent)

Appellant by : Shri J.D.Mistry/Shri Satish Mody  
Respondent by: Shri Girija Dayal

Date of hearing: 17.10.2012  
Date of pronouncement: 31.10.2012

**ORDER**

**Per B.R.Mittal, JM:**

The assessee has filed these two appeals against orders of Id CIT(A) dated 1.8.2011 for assessment year 2008-09 and dated 23.1.2012 for assessment year 2009-2010 on following grounds:

*"1. The Commissioner of Income tax (Appeal) erred in upholding the Assessing Officer's order for making addition of Rs.2936/-u/s 14A of the IT Act on the ground or grounds as alleged in the assessment order.*

*2. The Commissioner of Income tax (Appeal) erred in upholding the Assessing Officer's order of not allowing to set off the brought forward assessed business loss and unabsorbed depreciation of the previous assessment year 2004-05 against the current year's Business Income on the ground or grounds and in the circumstances of the case and law.*

*3. The Commissioner of Income tax (Appeal) erred in upholding the Assessing Officer's order of not allowing to set off the brought forward assessed unabsorbed depreciation of the previous assessment year 2004-*

*05 against the current year's Income from Other Sources on the ground or grounds and in the circumstances of the case and law.*

*4. The Commissioner of Income tax (Appeal) erred in upholding the Assessing Officer's order for making addition of Profit of IOA Unit located in SEZ Mumbai, to arrive at the Book Profit u/s 115JB of the c, in respect of on the ground or grounds as alleged in the assessment order."*

2. Both the representatives of parties submitted that facts and grounds of appeal for assessment year 2009-2010 are similar to assessment year 2008-09 and Id CIT(A) has also followed his own order for assessment year 2008-09 while deciding the grounds of appeal for assessment year 2009-2010. Therefore, we have heard these appeals together and dispose off the same by a common order for the sake of convenience.

3. During the course of hearing, it was submitted that Id CIT(A) has wrongly mentioned assessment year 2006-07 in para 2.3.1 due to typographical mistake in his order for assessment year 2009-10 and same be read as Assessment Year 2008-09, the assessment year followed by Id CIT(A) to decide the grounds of appeal for assessment year 2009-2010. Id A.R. also submitted that to rectify the said mistake, assessee has filed an application dated 9.2.2012 and same is pending.

4. Firstly, we take up appeal for assessment year 2008-09 being I.T.A. **No.6903/M/2011.**

5. The assessee is a public limited company registered under the Companies Act, 1956 and is engaged in the business of Information Technology Solution, providing geographical information services.

6. In ground No.1 of appeal, assessee has disputed confirmation of addition of Rs.2936/- u/s.14A of the Act made by the AO, Id A.R. submitted that said ground is not pressed for. In view of above, Ground No.1 for assessment year 2008-09 is rejected.

7. In respect of Ground Nos.2 & 3 of appeal, Id A.R. submitted that similar issue has been considered by the Tribunal in assessee's own case for assessment years 2004-05 and 2005-06 in I.T.A. No.3333 & 3334/M/2010 by its order dated 31.8.2012 and the

Tribunal has decided the issue in favour of assessee by following the decision of Hon'ble Jurisdictional High court in the case of Hindustan Uniliver Ltd vs. DCIT, 325 ITR 102(Bom) and ITAT Pune Bench in the case of Patni Computer Systems Ltd vs.DCIT,60 DTR 113 (Pune). To substantiate his submission, Id A.R. referred paras 28 to 34 of the said order of the Tribunal dated 31.8.2012 (supra). Ld A.R. submitted that said brought forward losses pertain to assessment year 2004-05 and whatever final figures comes after giving effect to earlier years orders of the Tribunal, set off may be restricted to that extent. Ld D.R. did not dispute above contention of Id A.R.

8. We have considered the submissions of Id representatives of parties and orders of authorities below as also the order of the Tribunal dated 31.8.2012 (supra).

9. We observe that assessee claimed set off of Rs.37,10,326/- being unabsorbed depreciation pertaining to assessment year 2004-05 against returned income at the time of filing the return. AO stated that above losses were denied in earlier years and the matter is under appeal with the higher authorities. Therefore, AO rejected the claim of set off of unabsorbed depreciation for assessment year 2004-05. Ld CIT(A) also confirmed the action of AO. Since the Tribunal by its order dated 31.8.2012 after considering the decision of Hon'ble Jurisdictional High Court in the case of Hindustan Uniliver Ltd (supra) has held that while computing the income, assessee was entitled to set off the losses sustained by section 10A eligible unit against normal business income and the income from other sources. In view of above and following earlier order of Tribunal in assessee's own case (supra), we allow Ground Nos.2 & 3 of appeal taken by assessee for assessment year 2008-09 subject to the direction that whatever is final figures of loss after giving effect to order of earlier years, set off if any, to that extent, will be allowed as per provisions of law. Hence, Ground Nos.2 & 3 of appeal taken by the assessee is allowed for assessment year 2008-09.

