

IN THE INCOME TAX APPELLATE TRIBUNAL  
BENCH "C" CHENNAI

(Before Shri Pradeep Parikh, Vice President  
Shri N. Barathvaja Sankar, Vice President  
and Shri Hari Om Maratha, Judicial Member)

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I.T.A. No. 229/Mds/2007

I.T.A. No. 352/Mds/2008

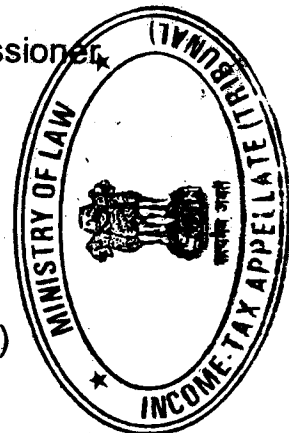
Assessment Years : 2003-04 & 2004-05

M/s Scientific Atlanta India  
Technology Pvt. Ltd.,  
ASV Suntech Park,  
230A, Old Mahabalipuram Road,  
148, Oggiam Thoraipakkam,  
Chennai – 600 096.

PAN : AABCB4448F  
(Appellant)

v. The Assistant Commissioner  
of Income Tax,  
Company Circle VI(1),  
Chennai – 600 034.

(Respondent)



I.T.A. No. 536/Mds/2007

Assessment Year : 2003-04

The Income Tax Officer (OSD),  
Company Circle VI(1),  
Chennai – 600 034.

(Appellant)

v. M/s Scientific Atlanta India  
Technology Pvt. Ltd.,  
Tidel Park Module – 0104,  
No.4, Canal Bank, Taramani,  
Chennai – 600 113.

(Respondent)

Assessee by : Dr. Anita Sumanth  
Shri Rajan Vora  
Revenue by : Smt. Pushya Sitaraman,  
Standing Counsel.

Intervener : Shri H. Padmachand Khincha  
for M/s Changepond Technologies  
Pvt. Ltd.

## O R D E R

PER N. BARATHVAJA SANKAR, VICE PRESIDENT :

The Hon'ble President, Income Tax Appellate Tribunal, vide orders dated 24.04.2009 and 08.05.2009 constituted the present Special Bench to dispose of the captioned appeals as well as to adjudicate the following question of law:-



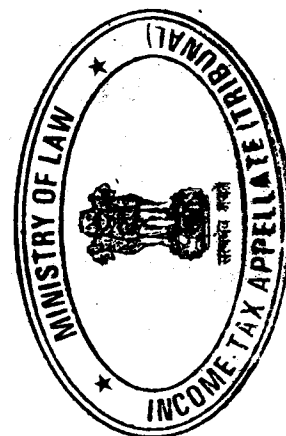
“Whether the business losses of a non eligible unit, whose income is not eligible for deduction under section 10A of the Act, have to be set off against the profits of the undertaking eligible for deduction under section 10A for the purposes of determining the allowable deduction under section 10A of the Act?”

2. The brief facts are that the assessee is a private limited company incorporated on July 17, 2000. In respect of assessment year 2003-04, the assessee filed a return claiming relief under section 10A of the Income-tax Act. During the years under appeal, the assessee had carried out business from two locations, viz. Chennai and Delhi. The Chennai Unit is eligible unit which was situated at Tidel Park, Taramani and registered with Software Technology Parks of India, was engaged in the business of software development. The Delhi Unit of the assessee carried out trading activities of various

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products in the field of video communication. For the assessment year 2003-04, the profit as per the memo of total income of the eligible unit (Chennai Unit) amounts to Rs.3,23,43,230/-. The trading Unit (Delhi Unit) reported a loss of Rs.61,25,224/-. The assessee's computation of deduction under section 10A was as under:-

I	Net profit of the eligible unit	Rs.3,23,43,230
	Less 90% of the above amount claimed as exempt (Statutory eligibility for this AY)	Rs. (2,91,08,907)
	Taxable profits of the eligible unit	<u>Rs. 32,34,323</u>
II	Loss incurred by the Trading unit at New Delhi	Rs. (61,25,224)
	Less Taxable profits of the eligible unit	Rs. 32,34,323
		<u>Rs. (28,90,901)</u>
III	Income from other sources	Rs. 22,01,134
	Business loss (II - III) to be carried forward	Rs. (6,89,768)



The Assessing Officer recomputed the benefit under section 10A as follows:-

I	Net business profit (profits of the eligible unit reduced by the loss of the Trading unit)	Rs.2,62,18,006
	Less: Deduction under section 10A Restricted to the net business profit	Rs. (2,62,18,006)
	Income from Business	<u>NIL</u>
II	Income from other sources	Rs. 22,01,134
	Tax on the above	Rs. 4,80,212

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For the assessment year 2004-05, the assessee's computation of deduction under section 10A is as follows:-

I	Net profit of the eligible unit	Rs. 88,28,657
	Less 10A deduction	<u>Rs. (88,28,657)</u>
	Taxable profits of the eligible unit	<u>Rs. NIL</u>
II	Loss incurred by the Trading unit at New Delhi	Rs. (77,23,636)
III	Income from other sources	Rs. 27,05,303
	Business loss (II - III) to be carried forward	<u>Rs. (50,18,333)</u>

The Assessing Officer recomputed the benefit under section 10A as follows:-

I	Net business profit (profits of the eligible unit reduced by the loss of the Trading unit)	Rs. 11,05,021
	Less: Deduction under section 10A Restricted to the net business profit	<u>Rs. (11,05,021)</u>
	Income from Business	<u>NIL</u>
II	Income from other sources	Rs. 27,36,980
	Tax on the above	<u>Rs. 9,81,891</u>

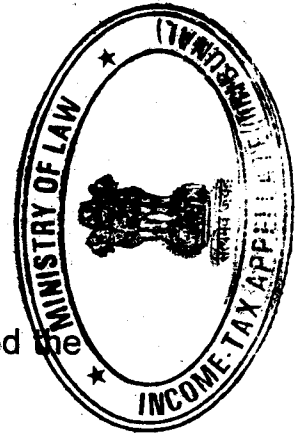
For both the assessment years, the assessee went in appeal before the CIT(Appeals). Vide order dated 11<sup>th</sup> October, 2006, the CIT(Appeals) accepted the plea of the assessee that the unit in Delhi was not an eligible unit and was engaged only in trading activity.

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However, the CIT(Appeals) recomputed the benefit under section 10A as follows:-

I	Eligible Profits	Rs.3,23,43,230
	Less Trading loss	<u>Rs. (61,25,224)</u>
	Net business income	Rs.2,62,18,006
	Add Income from other sources	<u>Rs. 22,01,134</u>
	Total income	<u>Rs.2,84,19,140</u>

- Eligible deduction under section 10A restricted to total income of Rs.2,84,19,140.
- The assessee has been permitted to carry forward the unabsorbed eligible deduction under section 10A amounting to Rs.6,89,767/- for assessment year 2003-04.



For the assessment year 2004-05, the CIT(Appeals) recomputed the benefit under section 10A as under:-

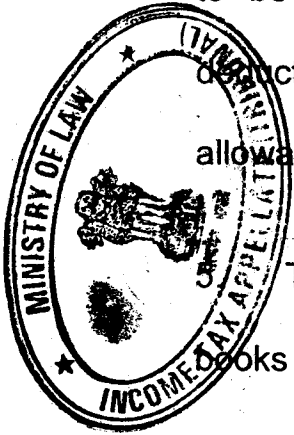
I	Eligible Profits	Rs. 88,28,657
	Less Trading loss	<u>Rs. (77,23,636)</u>
	Net business income	Rs. 11,05,021
	Add Income from other sources	<u>Rs. 27,05,303</u>
	Total income	<u>Rs. 38,10,324</u>

- Eligible deduction under section 10A restricted to total income of Rs.38,10,324. Further, the CIT(A) has not specifically made any observation with respect to the carry forward of the remaining losses.

3. For the assessment year 2003-04, appeals by both - the assessee and Revenue and for the assessment year 2004-05 the assessee's appeal are before us.

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4. In the above facts and circumstances, let us first decide the question referred by the Hon'ble President to the Special Bench, namely, "Whether the business losses of a non eligible unit, whose income is not eligible for deduction under section 10A of the Act, have to be set off against the profits of the undertaking eligible for deduction under section 10A for the purposes of determining the allowable deduction under section 10A of the Act?"



The learned counsel for the assessee placed on record paper-books I, II and III. Paper-book I contains the following:

1. 11.09.00 Approval issued by the Software Technology Parks of India
2. 13.08.01 Approval of Department of Industrial Policy and Promotion, Ministry of Commerce and Industry.
3. 21.08.02 Fresh Certificate of incorporation consequent of change of name issued by the Registrar of Companies, Tamil Nadu
4. 07.09.00 Application submitted by the Appellant for approval of unit under the Software Technology Park Scheme.
5. Various Sample Invoices  
Dates
6. 31.05.00 Orders passed by the Commercial Taxes Department

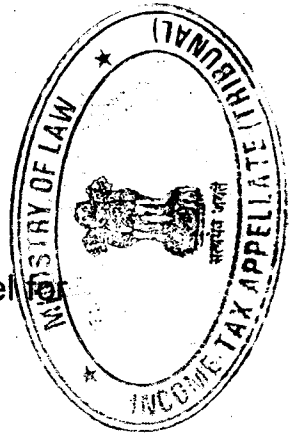
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Paper-book II contains the following:-

1. Computation of relief u/s 10A (A.Y. 2003-04) along with Form 56F
2. Computation of relief u/s 10A (A.Y. 2004-05) along with Form 56F
3. Written submissions filed before the Commissioner of Income Tax (Appeals) in respect of A.Y. 2003-04
4. Written submissions filed before the Commissioner of Income Tax (Appeals) in respect of A.Y. 2004-05

And Paper-book III consists of the case laws as indexed therein.

