
(2011) 12 KAR CK 0222
In the Karnataka High Court
Case No : ITA No. 431 C/W 430 of 2010

CIT and Others

APPELLANT

Vs

Tyco Electronics Tools India (P) Ltd.

RESPONDENT

Date of Decision : 12-12-2011

Acts Referred:

Income Tax Act, 1961 — Section 10 A, 10 A (6), 115 JB, 143 (1), 148

Citation : (2012) 205 TAXMAN 403

Hon'ble Judges : V. G. Sabhahit, J;S. N. Satyanarayana, J

Bench : Division Bench

Advocate : K.V. Aravind, for the Appellant; K.P. Kumar, for the Respondent

Judgement

Sabhahit, J.—These appeals are filed by the revenue being aggrieved by the common order passed by the Income Tax Appellate Tribunal, Bangalore Bench, in ITA Nos. 495 and 494 of 2007 dated 26-4-2010, wherein the order passed by the Commissioner of Income Tax in exercise of power u/s 263 of the income tax Act has been set aside and the appeals filed by the assessee have been allowed. The material facts of the case leading up to this appeal are as follows:

1.1 The assessing officer, by order dated 3-3-2005, processed the return filed by the respondent for the assessment year 2002-03, which was filed on 31-10-2002 declaring total income as nil after claiming exemption u/s 10A and set off of unabsorbed depreciation carried forward from assessment years 1993-1994 and 1994-95 and a book profit of Rs. 77,34,727 u/s 115JB of the Income Tax Act, 1961 (hereinafter referred to as the Act). The return was processed u/s 143(1) of the Act on 28-2-2003 and it was found that the assessee had treated income as business income and had claimed exemption u/s 10A of the Act and set off of unabsorbed depreciation against the same pertaining to assessment year 1993-94 and 1994-95. Notice u/s 148 of the Act was issued on 31-7-2003. In response to the said notice, the assessee filed a return of income on 29-8-2003. The assessing officer, after hearing the representative of the assessee, by order dated 3-3-2005, overruled the objections of the assessee and held that the

assessee is not entitled for carry forward and set off of unabsorbed depreciation for the assessment years 1993-94 and 1994-95 against the income determined for the assessment year 2001-02. Being aggrieved by the said order of the assessing officer, the assessee preferred appeal before the Commissioner (Appeals)-IV Kochi.

1.2 The appellate authority, by order dated 28-11-2005, allowed the appeal, in part and held that the assessee was entitled for carry forward and set off of unabsorbed depreciation for the assessment years 1993-94 and 1994-95 against the income determined for the assessment year 2001-02. Thereafter, an order of assessment was passed on 11-1-2006 giving effect to the order passed by the appellate authority.

1.3 The Commissioner of Income Tax in exercise of power u/s 263 of the Act, while reviewing the order passed by the assessing officer dt. 11-1-2006, issued notice to the assessee and held that the assessing officer while completing the assessment on 3-3-2005, did not allow the set off of unabsorbed depreciation relating to assessment years 1993-94 to 1994-95 against the business income of the assessment year 2002-03 by invoking the provisions of section 10A(6) of the Act. The relevant assessment year for the purpose of section 10A(6) of the Act is not the present assessment year 2002-03, but the assessment year 2003-04 i.e., the assessment year which immediately follows the block of ten assessment years from assessment years 1993-94 to 2002-03. Therefore, the action of the assessing officer in not setting off of carried forward unabsorbed depreciation, before allowing exemption u/s 10A of the Act was erroneous and contrary to the provisions of law and in the assessment year 2002-03, there remained unabsorbed depreciation to that extent, available to the assessee for claiming set off against the income of the assessment year 2003-04, causing loss of revenue in the assessment year 2003-04. Accordingly, the revisional authority held that both the orders of the assessing officer i.e., assessment order dt. 3-3-2005 and the order dated 11-1-2006 giving effect to the order of the appellate authority were erroneous as well as prejudicial to the interest of the revenue and set aside the said orders of the assessing officer and directed the assessing officer to redo the same setting off the unabsorbed depreciation before allowing exemption u/s 10A of the Act. Being aggrieved by the said order of the revisional authority dt. 26-3-2007, the assessee preferred appeal before the Income Tax Appellate Tribunal, Bangalore Bench, in ITA Nos. 494, 495 and 701/Coch/2007.

1.4 The Tribunal, by order dt. 26-4-2010, allowed the appeals filed by the assessee in respect of the assessment years 2001-02 and 2002-03 and dismissed the appeal for the assessment year 2003-04. Being aggrieved by the said order of the Tribunal allowing the appeals in respect of the assessment years 2001-02 and 2002-03, these two appeals are filed by the revenue.

2. We have heard the learned counsel appearing for the appellants and the learned senior counsel appearing for the respondent.

3. The learned counsel appearing for the appellants submitted that the order passed by the revisional authority was justified as the subject matter of revision was not pending in appeal and the Tribunal was not justified in holding that the issue regarding set off of unabsorbed depreciation, which was decided by the revisional authority was neither decided nor adjudicated by the appellate authority in appeals and the impugned order passed by the Tribunal is liable to be set aside.

4. The learned senior counsel appearing for the respondent submitted that the only question of law that arises for consideration in these appeals is as to whether the profit for the purpose of deduction u/s 10A of the Act should be allowed before or after deduction for set off of unabsorbed loss and depreciation. The learned senior counsel submitted that the said question of law has already been answered against the revenue and in favour of the assessee by this Court in ITA No. 78/2011 and connected cases disposed of on 9-8-2011.

5. We have given careful consideration to the contentions of the learned counsel appearing for the parties and scrutinized the material on record. The material on record would clearly show that the only question of law that would arise for consideration between the parties to this appeal is as to whether the profit for the purpose of deduction u/s 10A of the Act should be allowed without setting off of unabsorbed loss and depreciation or including the same. The fact that the said question has already been answered by this Court in favour of the assessee and against the revenue in ITA No. 78/2011 and connected cases disposed of on 9-8-2011 is not in dispute. In the said appeals, the following substantial questions of law were framed:

(i) Whether the Appellate Authorities failed to take into consideration that the amendment to section 10A by Finance Act of 2000 with effect from 1-4-2011, the deduction of profits and gains as earned by an undertaking from the export of articles or things or computer software is required to be allowed from the total income of the assessee and consequently the loss from the non-STP Unit is required to be set off against the income of the other STP Unit before allowing deduction u/s 10A of the Amended Act."

(ii) "Whether the Tribunal was correct in holding that the deduction u/s 10A or 10B of the Act during the current assessment year has to be allowed without setting off brought forward unabsorbed losses and the depreciation from earlier assessment year or current assessment year either in the case of non-STP units or in the case of the very same undertaking?"

In the said ITA No. 78/2011, this Court has held as follows:

31. As the income of 10A unit has to be excluded at source itself before arriving at the gross total income, the loss of non 10A unit cannot be set off against the income of 10A unit u/s 72. The loss incurred by the assessee under the head profits and gains of business or profession has to be set off against the profits and gains if any, of any business or profession carried on by such assessee.

Therefore, as the profits and gains u/s 10A is not be included in the income of the assessee at all, the question of setting off the loss of the assessee of any profits and gains of business against such profits and gains of the undertaking would of arise. Similarly, as per section 72(2), unabsorbed business loss is to be first set off and thereafter unabsorbed depreciation treated as current years depreciation u/s 32(2) is to be set off. As deduction u/s 10-A has to be excluded from the total income of the assessee, the question of unabsorbed business loss being set off against such profit and gains of the undertaking would not arise. In that view of the matter, the approach of the assessing authority was quite contrary to the aforesaid statutory provisions and the appellate Commissioner as well as the Tribunal were fully justified in setting aside the said assessment order and granting the benefit of section 10-A to the assessee. Hence, the main substantial question of law is answered in favour of the assessee and against the revenue.

Therefore, following the reasons assigned in the said judgment of this Court passed in ITA No. 78/2011 and connected cases, the substantial question of law that has arisen for determination in these appeals is answered in favour of the respondent " assessee and against the revenue. We hold that no other substantial question of law arises for determination in these appeals between the parties. Since we are following the reasons assigned in ITA No. 78/2011 and connected cases, we refrain to express any opinion about the jurisdiction of the revisional authority and the observations made by the Income Tax Appellate Tribunal in that behalf as the question of law that arises for determination in these appeals is already answered against the revenue. Accordingly, we hold that the appeals are devoid of merit and pass the following order:

ITA Nos. 431 and 430 of 2010 are dismissed.