10. In Ground No.4, the issued involved as to whether Id CIT(A) is justified to confirm the action of AO to make the addition of profit u/s.10A unit located in SEEPZ Mumbai to arrive at book profit u/s.115JB of the Act.

11. The relevant facts giving rise to this ground of appeal are that assessee, while computing tax liability u/s.115JB of the Act, deducted the income of Rs.10,86,10,248 in



Finance Act, 2007, the scope of Minimum Alternate Tax (MAT) was widened by including the income exempt u/s.10A/10B of the Income tax Act in the book profit. AO after considering explanatory notes i.e. Circular No.3/2008 dated 12.3.2008 held that MAT provisions are applicable to a company on the income which is from any business or services derived from unit or Special Economic Zone. He further stated that section 115JB(6) was inserted by Special Economic Zones Act, 2005, when section 10AA was also inserted by the same Act. Section 10AA provides a deduction of such profits and gain derived by an assessee being entrepreneur referred to in clause (f) of Section 2 of Special Economic Zone Act, 2005 from its unit. AO stated that by inserting sub-section(6) in Section 115JB, the legislature has provided an exemption under MAT also to such units. Therefore, section 115JB(6) is applicable to an assessee claiming deduction under section 10AA of the Act and not an assessee claiming deduction under 10A of the Act. AO stated that assessee has claimed deduction of 10A of the Act under normal provisions of the Act. Therefore, for computing book profit u/s.115JB of the Act, income relates to sec. 10A unit is to be included in the book profit. Being aggrieved, assessee filed appeal before Id CIT(A).

15. Ld CIT (A) after considering the submissions of assessee has confirmed the action of AO. Hence, assessee is in further appeal before the Tribunal.

17. On behalf of assessee, Id A.R. submitted that assessee has two undertakings, one located at SEEPZ, Mumbai which is SEZ unit and other unit is located at Bangalore, which is STPI unit. He submitted that both units of assessee are eligible for tax benefit u/s.10A of the Act. He submitted that by Special Economic Zone Act, 2005, Section 10AA was inserted w.e.f. 10.2.2006 to provide deduction/benefit in respect of units established in SEZ i.e. SEZ units and correspondingly, amendment was also made by inserting sub-section (6) to section 115JB of the Act to exclude profits in respect of SEZ unit from book profits for MAT. He further submitted that by the Finance Act, 2007, the amendment in clause (f) to explanation (1) to Section 115JB (2) was made w.e.f. 1.4.2008 i.e. from A.Y. 2008-09 by deleting words "section 10 or 10B" and retained sub-section (6) of Section 115JB which provides exclusion of income of units located in SEZ while computing book profit u/s.115JB of the Act. Ld A.R. submitted that AO as well as Id CIT(A) has rejected the claim of assessee for excluding profit of SEZ units from its book profit by stating that section 115JB(6) applies only to units which are covered by

section 10AA and not the units to which section 10A applies. He submitted that AO by placing reliance on the para 44 of CBDT Circular 3 dated 12.3.2008, which explains the amendment made by Finance Act, 2007, without appreciating that sub-section (6) of Section 115JB does not refer any section, either sec. 10A or 10AA and it refers only to SEZ units. He submitted that section 10A/10B of the Act provides tax incentive to a unit located in certain specified zone/park or to units which are export oriented, subject to the prescribed conditions and not only the unit located in SEZ. He submitted that benefits u/s.10A is available to unit located in following areas:

“\*Free Trade Zone (FTZ)

- Electronic Hardware Technology Park (EHTP)
- Software Technology Par (STP)
- Export Oriented Units (EOUs)
- SEZ

17. Ld A.R. further submitted that in view of amendment made by the Finance Act, 2007 in clause (f) of Explanation (1) to section 115JB(2) i.e. from A.Y. 2008-09, the units set up in STP, EHTP, SEZ, FTZ and EOU units are eligible for tax benefit under normal provisions of the Act but will be subject to levy of MAT. However, units in SEZ will continue to get the benefit of provisions of section 115JB of the Act in view of sub-section (6) of section 115JB of the Act, which was inserted w.e.f. 10.2.2006 by the Special Economic Zones Act, 2005. He submitted that the term ‘unit’ and ‘SEZ’ are not defined under section 115JB or under section 2 of the Income tax Act. The definition of these terms is provided under section 2 of Special Economic Zones Act, 2005 (hereinafter to be referred as SEZ Act). It is relevant to state that section 2 of SEZ Act, define the term ‘Special Economic Zone’ and ‘unit’ as under:

