

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 11.01.2019

Order Reserved on: 02.11.2018	Order delivered on: 11.01.2019
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CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal Nos.1456 & 1169 of 2008

M/s.Intimate Fashions(Inida) P.Ltd.,
Thiruporur Kottamedu High Road,
Nandhivaram Village,
Guduvancherry,
Chennai - 603 202.

...Appellant in both the appeals

-VS-

The Assistant Commissioner of Income Tax,
Company Circle II(3),
Chennai - 600 034.

...Respondent in both the appeals

COMMON PRAYER: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 (for brevity 'the Act') against the orders of the Income Tax Appellate Tribunal Chennai 'A' Bench, dated 27.11.2007 & 11.01.2008 in ITA No.2097 & 2070/Mds/2006, for the Assessment year 2003-04 respectively.

For Appellant : Mr.N.V.Balaji
(in both the appeals)

For Respondent : Mr.Karthick Ranganathan
Standing Counsel
(in both the appeals)

COMMON JUDGMENT

(Judgment was delivered by T.S.Sivagnanam, J.)

These Tax Case Appeals by the assessee are filed under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") against the orders of the Income Tax Appellate Tribunal Chennai 'A' Bench (hereinafter referred to as "the Tribunal") dated 27.11.2007 & 11.01.2008 in ITA No.2097 & 2070/Mds/2006, for the Assessment year 2003-04.

2.Heard Mr.N.V.Balaji, learned Counsel for the appellant and Mr.Karthick Ranganathan, learned Standing Counsel for the respondent.

3.Tax Case Appeal No.1456 of 2008 has been admitted on 09.09.2008 on the following Substantial Question of Law:

"Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that Section 10B(6) was attracted and

deduction under Section 10B was to be computed without setting off of any carried forward losses and unabsorbed depreciation of the earlier assessment years?"

4. Tax Case Appeal No.1169 of 2008 has been admitted on 18.08.2008, on the following Substantial Question of Law:

"Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that Section 10B(6) was attracted and deduction under Section 10B was to be computed without setting off of any carried forward losses and unabsorbed depreciation relating to the assessment year 2000-01?"

5. The assessee is a 100% export oriented unit claimed exemption under Section 10B of the Act from the assessment year 2000-01 onwards and upto assessment year 2009-10. For the assessment year 2003-04, the Assessing Officer determined the assessee taxable income at Rs.2,59,10,962/- and while doing so computed deduction under Section 10B without setting off the carried forward losses of the earlier years and unabsorbed depreciation relating to the assessment years 2000-01 and 2001-02.

6. Aggrieved by the same, the assessee preferred appeals before the Commissioner of Income Tax (Appeals) III (CIT(A)) contending that Section 10B

of the Act is not a self-contained provision and an assessee will have to compute income as per the normal provisions of the Act and then, the resultant income is eligible for exemption under Section 10B of the Act. In other words, it was contended that an assessee is eligible for carry forward and set off of losses within the ten year period. However, in view of the restriction given under Section 10B(6) of the Act, the losses of the assessee incurred during the ten year period cannot be carried forward beyond the ten year period. Hence, the exemption under Section 10B of the Act would be operative only when there is a resultant income after set off of the carried forward losses. The assessee furnished the following table and contended that after the carry forward losses are considered, the resultant income after set off would be NIL.

Asst. Year	Depreciation loss	Business loss	Total	Position of asst.
2001-02	52463487	-	52463487	
2000-01	67694487	26003471	93697830	Order passed u/s. 143(1) dt. 11.3.2002

7.The CIT(A) held that in terms of Section 10B(6) of the Act, any depreciation or business loss pertaining to the assessment years ending on 01.04.2001 cannot be allowed to be carried forward and set off in any subsequent assessment years. Further it is pointed out that as per Clause (i)

and (ii) of sub-section (6) of Section 10B, the depreciation allowance and business losses of earlier years are deemed to have been given full effect in the relevant assessment years up to the assessment year ending 1st April 2001. Accordingly, the CIT(A) by order dated 21.07.2006 directed the Assessing Officer to allow the set off to the assessee with respect to the unabsorbed depreciation pertaining to the assessment year 2001-02 against the income of the current year after due verification of assessment records as to how much is the actual carry forward depreciation as finally ascertained as on today for assessment year 2001-02.