By placing the above paper-books on record, the learned counsel for the assessee submitted as under:-



6. Section 10A(1) provides that a deduction of such profits and gains derived by an undertaking from the business of export of computer software shall be allowed from the total income of the assessee. The total income of the assessee would comprise of various items, viz.

- (a) Trading income/loss
- (b) Income/loss from house property
- (c) Income from the eligible unit
- (d) Interest income
- (e) Income from other sources

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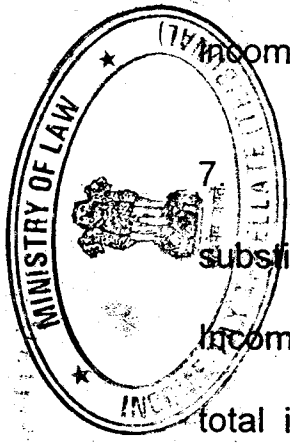
Total income

The sum total of the above (below the line) will be the total income of the assessee. Under section 10A, the income computed as per the

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formula in section 10A being the income from the eligible undertaking (item (c) above) will be allowed as deduction "from the total income".

This means in the above example, the income from the eligible unit would have to be removed as being the eligible deduction and total income computed excluding the same.

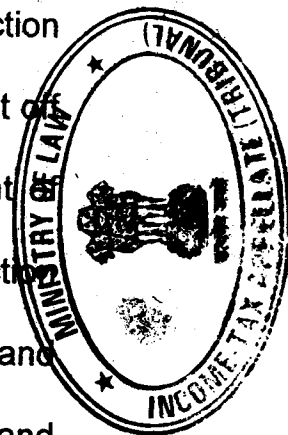


7. Section 10A was introduced in the year 1981. The section was substituted in the year 2001. It forms part of Chapter III of the Income-tax Act, which deals with "Incomes that do not form part of total income". Sub-section (1) of section 10 commences with "in computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included". The placement of section 10A in Chapter III leads to an inescapable conclusion that the income from the enumerated sources should not be subject to income-tax and is to be excluded from the total income, without any restriction whatsoever. Had the intention of legislature been that the profits derived from the eligible unit be subject to a restriction or a reduction in the manner provided under Chapter VIA, section 10A would have been part of Chapter VIA of the Income-tax Act, thus making it subject to the provisions of section 80AB and section 80B of the I.T. Act. In this connection, the

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judgement of the Hon'ble Supreme Court in the case of CIT v. V. Venkatachalam reported in 201 ITR 737 (SC) may be referred. This decision is in the context of section 80T of the Income-tax Act. Section 80T, which until 1<sup>st</sup> of April, 1993 was a part of Chapter VIA of the Income-tax Act provided for deductions to be made from capital gains. The assessee, in this case had derived capital gains during the relevant previous year. A deduction was claimed under section 80T of the Income-tax Act. The assessing authority, however, set off the business loss incurred by the assessee against the amount of capital gains, and accordingly conferred a deduction under section 80T to the balance gains alone. This was challenged in appeal and the assessee succeeded before both the first appellate authority and the Income Tax Appellate Tribunal which held that deduction under section 80T should be applied in respect of the entire sum of capital gains and the same should not be restricted. The issue as to whether deduction under section 80T should be applied in respect of the entire sum of capital gains or the amount of capital gains as restricted after reduction of the loss was carried at the instance of the Revenue to the Hon'ble Supreme Court. The Hon'ble Supreme Court considered the provisions of section 80T which reads as follows:



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"Where the gross total income of an assessee not being a company includes any income chargeable under the head "capital gains" relating to capital assets other than short term capital assets (.....) there shall be allowed in computing the total income of the assessee a deduction from such income of an amount equal to....."

The Hon'ble Supreme Court noted that the words used in the section stipulated that the deduction has to be granted from "such income"

being the "total income" computed by the Assessing Officer in accordance with the Act. Even so, the Hon'ble Supreme Court

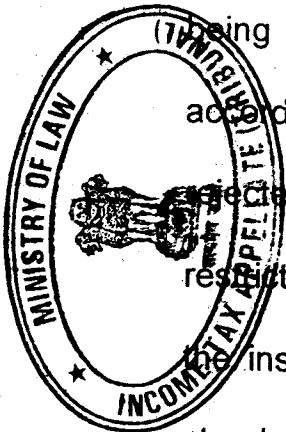
rejected the argument of the Revenue that the deduction would be restricted to the "total income", after reduction of the loss incurred. In

the instant case, section 10A is not even part of Chapter VIA, but stands as part of Chapter III of the Income-tax Act. Applying the

above ruling of the Hon'ble Apex Court, the words "total income" contained in sub-section (1) would not amount to placing any fetters on the allowability of the entire profit of the eligible unit without restriction to the available total income.

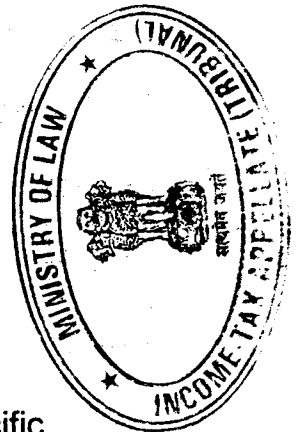
8. Deduction under section 10A is available in respect of each undertaking. The provisions of sections 28 to 44D are to be applied to each undertaking and not each business. This is because, section

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10A is undertaking specific. That, the section is undertaking specific is discernible from the following:

- (i) Under sub-section (1) profits derived by the undertaking from the export of articles and things qualify for deduction;
- (ii) Sub-section (2) prescribes certain conditions to be fulfilled by the undertaking for being eligible to the benefits of section 10A;
- (iii) Under sub-section (4), it is profits of the business of the undertaking that qualify for deduction. Similarly, the definition of export turnover refers to the sale proceeds to the exports made by the undertaking;
- (iv) Under sub-section (5), an audit report is to be furnished in support of claim of deduction. Such an audit report is to be submitted for each eligible undertaking.



In its structure and application, section 10A is undertaking specific.

Circular No.528 dated 16.12.1998 (1989) 176 ITR (St.) 154 also mentions about the profit of the undertaking being exempt. In Circular No.1 of 2005 (2005) 272 ITR (St.) 6, the CBDT has considered various situations and given a clarification on the applicability or otherwise of section 10B in those situations. The examples considered by the CBDT are undertaking specific. The ratio of Circular No.1 and the answers to the examples thereunder would be equally applicable to section 10A.

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The assessee may have many undertakings. An undertaking cannot be equated with an assessee. The distinction between an assessee and an undertaking was explained among others by the Madras High Court in Madras Machine Tools Manufacturers Ltd. v. CIT (1975) 98

ITR 119 (Mad). The observations of the Court were as under:-



"A company may own or run many undertakings some of which may be entitled to the benefit of section 84 and others may not be so entitled. It is not, therefore, possible to equate the undertaking with the company. When a company owns more than one undertaking the application of section 84 has to be with respect to the particular undertaking and not to the company in general. When we apply section 84 to a particular undertaking it has to be seen when that undertaking commenced the manufacture or production of articles. It is true that the word "undertaking" has not been defined under the Income-tax Act. But in common parlance it is taken as a concern started or formed for a specific purpose or a project engaged in."

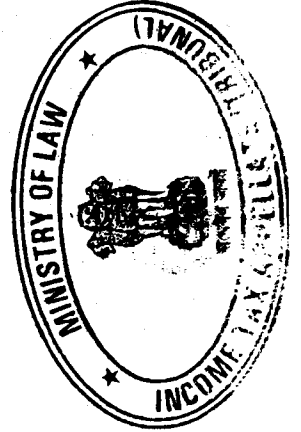
In the context of section 84(80J), a predecessor to sections 80-I, 80-IA etc. it had been clarified that the tax holiday benefit attaches to an undertaking and not to the assessee. The circular states that "The Board agrees that the benefit of section 84(80J) of the Income-tax Act 1961, attaches to the undertaking and not the owner thereof. The successor will be entitled to the benefit for the unexpired period of five years provided the undertaking is taken over as a "running concern" – [F.No.15/563-IT(AT) dated 13.12.1963 issued by CBR]."

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Though issued in the context of section 80J, the ratio would apply with equal force to section 10A as well.

Considering the above circular, in the following cases it has been held that deduction under section 80J/80-I/80-IA of the Act is attached to an undertaking and not to the owner thereof:

- (a) Kerala State Cashew Dev Corp v. CIT 205 ITR 19 (Ker);
- (b) CIT v. Tyresoles Concessionaries Pvt. Ltd. 213 ITR 660 (Bom);
- (c) CIT v. Dandeli Ferro Alloy (P) Ltd. 212 ITR 1 (Bom);
- (d) P.K. Engineering & Forging Pvt. Ltd. 87 Taxman 101 (Board's Circular for 84/80J is applicable to 80-I/80-IA also)
- (e) A.G.S. Tiber and Chemical Industries (P) Ltd. v. CIT (1998) 233 ITR 207 (Mad)
- (f) ITO v. Hindustan Petroleum Corpn. Ltd. (1986) 16 ITD 574 (Bom);
- (g) ITO v. SLM Maneklal Industries Ltd. (1986) 17 ITD 515 (Ahd);
- (h) Shah Granites (P) Ltd. v. ITO (1987) 21 ITD 282 (Bom)

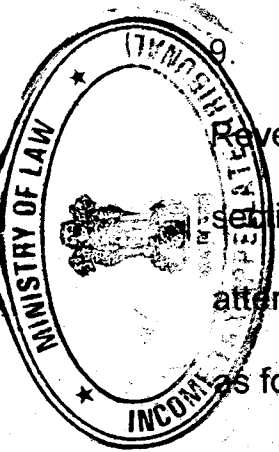


Considering the above circular/decisions, the Chennai ITAT in the following cases has held that deduction under section 10A would be available to the transferee of the eligible undertaking for the unexpired period of tax holiday:-

- (1) Premier Mills Pvt. Ltd. v. ACIT I.T.A. No. 2551/Mds/2005 AY 1999-2000 & Premier Fine Yarns Pvt. Ltd. v. ACIT I.T.A. No. 2552,

2553, 2554, 2555 & 2556/Mds/2005 AY's  
2000-01 to 2004-05 decision dated  
26.09.2008.