**“(za)Special Economic Zone – means each Special Economic Zone notified under the proviso to sub-section (4) of section 3 and sub-section(1) of section 4(including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone”**

**“(zc)Unit- means a unit set up by an entrepreneur in a Special Economic Zone and includes an existing unit, an Offshore Banking Unit and a unit in an International Finance Services**

**Centre whether established before or established after the commencement of this Act.”**

18. Ld A.R. further submitted that section 4(1) of SEZ Act provides that an existing SEZ shall be deemed to have been notified and established in accordance with the provisions of the SEZ Act and the provisions of Special Economic Zones Act shall apply to such existing SEZ units. Ld A.R. further submitted that in view of provisions of section 115JB(6), the exemption on MAT will be available to units located in SEZ and, accordingly, income in respect of SEZ unit is not to be included while computing book profit u/s.115JB of the Act. Ld A.R. also referred to para 143 of the speech of Hon'ble Finance Minister for financial year 2011-12 at page 63 of PB and submitted that exemption from MAT granted to units operating in SEZ has been deleted from A.Y. 2012-13 and correspondingly amendment has been made by inserting a proviso to sub-section(6) of Section 115JB to provide that provisions of sub-section(6) are ceased to have effect in respect of any previous year relevant to assessment year commencing on or after 1.4.2012. He submitted that from the assessment year 2012-13, the benefit of exemption of MAT while computing book profit will not be applicable to units located in SEZ but the assessee is entitled to get the benefit of MAT in assessment year 2008-09.

19. On the other hand, Id D.R. supported the orders of authorities below. He submitted that there should be harmonious interpretation of provisions of the Act. He submitted that assessee has claimed deduction u/s.10A of the Act and in view of amendment made in clause (f) of Explanation (1) to Section 115JB(2) by the Finance Act, 2007 w.e.f. 1.4.2008 i.e. FROM Assessment year 2008-09, the benefit is not available to the assessee. He submitted that provisions of section 115JB(6) was inserted w.e.f 10.2.2006 i.e. assessment year 2006-07 and assessee cannot get benefit under two provisions of the Act. Since the assessee is getting exemption u/s.10A and if the assessee's claim is accepted that assessee is also entitled for benefit of provisions of section 115JB(6), i.e. exemption from MAT in that case, assessee could claim exemption in the main provisions as well as u/s.115JB(6) of the Act prior to assessment year 2008-09, which could not be the intention of the legislature. He submitted that Id CIT(A) has rightly confirmed the action of AO that while computing book profit u/s.115JB of the Act, that income relating to assessee's unit located in SEZ, Mumbai is to be included in the book profit.

20. We have considered submissions of Id representatives of parties and orders of authorities below. We have also carefully considered the relevant provisions of the Act. There is no dispute to the fact that assessee's unit in Mumbai is located in SEZ. Section 10A provides deduction of profits derived by the undertaking in respect of units which are located not only in SEZ but also in the following areas:

“\*Free Trade Zone (FTZ)

- Electronic Hardware Technology Park (EHTP)
- Software Technology Par (STP)
- Export Oriented Units (EOUs)

By Special Economic Zone Act, 2005 w.e.f 10.2.2006, a new section 10AA has been inserted which provide exemption to the units located in SEZ. Section 2 of SEZ Act, defines SEZ as under:

**“(za)Special Economic Zone – means each Special Economic Zone notified under the proviso to sub-section (4) of section 3 and sub-section(1) of section 4(including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone”**

21. It is evident from above that an existing SEZ unit will also be governed by Special Economic Zones Act, 2005. Therefore, we are of the considered view that the benefits which are to be provided to the newly established unit in SEZ as per section 10AA of the Act will also be available to the existing units in SEZ. Moreover, section 4(1) of SEZ Act provides that an existing SEZ unit shall be deemed to have been notified and established in accordance with provisions of SEZ Act and the provisions of Special Economic Zones Act shall apply to such existing SEZ units. It is also observed that by the SEZ Act, sub-section (6) to section 115JB was also inserted providing that provisions of section 115JB shall not apply to the income accrued or arisen on or after 1.4.2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or Special Economic Zone, as the case may be. Hence, income of units located SEZ will not be included while computing book profit for the purpose of MAT as per section 115JB(6) of the Act. In view of above, we are of the considered view that there is merit in the contention of Id A.R. that irrespective of the fact that amendment has been made in clause (f) of Explanation (1) to section 115JB(2) of the Act to apply the provisions of MAT in respect of units which are entitled to deduction u/s.10A or 10B but the units which are in SEZ will continue to get benefits from the

