(2014) 12 BOM CK 0190

In the Bombay High Court

Case No : Income Tax Appeal No. 1534 of 2012

Commissioner of Income Tax-IV APPELLANT

Vs

Symantee Software India (P) Ltd. RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:
Income Tax Act, 1961 — Section 10A, 10B, 139, 288, 32
Special Economic Zones Act, 2005 — Section 2

Citation : (2014) 12 BOM CK 0190

Hon'ble Judges : S.C. Dharmadhikari, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Tejveer Singh, Advocates for the Appellant; Porus Kaka, Sr. Counsel and Manish Kanth, Advocates for the Respondent

Judgement

1. This Appeal by the Revenue challenges the order passed by the Income Tax Appellate Tribunal, Pune Bench in Income Tax Appeal No. 787/PN/2009 and 805/PN/2009 dated 30 November 2011 for the Assessment Year 2004-05.

2. The four questions of law formulated in this Appeal Paper Book at pages 4 & 5 are termed by Mr. Tejveer Singh as substantial questions of law.

3. Mr. Tejveer Singh submits that the Assessee is a company incorporated and registered under the Indian Companies Act, 1956 and engaged in Software Development Services. It filed a return of income for the previous year relevant to the Assessment Year 2004-05 on 27 May 2005 declaring the loss of Rs. 1,78,08,670/-. While passing the assessment order, the Assessing Officer questioned the separate existence of Unit-B of the company and concluded that it is a mere expansion of Unit-A and accordingly not eligible for deduction under section 10A of the Income Tax Act, 1961 (IT Act for short). He further held that loss of Unit-B should be set off against profit of Unit-A, before claiming deduction under section 10A of the Act.

4. The Assessing officer also held that while working out eligible profit under

section 10A, the Assessee ought to have reduced income like interest, profit on sale of assets, sales tax return/refund, liabilities no longer required and written back so also the office expenses for telecommunication charges and expenses incurred in foreign currency as well are liable to be excluded from the figures of export turnover. Proceeding, thus, he passed an Assessment Order on 28 December 2007.

5. Aggrieved by this order that Appeal was filed by the Assessee before the Commissioner of Income Tax (Appeals). The Commissioner allowed the Appeal on one point/question namely Unit-B is a new and separate undertaking and in that regard he reversed the finding and conclusion of the Assessing officer. However, he maintained the order of the Assessing Officer in setting off the loss of Unit-B against the profit of Unit-A before claiming deduction under section 10A. The second question was whether the Assessing Officer was right in reducing from the eligible profit u/s. 10A the profit of sale of assets, sales tax refund and liabilities no longer required written back from the eligible profit under section 10A. The Commissioner after noting the rival contentions, concluded, thus, in para 7.4:

7.4 The submission has been considered and is found to have merit. It is seen from the assessment order that in excluding income of Rs. 92,33,705/- from the profits derived from export activities, the Assessing Officer has relied upon the judgment in the case of Commissioner of Income Tax, Karnataka Vs. Sterling Foods, Mangalore, wherein, while interpreting the words ''derived from'' used in section 80HH, Hon''ble Apex Court has held that there must be, for the application of the words ''derived from'', a direct nexus between the profits and gains and the industrial undertaking. However, while applying the ratio of the decision mentioned supra, the distinction between the provisions of section 80HH and section 10A cannot be lost sight of. While the provisions of section 80HH leave margin for interpretation of the phase ''profits and gains derived from an industrial undertaking'' for want of any definition in section 80HH, section 10A categorically clarifies that the profits derived from export of 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 computer software bears to the total turnover of the business carried out by the assessee. The statutory formula prescribed in section 10A, rules out the applicability of the ration of the judgment of Hon''ble Supreme Court in the case of CIT vs. Sterling Food Ltd., given in the context of section 80HH. The Assessing Officer is, therefore, directed not to exclude the amounts of profit on sale of assets, sales tax refund and liabilities written back from the profits derived from export activities while computing deduction u/s. 10A. This ground of Appeal succeeds.

6. Mr. Tejveer Singh, therefore, submits that the Tribunal while maintaining this conclusion of the Commissioner of Income Tax (Appeals) has overlooked the provisions in question namely section 10A and section 80HHC. The Tribunal has

relied on its own order and passed by a co-ordinate Bench. Therefore, atleast these two questions be entertained as substantial question of law.

7. In relation to both questions, Mr. Kaka, learned Senior Counsel appearing on behalf of the Assessee would submit that the finding of fact is that Unit-B is not an expansion but a new Unit. A report was submitted by the Assessing Officer and which has been relied upon by the Commissioner. That was based on physical inspection of the business and the premises, therefore a pure finding of fact is rendered in relation to Unit-B, its location and its existence.

8. With regard to other questions, Mr. Kaka would submit that section 10A is a provision which enables the Revenue to give certain benefits and with a view to establish undertakings in free trade zone. He relies upon sub-section 1 and sub-section 4 of this provision to submit that the difference in the language of this provision and section 80HH has been noted by both the Commissioner and the Tribunal. There is no dispute that proceeds and gain are derived by the Assessee-undertaking from export and for a period of 10 consecutive assessment years. If it has exported computer software, then, the provisions enable the Assessee to claim a deduction in terms of sub-section 1 and its computation has been also indicated in sub-section 4 of the very provision. So long as on facts, the ingredients of these two provisions namely subsection 1 and sub-section 4 are satisfied by the Assessee, then, any larger controversy does not arise for determination by this Court. It is not the case of the Revenue that the finding of fact rendered by the Commissioner is that in computing the income not derived from the export activities be reduced. The reduced income has been included in the computation because of the co-relation established by the Assessee. In such circumstances, this Appeal does not raise any substantial question of law and it deserves to be dismissed.