- (2) ITO v. Heartland KG Information Ltd. I.T.A.  
No. 1884/Mds/2006 AY 04-05 decision dated  
21.11.2008.



The learned counsel for the assessee submitted that the Revenue has attempted to restrict the deduction available under section 10A to the total income of the assessee and brought to our attention the provisions of sub-section (1) of section 10A which reads as follows:-

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

The learned counsel further submitted that the section specifically allows a deduction of such profits of an undertaking and the intention of the legislature, thus clearly indicates that all the profits and gains that are derived by an eligible unit from the eligible activity would be entitled to the benefit of section 10A. It is, thus apparent that the

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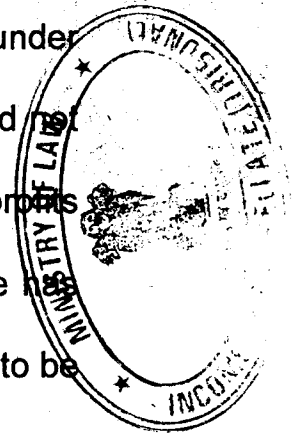
benefit would cover only the profits that are derived by the eligible unit. The Id. counsel placed reliance on the following decisions:-

1. Tata Consultancy Services Ltd. (2009-TIOL-41-ITAT-Bang)
2. Subex Limited (2008-TIOL-633-ITAT-Bang)
3. Yokogawa India Ltd. 111 TTJ (Bang) 548

The Id. counsel contended that looking at the language of section 10A(1) and section 10A(4) of the Act (both prior and subsequent to amendment to Finance Act, 2001), it can be inferred deduction under section 10A has to be claimed undertaking-wise or unit-wise and not to be computed business wise and is available to the extent of profits derived from export of computer software. Even if an assessee has more than one undertaking, then deduction under section 10A is to be computed for different undertakings. In support of this argument, the Id. counsel placed reliance on the following:-

1. Circular Explaining amendments made by Finance Act, 2001
2. Memorandum explaining the Finance Bill, 2001
3. Techspan India (P) Ltd. & Anr v. ITO (283 ITR 212) (Del)
4. Tata Consultancy Services Ltd. (2009-TIOL-41-ITAT-Bang)

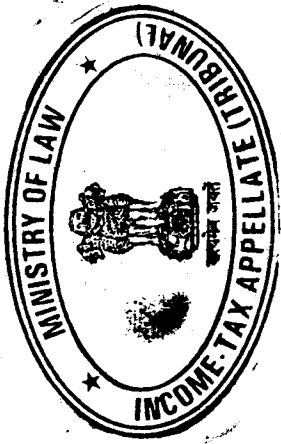
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The Id. counsel also brought to our attention the CBDT Circular No.014 of 2001 which clarifies as follows:-

"21. Rationalization of the provisions relating to undertakings in free trade zones, export processing zones, special economic zones and export oriented units.

Under Section 10A of the Income-tax Act, newly established undertakings in free trade zones are entitled to a tax holiday for a ten year period. Similarly, section 10B of the Income-tax Act provides for a ten year tax holiday in respect of newly established hundred per cent export oriented undertakings. The Finance Act, 2000 substituted sections 10A and 10B of the Income-tax Act. The newly substituted provisions of sections 10A and 10B provide for deduction of profits and gains of business derived by an undertaking from export of products or articles or things or computer software for a period of ten consecutive assessment years in a manner that the deductions are gradually phased out over the subsequent period. The definition of "export turnover" has been amended to clarify that the working of the proportionate deduction on export profits are meant to be of the undertaking, and of the business, as a whole."



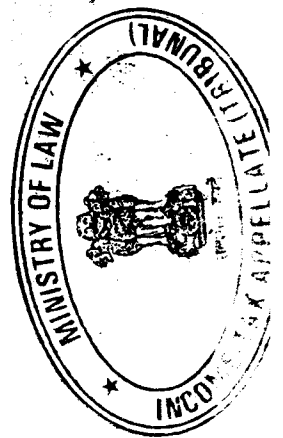
The learned counsel vehemently argued that what is relevant and is to be taken into consideration for the purpose of computation of deduction under section 10A is the profit of the undertaking specifically and not the business as a whole. This indicates clearly that legislature intended the eligible undertaking to be a separate island, unconnected to the rest of the assessee's business. The Id.

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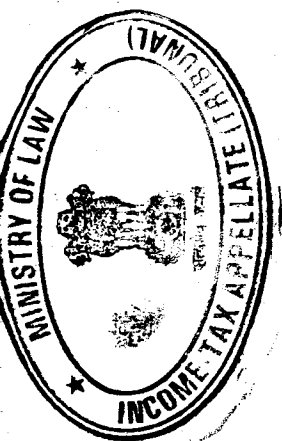


counsel further added that it is also clear that the spirit and intention behind the introduction section 10A in 1981 as seen from Circular 308/1981 continues notwithstanding the substitution of the section in 2001 and any interpretation contrary to the same may not be permitted. Section 10A was introduced into the Income-tax Act vide Finance Act 1981. Circular No.308 dated 29.6.1981 sets out as follows:

"With a view to encouraging establishment of export-oriented industries in the free trade zones, the Bill seeks to provide for complete tax exemption in respect of the profits and gains derived from industrial undertaking set up in these zones for a period of five initial assessment years. This concession will also apply in relation to other free trade zones that may be set up in future. The tax concession will be available to all taxpayers, including foreign companies and non-resident non-corporate taxpayers. The proposed "tax holiday" will be in lieu of all other tax concessions, e.g., investment allowance, the existing partial tax holiday, concessions available to industries set up in backward areas, etc. It is being provided that after the expiry of the tax holiday period, there will be no carry forward of any unabsorbed losses, depreciation, development rebate, investment allowance, tax holiday deficiency or any other deduction or allowance admissible under the Income-tax Act. For the purposes of depreciation, the written down value of the assets used in the industrial undertakings for the assessment years subsequent to the tax holiday period will be determined as if the depreciation allowable under the existing provisions had actually been claimed and allowed. Some of the existing tax concessions, such as, the deduction available in relation to new industrial



units set up in backward areas and small-scale industrial undertakings established in rural areas extend over a period exceeding five years. Units availing of the complete tax holiday now proposed will not be entitled to such concessions even after the expiry of the tax holiday period. The industrial units set up during any of the previous year relevant to the assessment years 1977-78 to 1980-81 will, at their option, be entitled to complete tax holiday for the unexpired period of five years. The tax concession in relation to the existing units is being made optional on the consideration that some taxpayers may find it more profitable to avail of the general tax concessions which are allowed in relation to new industrial undertakings under the existing provisions. Where the existing units exercise their option for complete tax holiday for the unexpired period of five years, no refund of any tax for any of the assessment years 1977-78 to 1980-81 will be allowed.



This amendment will take effect from 1<sup>st</sup> April 1981 and will accordingly apply in relation to the assessment year 1981-82 and subsequent years".

The learned counsel also placed reliance on circular No.8 of 2002 dated 27.8.2002. Para 19 of the said circular sets out the amendment to the provisions relating to deduction under section 10A units in free trade zones, etc and section 10B of the Act.

"19. Under the existing provisions of section 10A a deduction is given of 100 per cent of profits and gains from export earnings of new undertakings established in Free Trade Zones, Software Technology Parks, Electronic Hardware Technology Parks or Special Economic Zones (SEZs), which are engaged in

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manufacture or production of articles or things or computer software.

19.1 .....

19.4 In view of the need for resource mobilization in the short run, the Finance Act, 2002 seeks to restrict the 100% deduction under sections 10A and 10B, for one assessment year, i.e. 2003-04 to 90% of such profits and gains as are derived by an undertaking from the export of articles or things or computer software."

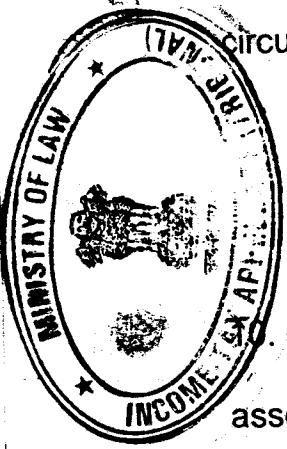
The Id. counsel further added that sub-para 4 of para 19 above specifies an isolated instance relating to assessment year 2003-04 alone whereas legislature itself has allowed only 90% of such profits and gains of the eligible profits and gains as deduction and justifies the reason for the grant of restricted benefits in the same paragraph. The Id. counsel highlighted the emphasis on deduction being granted in respect of 100 per cent of profits and gains from export earnings and the eligible undertakings. There is absolutely no justification for the interpretation of the Revenue that the deduction would be in respect of anything less than 100% as clarified by legislature. In fact, the stand taken by the Revenue is directly contrary to the letter and spirit of the circulars issued by the CBDT extracted above. The Id. counsel placed reliance on the following judgements of the Hon'ble



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Supreme Court for the proposition that any stand contrary to a CBDT

circular is illegal and liable to be struck down.



- (1) Navnit Lal C. Javeri v. K.K.Sen, AAC, Bombay (56 ITR 198)
- (2) UCO Bank v. CIT (237 ITR 889)

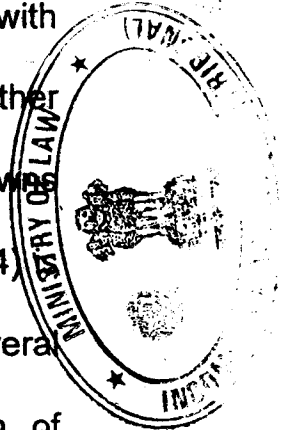
On the meaning of total income, the learned counsel for the assessee submitted that the term 'total income' is contextual. One notices difference shades of meaning of the term and its variants as employed in the Act:

- (i) Section 36(1)(vii) in its erstwhile format provided for a deduction at a percentage of total income, such total income being arrived at before deduction under that section and Chapter VI A.
- (ii) Section 80G(4) provides for the determination of the qualifying amount with reference to the "adjusted total income".
- (iii) Section 80B(5) defines Gross total income as the 'total income' arrived at after giving effect to all other provisions of the Act.
- (iv) Apart from the above, there are certain variants to the phrase 'total income'. For example, Explanation (i) to section 44C refers to 'adjusted total income'.

Sections 111A, 112, 115A etc provide for the total income to be split into two streams, one for being taxed as special rate and the balance being deemed to be total income for the purpose of normal rate of

tax. The phrase 'total income' used in these sections indicates a figure which may not represent the entire total income.

The learned counsel for the assessee strongly contended that the phrase 'total income' used in section 10A is one such variant. The phrase does not mean the total income as computed in accordance with the provisions of the Act. The relief under this section is with reference to the STP undertaking and not the assessee. In other words, the relief travels with the undertaking irrespective of who owns the same. The computation of relief as provided in section 10A(4) also with reference to the undertaking. A business may have several undertakings and section 28 does not envisage computation of income of each such undertaking. In other words, under the head 'profits and gains of business or profession', income from a business as a whole has to be computed and not that of the individual undertaking. The phrase 'total income' used in section 10A(1) is therefore to be understood as the total income of the STP unit. This is clear from the first proviso to section 10A(1) which makes a reference to the total income of the undertaking and not to the total income of the assessee. The counsel highlighted the terminology in various sections under Chapter III as follows:



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SectionOperative portion

19A(1A)

The deduction, in computing the total income of an undertaking, which begins to manufacture or produce articles or things or computer software during the previous year relevant to any assessment year commencing on or after the 1<sup>st</sup> day of April, 2003, in any special economic zone shall be .....

10AA

Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause (j) of section 2 of the Special Economic Zones Act, 2005, from his Unit, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any assessment year commencing on or after the 1<sup>st</sup> day of April, 2006, a deduction of .....

10BA

Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export out of India of eligible articles or things, shall be allowed from the total income of the assessee.

10C

Subject to the provisions of this section, any profits and gains derived by an assessee from industrial undertaking which has begun or begins to manufacture or produce any article or thing on or after the 1<sup>st</sup> day of April, 1998 in any Integrated Infrastructure Development Centre or Industrial Growth Centre located in the North-

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Eastern Region (hereafter in this section referred to as the industrial undertaking), shall not be included in the total income of the assessee

11 Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income .....

13A Any income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or ["Capital gains" or] any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party.



The difference in terminology notwithstanding, there is no inherent difference in the character of the deduction under various sections. It is appropriate therefore that the deduction under section 10A is given effect to in the process of or while computing the total income. In other words, section 10A continues to operate as an "exemption" section.

Again, deeply going through section 10A, the learned counsel submitted that section 10A provides for deduction from total income.

In the scheme of the Act, while various deductions are allowed in

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computing the total income, once the total income is computed, no further adjustment to the total income is envisaged. The scheme of the Act provides for deductions in computing total income and provides no mechanism for any deduction from the total income already computed. Once the total income is computed, the next step is determination of tax by applying the applicable rates on the total income. Deduction under section 10A thus cannot be from the total income. Section 2(45) defines "total income" as follows:

"(45) "total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act."

"Total income" is therefore defined to mean the total of the income referred to in section 5, computed in the manner laid down in the Act. The total amount of income cannot therefore be confused with or replaced by the concept of gross total income contained in section 80AB and section 80B. This is for a multitude of the reasons.

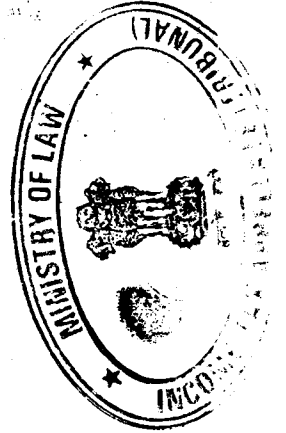
- (a) Firstly, the restriction placed by the Department in the interpretation of section 10A would apply only if section 80AB and section 80B in Chapter VI-A are made applicable to section 10A, while there is no provision in law to that effect. Reliance in this regard is placed on:

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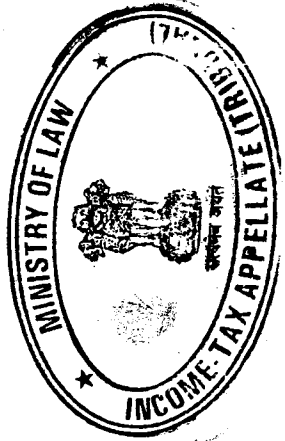
- (a) Webspectrum Software (P) Ltd. I.T.A. No. 382/Bang/2006
- (b) Stumpp Schuele & Somappa (P) Ltd. 102 ITR 320 (Karn), affirmed by Supreme Court in 187 ITR 108 (SC)
- (c) Schrafer Scovill Duncan Ltd. 132 ITR 822 (Cal)
- (d) Century Spg and Mfg Co. Ltd. 111 ITR 6 (Bom)

The expression "total income" figuring towards the end of sub-section (1) is referable to the income of the eligible unit only and cannot be interpreted to mean the total income of all the business carried on by the assessee. In fact, the Hon'ble Supreme Court, in the judgement referred to supra, has accepted a similar proposition in the aforementioned case, wherein the phrase 'such income' in 80T has been interpreted to mean and refer to the special category of income alone (in this case, the eligible profits alone) and not the total income. The stand of the Revenue amounts to insertion of Section 80AB and Section 80B into Chapter III, which is impermissible.



- (b) Section 80AB commences thus, "Where any deduction is required to be made or allowed under any section included in this Chapter under the heading "deductions in respect of certain incomes .....". The overriding effect of Section 80AB and 80B are statutorily applicable only to deductions claimed under Chapter VI-A. The rules of interpretation do not permit insertion of a section or of any words in the statute and a strict interpretation would have to be extended to the section as it stands.

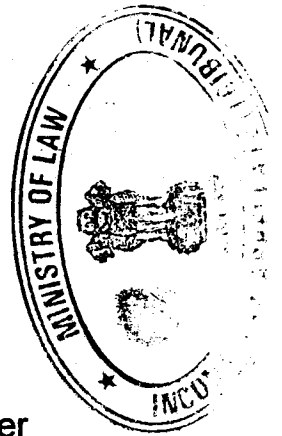
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- (c) Chapter III, admittedly, does not contain any statutory provision in pari materia with Section 80AB and Section 80B contained in Chapter VI-A.
- (d) As stated earlier, the words "total income" contained in sub-section (1) of section 10A is defined in sub-section (45) of section 2 to mean the "total amount of income". Section 4 of the Act seeks to charge tax on the total income of the assessee during the previous year. In other words, total income represents the "final line" item on which taxes are levied by the statute. If Section 10A is interpreted to hold that the deduction is available only from such total income, then it would make section 4 unworkable. Further, wherever the Act intended that specific adjustments be effected to the total income, the legislature has specifically provided for the same (Section 112 of the Act etc). This position has also been acknowledged in the case of KPIT Cummins (26 SOT 529). It is a trite law that a head-on-clash between two provisions should be avoided and the sections should be interpreted in a harmonious manner as to best fit in the whole setting of the Act. Accordingly, the total amount of income in respect of which the assessee would be entitled to the benefit of Section 10A would be such profits that are derived by the eligible unit from the eligible activity.
- (e) Chapter III deals with incomes that are excluded from total income. The marginal note therefore supports the argument

advanced to the effect that the interpretation of the words "total income" in Section 10A would be neither as defined under section 2(45) of the Act nor be influenced by the concept of gross total income as set out in section 80AB and section 80B in Chapter VI of the Act. Reliance is placed on the following judicial precedents:

- (i) Enercon Wind Farms (Krishna) Ltd. v. ACIT 21 SOT 29 (Mum)
- (ii) Tyco Electronics Corporation India (P) Ltd. I.T.A. No. 1229/2007 (Bang)
- (iii) KPIT Cummins Infosystems (Bangalore) Ltd. v. ACIT 26 SOT 529 (Bang)



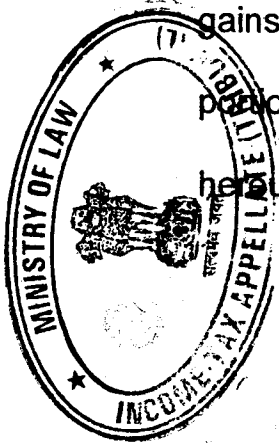
11. The learned counsel further submitted that deduction under section 10A is required to be granted at the source level from the total income and not after computing gross total income i.e., income eligible for deduction under section 10A would not enter gross total income at all as it is to be deducted at source level itself. The concept of granting deductions at source level has been appreciated in following precedents:-

- (1) Webspectrum Software (P) Ltd. (I.T.A. No. 382/Bang/2006)
- (2) CIT v. S.K. Nayak (145 ITR 791) (Kar)
- (3) CIT v. Lalji Agarwal (234 ITR 820) (All)

In this regard, reliance is also placed on the return form of the Companies. The form notified by CBDT for filing return of income

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also supports the view that the deduction under section 10A is to be granted at the time of computing income under the head 'profits and gains from business or profession'. An extract of the relevant portions of Part II of Schedule B of Form 1 has been given hereunder:-