applicability of provisions of MAT in view of sub-section(6) of the Act. The contention of ld D.R. that assessee will not be entitled to get the benefit u/s.115JB(6) of the Act as assessee has claimed deduction u/s.10A of the Act is to be rejected for the reason that section 115JB (6) does not refer section 10A or section 10AA but it only refer that provisions of section 115JB will not apply to the income accrued or arisen on or after 1.4.2005 from any business carried on in an unit located in SEZ. Hence, we are of the considered view that the unit in SEZ will be covered by sub-section(6) to section 115JB of the Act irrespective of the fact that those units were claiming deduction u/s.10A of the Act. We also observe that benefit given to SEZ unit from the applicability of provisions of section 115JB has been withdrawn by the Finance Act, 2011 by inserting a proviso to section 115JB(6) of the Act, which reads as under:

"Section 15JB(6).....

**Provided** that the provisions of this sub-section shall cease to have effect in respect of an previous year relevant to the assessment year commencing on or after the 1<sup>st</sup> day of April, 2012."

....

.....

22. Hence, we hold that authorities below were not justified to include the book profit in respect of SEZ unit at Mumbai of the assessee while computing book profit u/s.115JB of the Act for assessment year 2008-09. Therefore, we reverse the orders of authorities below by holding that income relating to SEZ unit at Mumbai is to be excluded while computing book profit u/s.115JB of the Act for assessment year 2008-09. Hence, Ground No.4 of appeal taken by the assessee for assessment year 2008-09 is allowed.

23. Now we take up appeal for assessment year 2009-2010 being **I.T.A. No.609/M/2012.**

24. Grounds raised by assessee read as under:

*"1. The Commissioner of Income tax (Appeal) erred in upholding the Assessing Officer's order for making addition of Profit of 10A Unit located in SEZ Mumbai, to arrive at the Book Profit u/s 115JB of the Act, in respect of on the ground or grounds as alleged in the assessment order."*

*2. The Commissioner of Income tax (Appeal) erred in upholding the Assessing Officer's order of not allowing to set off the brought forward assessed business loss and unabsorbed depreciation against the current*

*year's income on the ground or grounds and in the circumstances of the case and law."*

25. In respect of Ground No.1 of appeal, Id representatives of both the parties submitted that facts and issue involved is identical to Ground No.4 of appeal for assessment year 2008-09 and whatever decision is taken in regard thereto, same will apply mutatis mutandis to decide Ground No.1 of appeal for assessment year 2009-2010.

26. On perusal of orders of authorities below, we agree that facts and issue involved in Ground No.1 of appeal for assessment year 2009-10 are identical to ground No.4 of appeal for assessment year 2008-09, which we have discussed in paras 11 to 22 hereinabove. For the reasons mentioned in paras 20-22 hereinabove, we allow Ground No.1 of appeal taken by the assessee for assessment year 2009-10.

27. In respect of Ground No.2 of appeal, Id representatives of both the parties submitted that facts and issue involved is identical to Ground No.2 of appeal for assessment year 2008-09 and whatever decision is taken in regard thereto, same will apply mutatis mutandis to decide Ground No.2 of appeal for assessment year 2009-2010.

26. On perusal of orders of authorities below, we agree that facts and issue involved in Ground No.2 of appeal for assessment year 2009-10 are identical to ground No.2 & 3 of appeal for assessment year 2008-09, which we have discussed in paras 7 to 9 hereinabove. For the reasons mentioned in para 9 hereinabove, we allow Ground No.2 of appeal taken by the assessee for assessment year 2009-10.

27. In the result, appeal for assessment year 2008-09 is allowed in part and whereas appeal for assessment year 2009-2010 is allowed.

Pronounced on 31<sup>st</sup> October, 2012.

Sd/- (RAJENDRA) Accountant Member	Sd/- (B.R. MITTAL) Judicial Member
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Mumbai, Dated 31<sup>st</sup> October, 2012

Parida

Copy to:

1. The appellant
2. The respondent
3. Commissioner of Income Tax (Appeals),16, Mumbai
4. Commissioner of Income Tax, 8 , Mumbai
5. Departmental Representative, Bench 'E' Mumbai

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BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI