

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1336 OF 2013

WITH

INCOME TAX APPEAL NO. 1376 OF 2013

The Commissioner of Income Tax-8	}	Appellant
versus		
M/s. Shantivijay Jewels Ltd.	}	Respondent

Mr. Arvind Pinto for the Appellant.

Mr. Nilesh Joshi i/b. Mr. Atul K. Jasani for the
Respondent.

**CORAM :- S. C. DHARMADHIKARI &
A. K. MENON, JJ.**

DATED :- APRIL 7, 2015

ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

These Appeals of the Revenue were on our board and after hearing both sides at length, we placed them today for passing orders.

2) The Appeals are directed against the orders passed by the Income Tax Appellate Tribunal on 16th November, 2012.

3) Insofar as Appeal No. 1336 of 2013 is concerned, there, the relevant assessment year is 2005-06. The Assessee is engaged in the business of manufacturing and export of gems jewellery. The return of income for this assessment year was filed on 27th October, 2005, declaring income of Rs.24,44,945/- after claiming deduction under

section 10A of the Income Tax Act, 1961 (for short the “IT Act”) at Rs.1,06,81,302/-. This return of income was revised by the Assessee on 20th February, 2006, declaring income at Rs.26,79,480/-. Thus, in the revised return, the Assessee withdrew its claim of deduction under section 10A of the IT Act and instead, claimed set off of unabsorbed business loss brought forward from assessment year 2002-03 against the profits of the erstwhile 10A unit. This claim for set off was disallowed by the Assessing Officer by his order dated 30th November, 2007. The ground of dis-allowance was that such claim of set off or brought forward business loss in the sum of Rs.3,26,08,931/- against the profits of the erstwhile 10A unit in the year under consideration, being the first assessment year, after the expiry of the tax holiday period, cannot be allowed. Since the unabsorbed loss of assessment year 2002-03 had been set off against the business profit of the 10A unit in the assessment year 2003-04 and 2004-05, there remains no loss for set off in the subject assessment year 2005-06. The Assessee, therefore, was aggrieved by such a finding and challenged the assessment order before the Commissioner of Income Tax (Appeals). The Assessee's Appeal was dismissed by the Commissioner on 16th August, 2010. The Bench of the Tribunal at Mumbai allowed the Appeal of the Assessee by the impugned order. Hence, the Revenue has approached this Court under section 260A of the IT Act.

4) Mr. Pinto, learned Counsel appearing for the Revenue would submit that though the questions of law at page 4 of the paper book are somewhat clumsily worded, yet, the essential and core question is, “whether the Tribunal was justified in upholding the Assessee's claim for set off?” He submits that the Tribunal failed to appreciate that these unabsorbed business losses have been already set off against the profits of the said 10A unit in the assessment years referred above. It is in these circumstances that the Tribunal erred in law. Mr. Pinto also referred to a Judgment delivered by this Court in the case of *Commissioner of Income Tax, Mumbai vs. Galaxy Surfactants Ltd.* (ITXA/3465/2010). He would submit that this claim was therefore not allowable. Mr. Pinto would therefore submit that both questions at page 4 and 5 of the paper book are substantial.

5) However, Mr. Joshi, learned Counsel appearing for the Assessee would submit that the Tribunal has correctly appreciated the facts and the legal provision. The Tribunal has merely applied the law laid down by this Court in the case of *Hindustan Unilever Limited* (325 ITR 102) and *Black & Veatch Consulting Pvt. Ltd.* (ITA No. 1237 of 2011). That has applied to the facts of the present case. In the circumstances, the findings recorded do not raise any substantial question of law. It is submitted that the impugned order of the Tribunal need not be interfered with and this Appeal should be dismissed.

6) In the assessment year 2005-06, return of income was filed and all that the Tribunal, in allowing the claim of the Assessee, did was to refer to section 10A and sub-section (6) thereof. The Tribunal held that the Assessee was entitled for carried forward loss and that loss pertained to assessment year 2002-03. As per the provision of the Act, losses up to the assessment year 2001 were not allowable. The understanding of the Revenue also was on these lines and the Tribunal referred to Circular No. 7 of 2005 issued by the Central Board of Direct Tax dated 5th September, 2003. That mentioned that losses arising in the assessment year 2001-02 and subsequent years were to be allowed while computing the income under section 10A of the IT Act. There is an explanatory note of the Finance Bill of 2003 as well.

7) Section 10A of the IT Act, to the extent relevant, reads as under:-

“10A. (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed 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:

Provided also that for the assessment year beginning on the 1st 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:

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, 2012 and subsequent years.

(1A) Notwithstanding anything contained in sub-section (1), 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 1st day of April, 2003, in any special economic zone, shall be,—

(i) hundred per cent of profits and gains derived from the export of such articles or things or computer software for a period of five 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, and thereafter, fifty per cent of such profits and gains for further two consecutive assessment years, and thereafter;

(ii) for the next three consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the “Special Economic Zone Re-investment Allowance Reserve Account”) to be created and utilised for the purposes of the business of the assessee in the manner laid down in sub-section (1B):

[Provided that no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or

before the due date specified under sub-section (1) of section 139.

(1B) The deduction under clause (ii) of sub-section (1A) shall be allowed only if the following conditions are fulfilled, namely:—

(a) the amount credited to the Special Economic Zone Re-investment Allowance Reserve Account is to be utilised—

(i) for the purposes of acquiring new machinery or plant which is first put to use before the expiry of a period of three years next following the previous year in which the reserve was created; and

(ii) until the acquisition of new machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India;

(b) the particulars, as may be prescribed in this behalf, have been furnished by the assessee in respect of new machinery or plant along with the return of income for the assessment year relevant to the previous year in which such plant or machinery was first put to use.

(1C) Where any amount credited to the Special Economic Zone Re-investment Allowance Reserve Account under clause (ii) of sub-section (1A),—

(a) has been utilised for any purpose other than those referred to in sub-section (1B), the amount so utilised; or

(b) has not been utilised before the expiry of the period specified in sub-clause (i) of clause (a) of sub-section (1B), the amount not so utilised, shall be deemed to be the profits,—

(i) in a case referred to in clause

(a) in the year in which the amount was so utilised; or

(ii) in a case referred to in clause (b), in the year immediately following the period of three years specified in sub-clause

(i) of clause (a) of sub-section (1B), and shall be charged to tax accordingly.

(2) This section applies to any undertaking which fulfils all the following conditions, namely :—

(i) it has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year—

(a) commencing on or after the 1st day of April, 1981, in any free trade zone; or

(b) commencing on or after the 1st day of April, 1994, in any electronic hardware technology park, or, as the case may be, software technology park;

(c) commencing on or after the 1st day of April, 2001 in any special economic zone;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of any undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertakings as is referred to in section 33B, in the circumstances and within the period specified in that section;

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Explanation.— The provisions of Explanation 1 and Explanation 2 to sub-section (2) of section 80-I shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(3) This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation 1.—For the purposes of this sub-section, the expression “competent authority” means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

Explanation 2. —The sale proceeds referred to in this sub-section shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

(4) For the purposes of sub-sections (1) and (1A), the profits derived from export of articles or things or computer software

shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.

(5) The deduction under this section shall not be admissible for any assessment year beginning on or after the 1st day of April, 2001, unless the assessee furnishes in the prescribed form, alongwith the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

(6) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year,—

(i) section 32, section 32A, section 33, section 35 and clause (ix) of sub-section (1) of section 36 shall apply as if every allowance or deduction referred to therein and relating to or allowable for any of the relevant assessment years ending before the 1st day of April, 2001, in relation to any building, machinery, plant or furniture used for the purposes of the business of the undertaking in the previous year relevant to such assessment year or any expenditure incurred for the purposes of such business in such previous year had been given full effect to for that assessment year itself and accordingly sub-section(2) of section 32, clause (ii) of sub-section (3) of section 32A, clause (ii) of sub-section (2) of section 33, sub-section (4) of section 35 or the second proviso to clause (ix) of sub-section (1) of section 36, as the case may be, shall not apply in relation to any such allowance or deduction;

(ii) 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 1st day of April, 2001;

(iii) no deduction shall be allowed under section 80HH or section 80HHA or section 80-I or section 80-IA or section 80-IB in relation to the profits and gains of the undertaking; and

(iv) in computing the depreciation allowance under section 32, the written down value of any asset used for the purposes of the business of the undertaking shall be computed as if the assessee

had claimed and been actually allowed the deduction in respect of depreciation for each of the relevant assessment year.

(7) The provisions of sub-section (8) and sub-section (10) of section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purposes of the undertaking referred to in section 80-IA.

(7A) Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger,—

(a) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and

(b) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.

(7B) The provisions of this section shall not apply to any undertaking, being a Unit referred to in clause (zc) of section 2 of the Special Economic Zones Act, 2005, which has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone.

(8) Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the due date for furnishing the return of income under sub-section (1) of section 139, furnishes to the Assessing Officer a declaration in writing that the provisions of this section may not be made applicable to him, the provisions of this section shall not apply to him for any of the relevant assessment years.

(9) Omitted by the Finance Act, 2003, w.e.f. 1-4-2004.

(9A) Omitted by the Finance Act, 2003, w.e.f. 1-4-2004.

Explanation 1.— Omitted by the Finance Act, 2003, w.e.f. 1-4-2004.

Explanation 2.— For the purposes of this section,—(i) “computer software” means—

(a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or

(b) any customized electronic data or any product or service of similar nature, as may be notified by the Board, which is transmitted or exported from India to any place outside India by any means;

(ii) “convertible foreign exchange” means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 (42 of 1999), and any rules made thereunder or any other corresponding law for the time being in force;

(iii) “electronic hardware technology park” means any park set up in accordance with the Electronic Hardware Technology Park (EHTP) Scheme notified by the Government of India in the Ministry of Commerce and Industry;

(iv) “export turnover” means the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into, India by the assessee in convertible foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India;

(v) “free trade zone” means the Kandla Free Trade Zone and the Santacruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette, specify for the purposes of this section;

(vi) “relevant assessment year” means any assessment year falling within a period of ten consecutive assessment years referred to in this section;

(vii) “software technology park” means any park set up in accordance with the Software Technology Park Scheme notified by the Government of India in the Ministry of Commerce and Industry;

(viii) “special economic zone” means a zone which the Central Government may, by notification in the Official Gazette, specify as a special economic zone for the purposes of this section.

Explanation 3.— For the removal of doubts, it is hereby declared that the profits and gains derived from on site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.

Explanation 4.—For the purposes of this section, “manufacture or produce” shall include the cutting and polishing of precious and semi-precious stones.”

8) A perusal thereof reveals that it is a special provision in respect of newly established undertakings in free trade zone etc. Therefore, subject to the provisions of section 10A, 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. We are not as much concerned with the proviso and other sub-sections, save and except sub-section (6). The Tribunal has understood that this sub-section contains non obstante clause and therefore, notwithstanding anything contained in any other provision of the Act, in computing the total income of the Assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year relevant to any subsequent assessment year, as per clause (ii) thereof, no loss referred to in sub-

section (1) of section 72 or sub-section (1) or sub-section (3) of section 74 insofar 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. In clause (ii) w.e.f. 1st April, 2004, the words “ending before the 1st day of April, 2001” were inserted. It is this insertion which has enabled the Tribunal to hold that if the losses pertain to any subsequent assessment year, then, the understanding of the Revenue as reflected in the Circulars would bind it. That understanding apart, independently, the Tribunal has analysed this provision and found that by virtue of the non-obstante clause and by virtue of wording of sub clause (ii) that the Revenue could not have disallowed this claim of set off. We therefore do not find that in allowing the Appeal of the Assessee, the Tribunal has committed any error of law apparent on the face of the record or acted perversely. The Appeal therefore does not raise any substantial question of law.

9) Insofar as Income Tax Appeal No. 1376 of 2013 is concerned, that pertains to the assessment year 2004-05. The facts therein are identical. Save and except change in the figures, what we find is that the questions of law at page 5 in para 4(a) and (b) would stand answered in the light of our conclusions referred hereinabove.

10) Similarly, question No. 4(c) at page 6, there as well the same issue has been raised. The Tribunal has passed a common order. In relation to that, we find that in paras 2, 2.1 to 2.3, the rival contentions have been reproduced. From para 2.3 onwards, the findings recorded pertain to law laid down by the two Division Bench Judgments of this Court. In such circumstances and when nothing contrary to the said law and laid down in two Division Bench Judgments of this Court has been brought to our notice, then, even this Appeal must fail and for identical reasons. Thus, both the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would not order as to costs.

(A.K.MENON, J.)

(S.C.DHARMADHIKARI, J.)