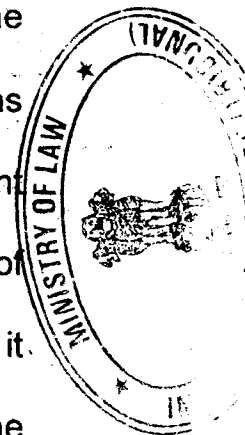
S.No.	Particulars
14.	Net profit or loss as per consolidated profit and loss account.
.....	.....
18	Is section 10A/10B/10C applicable in your case?
.....	.....
	Deduct:                      Amount                      claimed deductible/not                      includible                      in total income not arrived at above.
.....	.....
26	Profits and gains of business or profession other than speculation business

The relevance of forms prescribed under Income-tax Rules has been upheld in following precedents:

- (1) KPIT Cummins Infosystems (Bangalore) Ltd. v. ACIT 26 SOT 529 (Bang)
- (2) Honeywell International India Pvt. Ltd. v. DCIT 108 TTJ 924 (Delhi)
- (3) Nous Infosystems (P) Ltd. v. ITO I.T.A. No. 1042/Bang/2007
- (4) P.K. Kochammu Amma Peroke 125 ITR 624 (SC)

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Under section 10A(1), the deduction “shall be allowed from the total income of the assessee.” Instruction No.18 in the “Instruction in filling form No.1” reads as follows. “Item 18: Section 10A, 10A and 10C permit the claiming of deduction from incomes of some specified businesses. This item is meant to eliminate such income(s) from the computation of profits/gains” (emphasis supplied). The instructions are clear that section 10A would operate to eliminate the relevant income from the computation of profits and gains. In the context of the purpose, object and the placement of the section in Chapter III, it would be appropriate to rephrase sub-section (1) as follows, “the deduction shall be allowed while computing or arriving at the total income of the assessee.”

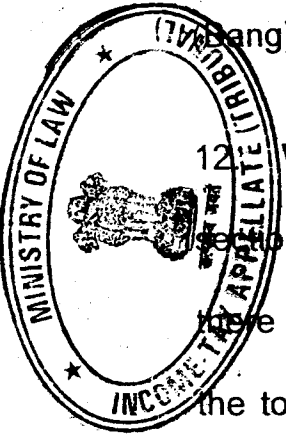


Section 10A(1) provides deduction of such profits and gains derived by an undertaking. Profits and gains of business an undertaking are to be computed in accordance with provisions pertaining to head of income ‘profits and gains of business or profession’ i.e. section 30 to section 43D while the setting off a loss from one source against income from another source under the same head of income is governed by section 70. Therefore the loss of any other unit cannot be set off before allowing deduction under section 10A of the Act.

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This has been upheld in the decision of Yokogawa India Ltd 111 TTJ

(Bang) 548.



While stressing the exceptions specifically carved out under section 10A, the learned counsel for the assessee submitted that there is no specific mention that 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 wanted to restrict the deduction, the legislature has provided such restrictions. For eg. In section 24, deduction in respect of interest is restricted as per proviso to section 24(b), deduction under Chapter VI-A are to be restricted in view of section 80A(2), Section 57 etc. He placed reliance on the following decisions:-

- (1) Medreich Ltd. (I.T.A. No. 632/Bang/2008)
- (2) Changepond Technology (P) Ltd. (22 SOT 220) (Chennai)
- (3) Webspectrum (Unreported)

In addition, Chapter III contains certain instances wherein Legislature has carved out exceptions to the exempted categories of income. For instance, while Section 11 exempts income from property that is held for charitable or religious purposes, there is an exception in Section 13 which enumerates certain instances wherein income from property

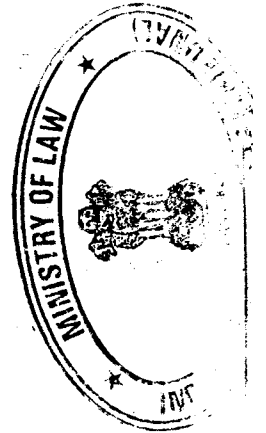
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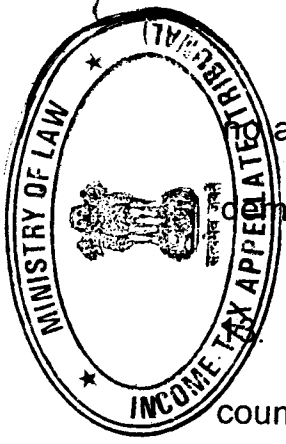
held by a Trust in certain designated situations would not be eligible to the exemption under section 11. It follows therefore, that if the Legislature had intended to place a restriction on the benefit available under section 10A, it would have provided for the same explicitly.

In fact, a specific restriction has been carved out vide insertion of provision to section 92C as follows:-

"Provided that no deduction shall be allowed under section 10A (or section 10AA) or section 10B or under Chapter VI A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section."

The provisions of section 92C have been amended to provide that where the total income of an assessee as computed by the Assessing Officer is higher than that declared by the assessee deduction under section 10A or 10B or under Chapter VI A shall be rejected in respect of amount by which the income has been enhanced by the Assessing Officer. It is only under this specific and special circumstance that the income of an eligible unit can be tampered with or adjusted and no other. This supports the assessee's submission that the intention of the legislature is that section 10A is a special code in respect of which





adjustment is permissible except in special cases that have been demarcated by legislature.

Viewing section 10A as an incentive section, the learned counsel for the assessee submitted that section 10A is a beneficial section that was introduced to benefit a certain sector of industry. This is an admitted position accepted by various Courts and Tribunals. The interpretation now sought to be applied by the Department would result in curtailing the benefit intended by the Legislature and cannot therefore be upheld. The Hon'ble Supreme Court in the case of Bajaj Tempo has reiterated that the statutory provisions inserted with the avowed object of benefiting the assessee should be likewise interpreted and construed beneficially. As per the principle of harmonious construction, the applicable provisions should be read harmoniously to arrive at the intended object.

14. *Per contra*, the learned Standing Counsel submitted that section 10A which finds a place in Chapter III of the Income-tax Act was originally enacted as an exemption provision, in that its profits and gains did not form part of total income at all. Section 10A(1) read in 1981, when it was first introduced: "Subject to the provisions of this section, any profits and gains derived by an assessee from an

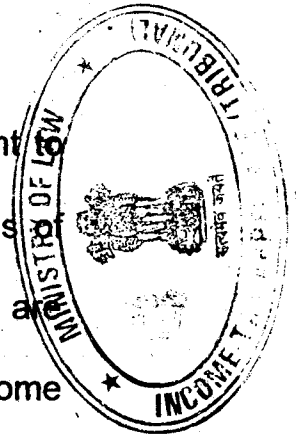
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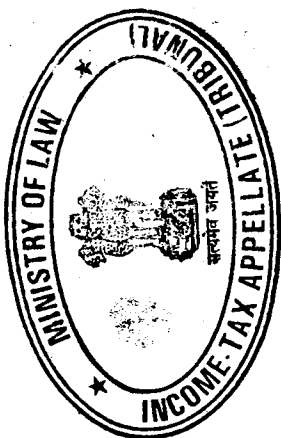
industrial undertaking to which this section applies shall not be included in the total income of the assessee." As such, regardless of whether there is profit or loss in the total income of the assessee, the income from the 10A unit will not included in the total income.

15. She also brought to our attention that after the amendment of the section, section 10A(1) reads as: "Subject to the provisions of this section, a deduction of such profits and gains derived as a result of business derived by undertaking ---- .....shall be allowed from the total income of the assessee." Thus, while the amount derived would not form part of the total income in the old section, subsequent to the amendment, it would be allowed as a deduction from the total income. At the same time, it must be noted that the provisions continue to remain in Chapter III which refers to "Incomes not forming part of total income", and has not been moved to Chapter VI A.

16. The learned Standing Counsel contended that the assessee's stand is that the total income refers to "such profits" in section 10A and the profits should be isolated and the total income of the assessee computed separately and they argue that the loss in the other units should be carried forward as such, and total exemption be granted to the profits of the 10A unit. It is submitted that such an



interpretation would amount to ignoring the amendment, and treating the deduction as an exemption as was originally envisaged prior to the amendment. It is well settled that while interpreting a statute, the words of the amended section should be given their clear and plain meaning. In the amended section, clearly, a deduction of the profits derived by the undertaking shall be allowed from the total income of the assessee.

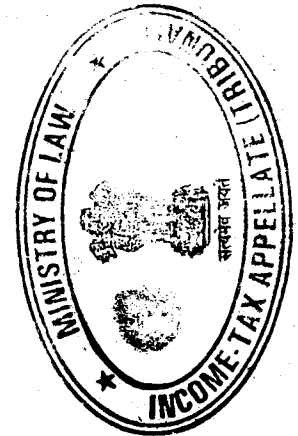


- The section envisages a total income which is a whole from which the deduction should be made of the profits of the undertaking.
- The total income can only be calculated as per the provisions of the Act. Section 2(45) defines "total income" to mean the total amount of income referred to in section 5, computed in the manner laid down in this Act". Once the total income so computed is a loss, it would not be possible to ignore the same and as such loss would have to necessarily be set off against the profits derived from the undertaking and it does not make sense to ignore the loss in the total income, and isolate the profits and gains of the undertaking.
- An interpretation cannot be given that is totally at variance with the wordings of the amended section, and the plain meaning thereof.

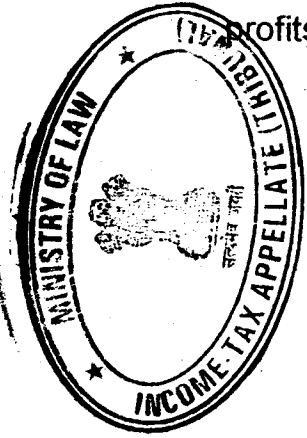
17. She submitted that it is now settled law that when a deduction is granted of any profits and gains from the total income, such a profit or gain can only refer to a positive figure arrived at after setting off the losses of other units.

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- (1) In the case of IPCA Laboratory Ltd. v. DCIT (2004) 266 ITR 521, the Supreme Court has held that profits and gains can only refer to a positive profit, and as such, the losses have to be set off to see whether the resultant figure is a positive profit or a loss; and deduction will be available only in the case of positive profit.
- (2) In ITO v. Induflex Products Pvt. Ltd. (2006) 280 ITR 0001, the Supreme Court has once again reiterated that deduction under section 80HHC would be available only after adjusting losses.
- (3) Although these judgements are with reference to section 80HHC, they would be equally applicable to deduction under section 10A/10B, inspite of the fact that there is no section similar to section 80AB in Chapter III.
- (4) The fact that section 10A talks about deduction from total income, and 'total income' has been defined under section 2(45) of the Act to mean the total amount of income referred to in section 5, computed in the manner laid down in the Act, make it clear that the total income from which the profits and gains of the eligible undertaking are to be deducted have to be computed only after setting off the losses. Thus, the ratio of the Supreme Court's rulings are squarely applicable to deduction under section 10A also.
- (5) The method of computation of the deduction under section 10A/10B is similar to the method of computation of the deduction under sections 80HHC and 80HHE of the Act. Therefore, in the absence of the definition of total turnover in sections 10A/10B, the definition/clarifications should be borrowed from sections 80HHC/80HHE, which provide for a similar adjustment of total turnover.



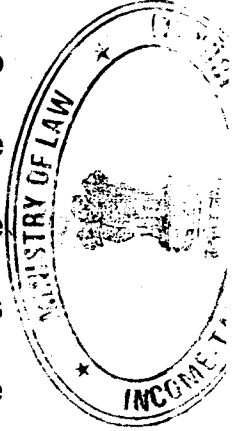
18. She further submitted that in all the cases pertaining to losses (copies of which are included in our paper-book), the Tribunal has repeatedly held that the loss of the 10A unit can be set off against the profits of the other units.



- (1) In the case of *Mindtree Consulting Pvt. Ltd. v. ACIT (102 TTJ (Bang) 691*, the Tribunal has held that since the section now talks about deduction and not exemption, loss from the eligible unit can be set off against the profits of the other units. Similar view has been taken in *Honeywell International (India) Pvt. Ltd. (108 TTJ (Del); etc.*
- (2) If the profits and gains of the 10A unit are to be isolated (as claimed by the assessee) and are not to be affected by the losses of the other units, such a stand cannot be taken. The interpretation of the section, and computation of the deduction is to be made in a consistent and logical manner, whether the assessee makes a loss or a profit in the 10A unit.

19. The learned Standing Counsel contended that while all the Tribunal decisions cited agree with 10A grants a deduction and not an exemption, divergent stands are being taken on the total income from which the deduction should be granted. It is important that a uniform method of computation be taken, and deduction allowed from the total income, having computed the same in accordance with the Act.

20. - She further submitted that the assessee contends that the return form shows the deduction at a stage prior to set off of losses, and so the losses from the other units cannot be set off before grant of deduction. A similar argument was raised by the Revenue before the Madras High Court in the case of Chemplast Sanmar & other cases (314 ITR 231), but the High Court turned it down holding that once the intention is clear from the section, the form could not go beyond the provisions of the Act. In the present case, after the amendment, it is very clear from the provisions that the profits of the eligible undertaking is to be deducted from the total income, which is computed as per the provisions of the Act. Computation as per the provisions of the Act will include setting off of losses.

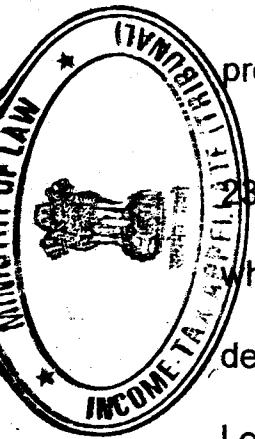


21. Finally, the learned Standing Counsel summed up her argument as under:-

- (1) Profits and gains derived from eligible unit under section 10A are to be deducted from the total income.
- (2) Total income is to be arrived at by computation as per the Act, which includes setting off of losses.
- (3) Once the section specifies that the deduction shall be made from the total income, it should be seen that if the total income is negative, deduction from the same may only result in reducing the carry forward loss.
- (4) Reliance cannot be placed on the return form, as once the intention is clear from the section, the form could not go beyond the provisions of the Act [314 ITR 231(Mad)]

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22. We have heard the rival submissions and considered the facts and materials on record including the contents of the paper-book filed before us. We have also considered the principle arising out of the precedents cited before us by both the parties.



23. To decide the question posed before us, we have to first decide whether the deduction under section 10A is an exemption or a deduction from total income of the assessee. We find that the Legislature has devoted separate chapter, namely, Chapter III for incomes which do not form part of the total income, i.e. exempted income, and another chapter, namely, Chapter VI-A for deduction to be made in computing total income. This itself would clearly show the intention of the legislature that the items mentioned under Chapter VI-A are to be deducted in computing the total income of the assessee and the items enumerated in Chapter III are not forming part of the total income of the assessee at all. Section 10A falls under Chapter III. This section was introduced into a statute book in the year 1981 and was subsequently substituted in the year 2001. With effect from 1<sup>st</sup> April 2001, as substituted by Finance Act 2000, a deduction of the profits derived by the undertaking from the export of computer

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software is allowed from the total income. It is argued that there is no material change in the character of the section so far as the exclusion of income of the nature of section 10A is concerned. The heading of the Chapter III reads as under:-

“Incomes which do not form part of total income”

and the sub-heading is as under:-

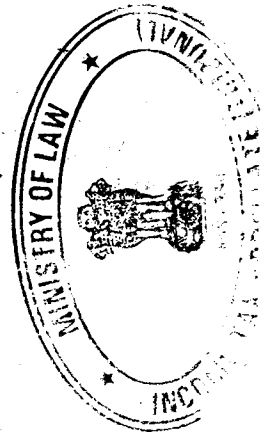
“Incomes not included in total income”

From sections 10(1) to 10(43) fall under this sub-heading. In other words, it has to be inferred that the incomes mentioned in sections 10(1) to 10(43) are not to be included in the total income. However, section 10A falls under another sub-heading within Chapter III and the said sub-heading reads as under:-

“Special provision in respect of newly established undertakings in free trade zone, etc.”

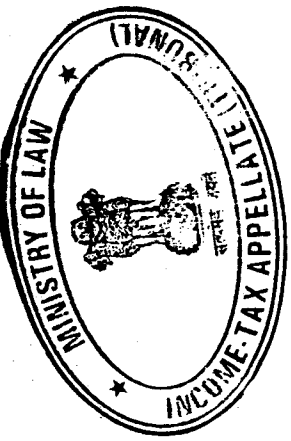
In our considered view those sections mentioned under this sub-heading will not be governed by the first sub-heading, namely, “Incomes not included in total income” which would be applicable only for sections 10(1) to 10(43). In other words, within Chapter III, there are different sub-headings and section 10A falls under the sub-heading – “Special provision in respect of newly established

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undertakings in free trade zone, etc.” Under this sub-heading, section

10A is embedded and the said section reads as under:-



“10A. Special provision in respect of newly established undertakings in free trade zone, etc.-(1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the 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:

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

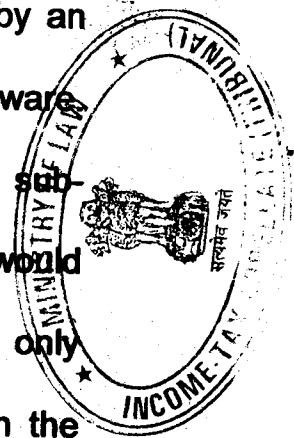
Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment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

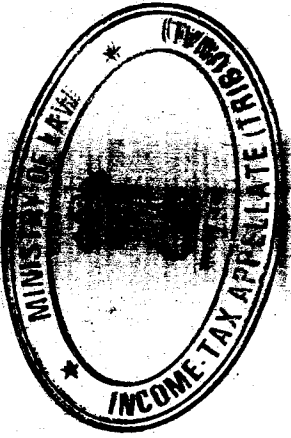
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[Provided also that for the assessment year beginning on the 1<sup>st</sup> day of April, 2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software.]

From the reading of the section, it can be easily inferred that what is contemplated is only deduction of profits and gains derived by an undertaking from export of articles or things or computer software. The very fact that the section 10A is brought under separate sub-heading and the specific word "deduction" used in the section would go to show that the intention of the Legislature was to give only deduction and not exclusion from total income. Of course, in the initial years, the entire profits of such undertaking eligible for deduction under section 10A was allowed as deduction. However, with effect from 1<sup>st</sup> April, 2003, the said deduction was restricted to 90% of such profits and gains derived by undertaking by adding separate proviso to section 10A. Perhaps, the Legislature knowingly or consciously has kept section 10A under a separate sub-heading within Chapter III only with the idea of varying the percentage of deduction from year to year or whenever necessary. The Hon'ble Calcutta High Court in the case of Royal Calcutta Turf Club (1983) 144 ITR 709 observed at page No.714 as under:-



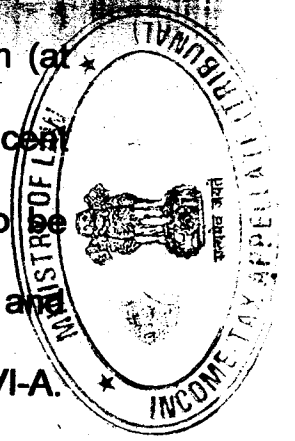


"In computing the total income, certain incomes are not included under section 10 of the Income-tax Act. It depends on the particular case where certain income, in respect of which the Act is made inapplicable to the scheme of the Act, and in such a case, the profits and gains resulting from such a source do not enter into the computation at all. But there are other sources which for certain economic reasons are not included or excluded by the 'will' of the Legislature. In such a case, we must look to the specific exclusion that has been made."