8. Before we proceed to decide the controversy, we need to point out that the learned counsels on either side made elaborate submissions about the scheme of the Act with particular reference to the scheme under Section 10B of the Act. It needs to be mentioned that the contentions advanced before us were never advanced either before the Assessing Officer or before the CIT(A) or before the Tribunal, that too, in the particular form as presented before us. We pointed out to the learned counsels that we are required to test the correctness of the order passed by the Tribunal and proceed to decide the substantial question of law, but we are now being called upon to test the correctness of the order passed by the Tribunal based on arguments both factually and legally which were never canvassed before the Tribunal.

Nevertheless, this Court exercising the power under Section 260A of the Act is entitled to decide the substantial question of law raised and also entitled to frame additional substantial questions of law for consideration and to be answered. Once the legal position is pointed out, it would be well open to the Court to remand the matter to the Assessing Officer to apply the legal position to the facts on hand and complete the assessment. The Tribunal while allowing the revenue's appeal held that Section 10B(6) of the Act begins with a non-obstante clause and it overrides the other provisions of the Act. It was pointed out that the expression "relevant assessment year" according to Clause (ii) of the Explanation means any assessment year falling within a period of ten consecutive assessment years referred to in the section. It held that where an assessee avails the benefit of Section 10B for ten consecutive assessment years, namely, 2000-01 to 2009-10, the overriding provision of Section 10B(6) of the Act comes into operation for the assessment year 2010-11 and any subsequent assessment year. It further held that entitlement of tax holiday for a period of ten years is visited with a bar on availment of other provisions of the Act, consequently, after the expiry of the tax holiday period in the assessment year of non-tax holiday, it will be presumed that full effect was given during the tax holiday period in respect of depreciation allowance, etc. Thus, the Tribunal held that the unabsorbed business loss, etc. relating to the tax holiday period will not be taken after that period and similarly, the

unabsorbed business losses, etc. relating to the tax holiday profits of the tax holiday period cannot be carried forward and set off. Thus, it held that the deduction under Section 10B is to be computed without set off any carried forward losses of earlier assessment years and accordingly decided the appeal in favour of the revenue and against the assessee.

9. The learned counsel for the assessee relied on the decision of the Hon'ble Division Bench of the High Court of Kerala in the case of ***Commission of Income Tax, Cochin vs. Patspin India Ltd.*** reported in ***(2011) 15 taxmann.com 122 (Kerala)***. The question which fell for consideration before the Hon'ble Division Bench was that whether the deduction admissible under Section 10B(4) of the Act on the export profit earned by 100% export oriented industrial units has to be determined based on "business income" computed under Sections 30 to 43D of the Act including setting off of carried forward unabsorbed depreciation under Section 32(2) or whether the eligible deduction is to be computed without setting off carried forward unabsorbed depreciation. Before the Division Bench, the revenue pointed out that the said issue stands decided by the decision of the High Court of Karnataka in the case of ***Commissioner of Income Tax vs. Himatasingike Seide Ltd. [(2006) 286 ITR 255]***. However, the learned counsel for the revenue pointed out that a Special Leave Petition has been filed against the said decision and the Hon'ble

Supreme Court has granted leave against the said judgment. Therefore, the Court proceeded to consider the issue on merits. After referring to Section 10B and the relevant sub-sections, it was held that Section 10B(6) of the Act does not deal with computation of business profit during the period the assessee enjoys exemption under Section 10B(4) of the Act. It was pointed out that this sub-section is only an embargo against the assessee claiming any carried forward benefit under the sections referred to in the assessment for the assessment year following the end of tax holiday enjoyed by the assessee under Section 10B(4) of the Act. It thus held that contrary to the finding of the Tribunal in the said case, sub-section (6) only supports the revenue's case that carried forward depreciation should be set off in the computation of business profit even during the period the assessee enjoys exemption under Section 10B(4) of the Act. Accordingly, the appeal was allowed reversing the order of the Tribunal by restoring the orders of the Commissioner of Income Tax under Section 263 of the Act for the first four years and by upholding the order of the CIT(A) for the assessment year 2005-06 [The CIT(A) in the said case issued notice under Section 263 of the Act and ordered revision of assessment for the first four years, 2001-02 to 2004-05 holding that deduction under Section 10B(4) of the Act on the export profit of both 100% EOUs have to be computed after setting off carried forward unabsorbed depreciation as provided under Section 32(2) of the Act].

10. On the other hand, the learned counsel for the revenue referred to another decision of the Division Bench of High Court of Kerala in the case of *Akay Flavours & Aromatics (P.) Ltd. vs. Deputy Commissioner of Income Tax* reported in **(2012) 20 taxmann.com 384 (Kerala)**. To be noted that the decision in the case of *Akay Flavours & Aromatics (P.) Ltd.* was not brought to the notice of the Division Bench in the case of *Patspin India Ltd.* In the case of *Akay Flavours & Aromatics (P.) Ltd.*, the question which fell for consideration was whether the Tribunal was justified in holding that the assessee is not entitled to carry forward depreciation loss from 2002-03 to 2003-04, the years of assessment under appeal. In the said case, the Assessing Officer while completing the assessment for the assessment year 2002-03 made an observation that unabsorbed depreciation is not available for carry forward or set off in the succeeding year which is the assessment under appeal before the Court. This disallowance was confirmed by the Tribunal under Section 10B(6) of the Act. The Court agreed with the submission of the revenue and if any unabsorbed depreciation is carried forward for the assessment year 2001-02, then such carry forward unabsorbed depreciation cannot be added to the current depreciation of that year because until 2001 there is complete exclusion of the income from EOU. Accordingly, the Assessing Officer was directed to re-compute the eligible depreciation and carry over unabsorbed

depreciation and business loss from 2001-02 onwards based on amendment. The learned counsel for the assessee had referred to the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax vs. Manmohan Das*** reported in ***[1966] 59 ITR 699 (SC)***, wherein it was held that eligibility for carry forward of unabsorbed depreciation is to be considered in the succeeding year. The Court directed the Assessing Officer to follow the decision of the Hon'ble Supreme Court on this issue.

11. Learned counsel for the revenue relied on the recent decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax and others vs. Yokogawa India Ltd. in C.A.Nos.8498 of 2013 and batch dated 16.12.2016***. The principal issue which came for determination of the Court was the true and correct meaning and effect of the provisions of Section 10A of the Act. The Hon'ble Supreme Court prefaced its judgment by stating that the decision of the Court with regard to the provisions of Section 10A of the Act would equally be applicable to cases governed by provisions of Section 10B of the Act in view of the said later provision being *pari materia* with Section 10A of the Act though governing a different situation. Two of the questions which were decided by the Hon'ble Supreme Court would be of relevance for us in these appeals which are as follows:

"3(iv) Whether losses of other 10A Units or non 10A Units can be set off against the profits of 10A Units before deductions under Section 10A are effected?

(v) Whether brought forward business losses and unabsorbed depreciation of 10A Units or non 10A Units can be set off against the profits of another 10A Units of the assessee?"

12. The Hon'ble Supreme Court pointed out the cardinal principles of interpretation of taxation statute and by relying to the decision in the case of ***Cape Brandy Syndicate vs. Inland Revenue Commissioner [(1921) 1 KB 64]***, it was pointed out that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. While answering the above questions, it was held that sub-section (4) of Section 10A which provides for prorata exemption, necessarily involving deduction of the profits arising out of domestic sales, is one instance of deduction provided by the amendment. The provisions of sub-section (6) of Section 10A as amended by

Finance Act of 2003, granting the benefit of adjustment of losses and unabsorbed depreciation etc. commencing from the year 2001-02 on a completion of the period of tax holiday also virtually works as a deduction which has to be worked out at a future point of time, namely, after the expiry of period of tax holiday. It was further held that the absence of any reference to deduction under Section 10A in Chapter VI of the Act can be understood by acknowledging that any such reference or mention would have been a repetition of what has already been provided in Section 10A. Further, it was pointed out that a very reading of the relevant provisions of Section 10A of the Act, it is more than clear that the deductions contemplated therein is qua the eligible or non-eligible units or undertakings of the assessee. Further, it was pointed out that if the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A(1A) and 10A(4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous circular of the department (No.794 dated 09.08.2000) understood the situation. Therefore, it is only logical and natural that the stage of deduction of profits and gains of the business of an eligible undertaking has to be made independently and therefore immediately after the stage of determination of its profits and gains. It was further pointed out that at that stage the aggregate of income under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of

the Act would be premature for application. Thus, it held that the deductions under Section 10A would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. For the above reasons, it was held that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI of the Act.

13. As pointed out by us earlier, the arguments advanced by the learned counsels for the parties was not the arguments which were put forth before the Tribunal. That apart, the decision of the Tribunal was rendered in the year 2007 and the law on the issue has been interpreted by the Appellate Courts and some of the decisions have been referred supra. All the decisions which were referred by us, the latest being the decision of the Apex Court in the case of *Yokogawa India Ltd* (supra). In our considered view, the issue requires to be decided afresh, more particularly, in the light of the law laid down by the Hon'ble Supreme Court as to its applicability to the case on hand. Thus, we are of the view that the matter requires to be remanded to the Assessing Officer for fresh consideration,

14. Accordingly, the tax case appeals filed by the assessee are allowed and the orders passed by the Tribunal and CIT(A) are set aside and the matter is remanded to the Assessing Officer to take a fresh decision after opportunity to the assessee and the revenue, consider the decisions placed before it and proceed to decide in accordance with law. No costs.

(T.S.S., J.) (V.B.S., J.)
11.01.2019

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Index: Yes/No
Internet: Yes/No
Speaking Order/Non-speaking Order

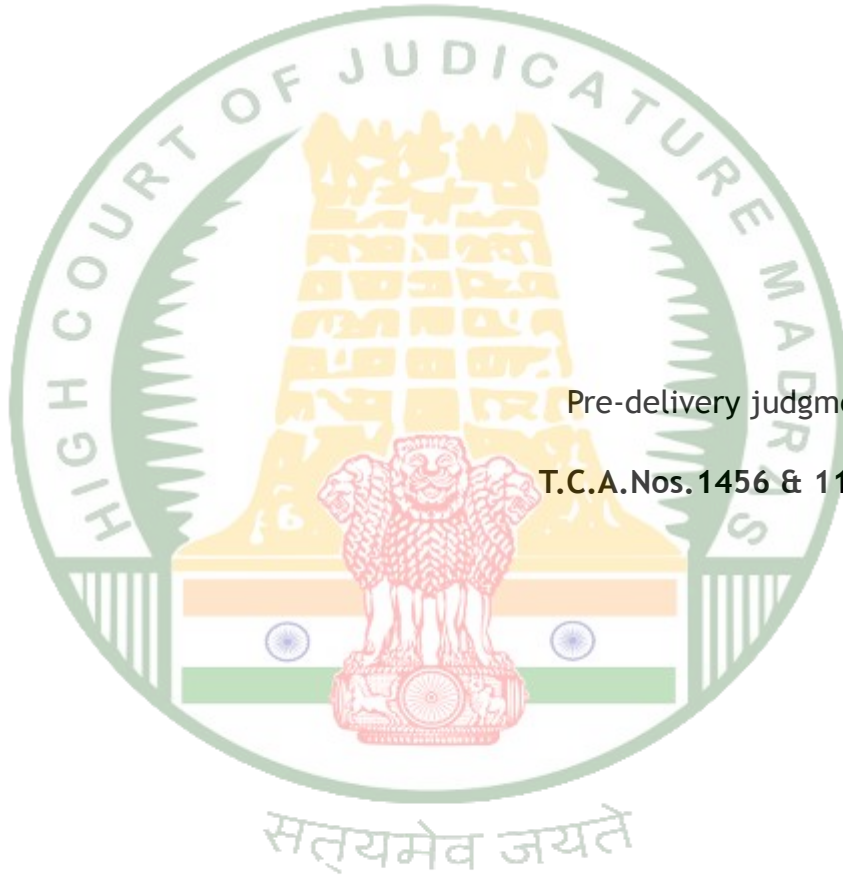
To

1. The Assistant Commissioner of Income Tax,
Company Circle II(3),
Chennai - 600 034.
2. The Income-tax Appellate Tribunal, "A" Bench, Chennai.

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T.S.SIVAGNANAM, J.
AND
V.BHAVANI SUBBAROYAN, J.

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Pre-delivery judgment made in

T.C.A.Nos.1456 & 1169 of 2008

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