In view of the above discussion and in view of the decision of Calcutta High Court, it can be seen that even though section 10A falls under Chapter III, it has been mentioned in the section itself that what is to be given is only a deduction and not exemption.

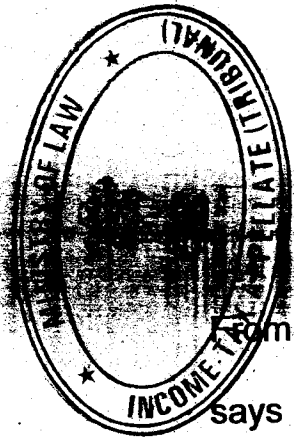
Under the scheme of the Act, the profits of the unit eligible for deduction under section 10A of the Act, would form part of the income computed under the head "Profits and gains of business and profession". However, in order the same will not suffer tax, deduction will have to be made in respect of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

profession". Thus, we find that what is contemplated by the Legislature is that profits and gains of the undertakings from the export of articles or things or computer software are to be deducted while computing the profits and gains of business or profession (at hundred per cent upto assessment year 2002-03 and ninety per cent thereafter). Even though it is a deduction to be given, it is to be deducted while arriving at the profits of business and profession and not from the gross total income as envisaged under Chapter VI-A. Thus, we hold that deduction under section 10A under Chapter III of the I.T. Act is to be granted while computing the profits and gains of business and profession itself and not from the gross total income.



24. Having held it is only deduction, let us now consider whether the provisions of section 80AB of Chapter VI-A of the Income-tax Act would be applicable. Section 80AB reads as follows:-

**"80AB.** 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 provisions of this Act (before making any

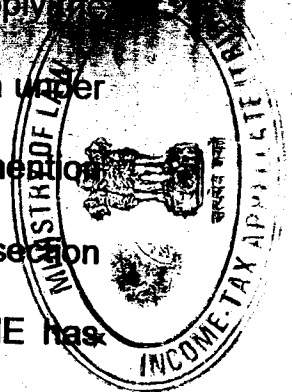


deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income.

From the reading of the above section, it can be seen that the section says that "where any deduction is required to be made or allowed under any section included in this Chapter .....". It is needless to say that section 10A is not included in Chapter VI-A. Hence, as long as section 10A is not falling under Chapter VI-A, section 80AB cannot be applied. Had it been the intention of the Legislature, it would have specifically mentioned in the Act that such deduction is to be given only from the gross total income. We do not find force in the contention of the Id. Standing Counsel of the Revenue that the decision in the case of IPCA Laboratory Ltd. v. DCIT (2004) (266 ITR 521) (SC) would apply to the present case on hand, even though the method of computation of deduction is similar to the method of deduction under section 80HHC and 80HHE of the Act for the simple reason that sections 80A and 80AB fall under Chapter VI-A which chapter is to be applied after arriving at the gross total income, whereas section 10A falls under Chapter III which is to be given effect while arriving at the total income of the assessee. Hence, we hold that even though the claim under section 10A is a deduction and not

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exemption, the same cannot be subjected to provisions of section 80AB which falls under different chapter, namely, Chapter VI-A, so long as the Legislature has not specifically mentioned so, to apply the provisions of section 80AB of the Act, to the claim of deduction under section 10A. It can be noticed that even though there is a mention about sections 80HH, 80HHA, 80-I, 80-IA and 80-IB in section 10A(6), no mention about sections 80AB, 80HHC and 80HHE has been made. The Bombay High Court in the case of Siemens Information System Ltd. v. ACIT And Others (2007) 293 ITR 548 (Bom), has held as under:-



“Total income” means the total amount of income referred to in section 5, computed in the manner laid down in this Act. Next, our attention is invited to what is gross total income under section 80B(5). The gross total income has been described to be the total income computed in accordance with the provisions of the Act before making any deduction under the relevant Chapter. A perusal of section 10A(1), as it stood at the relevant time, clearly sets out that subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which the section applies shall not be included in the total income of the assessee. In other words, it is clear that the income derived from an industrial undertaking by the assessee to which section 10A applies could not be included in the total income of the assessee. Once that is the case, the petitioner was right in filing the income by excluding the income of income in terms of section 10A.”



In view of the above decision of the Bombay High Court also, we do not find force in the contention of the learned Standing Counsel that the decision rendered in the case of IPCA Laboratory Ltd. would be applicable.

25. Having held that the claim under section 10A is only deduction and the same is not subjected to section 80AB of Chapter VI-A, now, let us consider whether the deduction so to be given under section 10A is undertaking specific or otherwise.

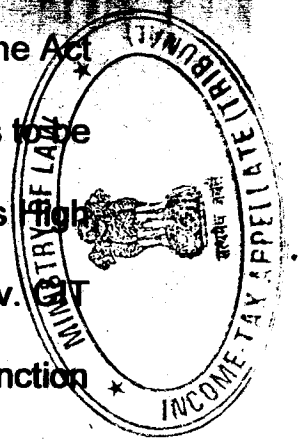
26. It can be noticed from the language of section 10A(1) that a deduction of such profits and gains that as are derived by "an" undertaking qualifies under section 10A is to be given from the total income. Interestingly, the Legislature has mentioned the profits and gains as are derived by an undertaking. It means that the assessee may have more than one undertaking and in such a case, one has to consider the profits and gains of that "particular undertaking" which qualifies for deduction under section 10A. According to section 10A(4), the deduction is to be computed in the same proportion which bears to the profits of the undertaking, the same proportion as the export turnover bears to the total turnover. It may be noticed that

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again the words used are "Profits and gains of business of the undertaking". In any case, this is not the total profits of the business of the assessee. Thus, in computing deduction under section 84, we have to ascertain the total income as per the provisions of the Act in respect of "that undertaking" and the amount so determined is to be reduced from the total income. We find that the Hon'ble Madras High Court in the case of *Madras Machine Tools Manufacturers Ltd. v. CIT* (1975) 98 ITR 119 (Mad.) had an occasion to consider the distinction between company and its undertakings while deciding the case in the context of section 84 deduction. In that case, the Hon'ble Madras High Court has observed as under:-

"A company may own or run many undertakings some of which may be entitled to the benefit of section 84 and others may not be so entitled. It is not, therefore, possible to equate the undertaking with the company. When a company owns more than one undertaking the application of section 84 has to be with respect to the particular undertaking and not to the company in general. When we apply section 84 to a particular undertaking it has to be seen when that undertaking commenced the manufacture or production of articles. It is true that the word "undertaking" has not been defined under the Income-tax Act. But in common parlance it is taken as a concern started or formed for a specific purpose or a project engaged in."

We also note that in the Circular F.No.15/563-IT(AT) dated 13.12.1963 issued by CBR in the context of section 80J, the Board



agrees that the benefit of section 84(80J) of the Income-tax Act,

1961, attaches to the undertaking and not the owner thereof. We

also find that in the CBDT Circular No 308 dated 29.6.1981 also it is

mentioned that complete tax exemption in respect of the profits and

gains derived from **undertakings** set up in Free Trade Zones are

available to export oriented industries. In Circular No.8 of 2002 dated

27.8.2002, para No.19 reads as under:-

“Under the existing provisions of section 10A a deduction is given of 100 per cent of profits and gains from export earnings of new undertakings (emphasis supplied) established in Free Trade Zones, Software Technology Parks, Electronic Hardware Technology Parks .....

Para 19.4 of the said Circular reads as under:-

“In view of the need for resource mobilization in the short run, the Finance Act, 2002 seeks to restrict the 100% deduction under sections 10A and 10B, for one assessment year, i.e. 2003-04 to 90% of such profits and gains as are derived by an undertaking from the export of articles or things or computer software.”

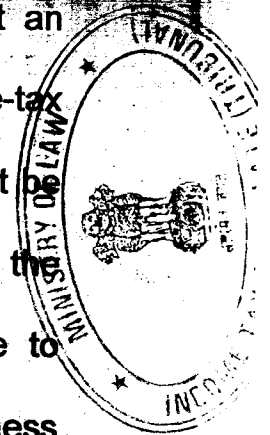
Further, it can be seen that nowhere it is mentioned in the section that such deduction is to be restricted to the total income of the assessee computed under the provisions of the Act, before allowing such deduction. On the other hand, wherever the Legislature wants to restrict the deduction, it has provided such restriction. For example,

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we can mention section 24 dealing with respect to interest as per proviso to section 24B

27. Having held that the deduction under section 10A is not an exemption but only a deduction under Chapter III of the Income-tax Act and the provisions of section 80AB of Chapter VIA would not be applicable to such deduction under section 10A, and also that the deduction under section 10A is undertaking specific, we have to answer the question posed before us by holding that the business losses of a non-eligible unit, whose income is not eligible for deduction under section 10A of the Act, cannot be set off against the profits of the undertaking eligible for deduction under section 10A for the purpose of determining the allowable deduction under section 10A of the Act. Of course, if there are more than one undertaking which is eligible for deduction under section 10A and if some of the units have profit and other units have loss, it would be an entirely different case which is before us. Hence, the decision rendered in this appeal would not be applicable to such cases where there are more than one eligible undertaking claiming deduction under section 10A. In this case, there is only one eligible unit claiming deduction under section 10A and hence, the loss from non-eligible unit cannot



be set off against the profits of the eligible unit while determining deduction under section 10A.



28. In I.T.A. No. 229/Mds/2007, for the assessment year 2003-04, the assessee has raised another ground vide ground No.2 which reads as under:-

“Consequently, the CIT(A) has erred in not allowing a set off of Delhi unit's losses against the interest income.”

29. As we have already held that the loss from non-eligible unit cannot be set off against the profit of eligible unit while computing deduction under section 10A, we find force in the contention of the learned counsel for the assessee that the CIT(Appeals) ought to have allowed the set off of Delhi Unit (non-eligible unit) losses against the interest income. Hence, we direct the Assessing Officer to allow the set off of loss of non-eligible unit, namely, Delhi Unit against the interest income. Thus, the assessee's appeal in I.T.A. No. 229/Mds/2007 is allowed.

30. Turning to I.T.A. No. 352/Mds/2008 for assessment year 2004-05, the assessee has raised the issue of deduction under section 10A as first ground. Similar arguments were made by both sides in

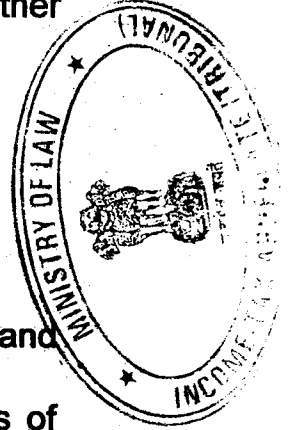
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respect of this issue as made for assessment year 2003-04. For the reasons stated in our order in I.T.A. No. 229/Mds/2007, this issue is allowed in favour of the assessee.

31. Apart from the issue of 10A, the assessee has raised another issue in ground No.2(a) which reads as under:-

"Consequently, the CIT(A) has erred in not allowing a set off of Delhi trading unit's losses against the interest income."

This issue has also been dealt with in I.T.A. No. 229/Mds/2007 and the Assessing Officer was directed to allow the set off of losses of non-eligible unit, namely, Delhi Unit against the interest income. Following the above, similar order is passed in this appeal also and this issue is allowed in favour of the assessee.

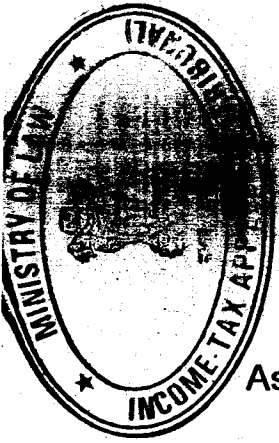


32. Lastly, the assessee has raised third issue wherein the ground reads as under:-

"Consequently, the CIT(A) has erred in not allowing a carry forward of the losses of the Delhi trading unit."

33. The assessee has computed deduction under section 10A as under:-

I	Net profit of the eligible unit	Rs. 88,28,657
	Less 10A deduction	Rs. (88,28,657)
	Taxable profits of the eligible unit	Rs. NIL



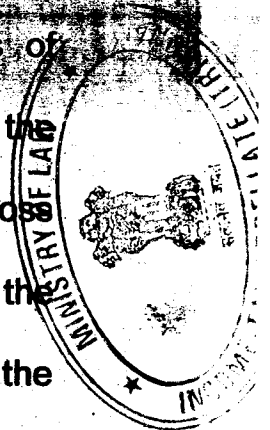
II	Loss incurred by the Trading unit at New Delhi	Rs. (77,23,636)
III	Income from other sources	Rs. 27,05,303
	Business loss (II - III) to be carried forward	Rs. (50,18,333)

As against the above, the Assessing Officer has recomputed the benefit of section 10A by reducing the loss incurred in the trading unit from net profit of eligible unit. He has come to a net figure of Rs.11,05,021/- as eligible for deduction under section 10A (Rs.88,28,657 – Rs.77,23,636 = Rs.11,05,021/-). He has treated income from other sources being Rs.27,36,980/- as taxable and thus levied tax of Rs.9,81,891/-. However, the learned CIT(A) has reduced trading loss of Rs.77,23,636/- from eligible profit of Rs.88,28,657/- and has arrived at a net business income of Rs.38,10,324/- after adding Rs.27,05,303/-, as income from other sources. He found that the entire income eligible for deduction under section 10A but he has not made any observation regarding carry forward of remaining losses. The assessee is aggrieved and has raised this above ground.

34. We have heard the rival submissions and considered the facts and materials on record. Since we have given clear cut finding that

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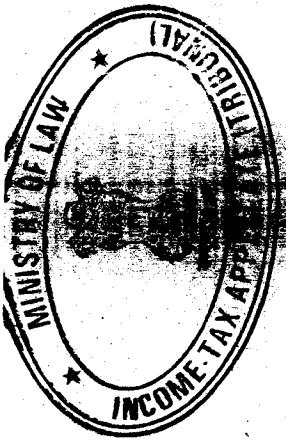
business loss of non-eligible unit cannot be set off against the profits of undertaking, eligible for deduction under section 10A, the recomputation done by the Id. CIT(Appeals) by reducing loss of trading unit from profits of eligible unit cannot be upheld. Now, the specific prayer of the assessee's counsel is that the trading loss should be set off against income from other sources and the remaining loss should be carried forward. We find force in the contention of the learned counsel and we are inclined to allow the claim of the assessee. Hence, we direct the Assessing Officer to set off the trading loss against income from other sources and to allow remaining loss to carry forward.



35. Thus, the appeal of the assessee in I.T.A. No. 352/Mds/2008 is allowed in favour of the assessee.

36. Now, let us turn to Revenue's appeal in I.T.A. No. 536/Mds/2007. The Revenue's grounds read as under:-

- 2.1 The learned CIT(A) erred in holding that carry forward of unabsorbed u/s.10A amounting to Rs.6,89,767/- is permissible, relying upon the provisions of sec.10A(6)(ii) of the I.T. Act.
- 2.2 It is submitted that a plain reading of clause (ii) of sub-section (6) of Sec.10A of the I.T. Act does not support the learned CIT(A)'s direction



of allowing carry forward of unabsorbed claim u/s.10A of the I.T. Act.

2.3 The CIT(A) ought to have seen that the explanatory notes to the Finance Act, 2003 (para 20) has categorically stated that sub-section (6) to Sec.10A has been amended to do away with the restrictions on the carry forward of business losses and unabsorbed depreciation arising in the assessment year 2001-02 and subsequent years and consequently, the learned CIT(A) ought to have observed that Sec.10A(6)(ii) of the I.T. Act does not provide for carry forward of unabsorbed claim u/s.10A.

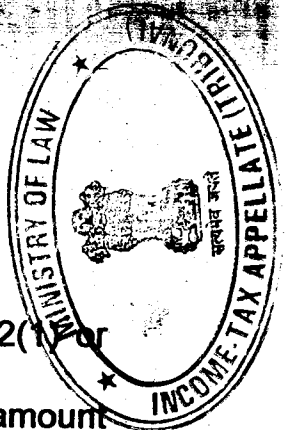
37. After allowing loss of trading unit at Delhi as per section 70 of the Act, the total income comes to Rs.2,84,19,140/- after adding income of Rs.22,01,134/- being income from other sources. Since 90% of profits of eligible unit at Chennai comes to Rs.2,91,08,907/- (90% of Rs.3,23,43,230/-), the remaining profit of Rs.6,87,767/- (Rs.2,91,08,907 – 2,84,19,140) is to be permitted (being unabsorbed claim under section 10A as per section 10A(6)(ii) of the Act). It was argued by the Senior Standing Counsel that even going by the plain reading of section 10A(6)(ii), the direction of Id. CIT(A) to allow carry forward of unabsorbed claim under section 10A is not supported.

38. On the other hand, the learned counsel for the assessee has relied on the finding of the learned CIT(Appeals) and on his paper-book, besides making oral submissions.

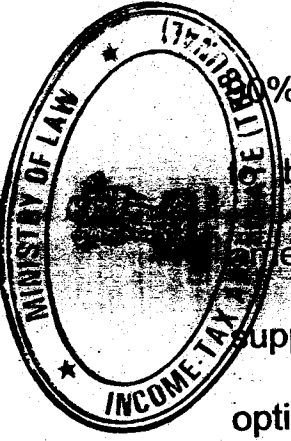
39. After considering the rival submissions by written and oral, we

deem it fit to reproduce section 10A(6)(ii) which reads as under:-

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



40. This provision talks about loss referred to in section 72(1) or 74(3) and not the unabsorbed claim under section 10A. This amount of Rs.6,87,767/- is only an unabsorbed claim (being 10% of total profit of the eligible unit which is left out after the amendment). This provision of section 10A now allows deduction upto 90% alone. Now, it is to be seen as to what is the fate of this left over amount – whether it can be carried forward in the like manner which a business loss or unabsorbed depreciation can be carried forward. We are afraid; this does seem to be intention of the legislature. There is no such provision in the entire Act which can support the view taken by the learned CIT(Appeals). Rather, the view of the CIT(Appeals) is not clear in accordance with section 10A(6)(ii) as this provision speaks about business loss and unabsorbed depreciation and not unabsorbed claim under section 10A. When the section itself allows



10% of such profit of eligible business, obviously, 10% of the same is to be subjected to tax, otherwise what is the meaning of the amendment. Specifically, when the provision of the Act does not support the direction of the learned CIT(Appeals), we are left with no option but to set aside the same. Accordingly, we allow the grounds taken in this appeal by the Revenue. Thus, the Revenue's appeal is allowed.

41. In the result, the assessee's appeals in I.T.A. No. 229/Mds/2007 and I.T.A. No. 352/Mds/2008 are allowed, and Revenue's appeal in I.T.A. No. 536/Mds/2007 is also allowed.

42. The order was pronounced in the Court on 05.02.2010.

(Hari Om Maratha)  
Judicial Member

(Pradeep Parikh)  
Vice President

(N. Barathvaja Sankar)  
Vice President

Chennai,  
Dated the 5<sup>th</sup> Feb. 2010.

Kri.

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