9. Four questions, which are termed as substantial questions of law, read as under:

4(A) Whether on the facts and in the circumstances of the case, the Tribunal was right in upholding the assessee''s claim for treating Unit-B as a separate and independent unit for the purpose of claiming deduction u/s. 10A of the I.T. Act? (B) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that incomes by way of sales tax refund, liabilities no longer required written back and profit on sale of assets are eligible incomes for computing deduction u/s. 10A for Unit-A? (C) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the Assessing Officer was not justified in rejecting assessee''s claim of computing deduction u/s. 10A of the I.T. Act, for the profits of Unit-A without deducting loss pertaining to Unit and directing the Assessing Officer to re-compute the deduction pertaining to Unit-A accordingly?

(D) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that expenses for telecommunication charges and expenses incurred in foreign currency are liable to be excluded from the figures of "Export Turnover" as well as corresponding reduction in "Total turnover" also for the purpose of computing deduction u/s. 10A?

10. In relation to question No. 4A, what the Tribunal holds is that the Departmental Representative urged that the Assessing Officer was justified in holding that Unit-B could not be treated as independent Unit for the purpose of claim of deduction under section 10A of the IT Act. The finding of fact rendered by the Assessing Officer has been erroneously reversed by the First Appellate Authority. The intention of the Assessee was to claim Unit-B as a separate Unit. That is to enable it to extend the tax holiday of 10 years enjoyed by Unit-A and particularly when it was coming to an end in the assessment year 2005-06. The Assessee supported the finding of the Commissioner. In para 9, the Tribunal extensively refers to the documents placed on record. The nature of the business activities, location, lease agreement, layout plans and photographs of the premises Unit-B, which are all forming part of the order of the Commissioner and the remand report of the Assessing Officer have been extensively referred to. The Tribunal concludes that all this material shows that Unit-B is a separate or an independent Unit. That it is housed in different premises. No contrary material was brought on record by the Departmental Representative or the Revenue before the Tribunal. The Tribunal has also affirmed a finding of fact of the Commissioner by concluding that merely because a new permission is obtained in relation to this Unit, containing reference to the original licence, that is not conclusive to demonstrate that the new Unit is a separate or independent Unit. The Software Technology Park is the broad identity of the area, but the Unit-B is held not to be expansion of the existing Unit-A, rather it is a separate or an independent Unit. Such findings of fact to our mind do not raise any substantial question of law. The material on record was enough to conclude about the Unit-B being separate or independent.

11. In relation to questions 4B, 4C & 4D, what we must immediately indicate is that question 4C pertains to the conclusion of the Tribunal that deduction under section 10A for the profit of Unit-A have to be computed without deducting loss pertaining to Unit-B. The Tribunal in relation to that question has in paras 19 onwards referred to the fact that the Assessee-company showed loss of Rs. 1,78,08,674/- in Unit-B, whereas profit of Rs. 13,15,75,991/- in Unit-A was shown. The Assessee claimed deduction under section 10A of the Act in respect of this net profit pertaining to Unit-A alone and loss of Unit-B was carried forward by the Assessee. The Tribunal concluded that being a separate Unit, the view taken by the Assessing Officer requires a proper scrutiny. That scrutiny has been undertaken by the Tribunal and it was not impressed by the Commissioner''s order upholding that part of the Assessing Office''s order. It considered the rival contentions and concluded in para 24, that there is a judgment rendered by it in somewhat identical circumstances in the case of Commissioner of Income Tax, Karnataka Vs. Sterling Foods, Mangalore, . After referring to that judgment, the Tribunal concludes that the Assessing Officer was not justified in rejecting the

Assessee''s claim of computing deduction under section 10A of the Act for profit of Unit-A without deducting loss pertaining to Unit-B.

12. In Addition, Mr. Tejveer Singh has fairly conceded that after the Tribunal''s order this Court had a occasion to consider somewhat identical controversy in a decision in the case of The Commissioner of Income Tax-10 Vs. Black and Veatch Consulting Pvt. Ltd., Mr. Tejveer Singh fairly concedes that question 4C will, therefore, have to be answered against the Revenue. In so far as deduction or reduction from export turnover, the telecommunication charges and expenses incurred in foreign currency (Question D), the Revenue concedes before us that the judgment of this Court in the case of The Commissioner of Income Tax Vs. Gem Plus Jewellery India Ltd., concludes the issue against it.

13. Therefore, we need not make any further or independent observation. Following this judgment and accepting above concessions of Mr. Tejveer Singh, we hold that this Appeal does not raise any substantial question of law in relation to questions 4C & 4D.

14. Remaining question is question 4B. In relation to that question what the Tribunal has observed is that the manner of computing deduction under section 10A of the Act, according to the Revenue, enables it to compute the deduction and in the manner that while working out eligible profits under section 10A, the Assessee was required to exclude a sum of Rs. 21,13,822/- being the sales tax refund, a sum of Rs. 12,79,558/- being the liabilities no longer required and written back and Rs. 74,104/- being the profit on sale of assets. The Commissioner negated this stand of the Revenue and reversed the order of the Assessing Officer. However, the Departmental Representative''s argument before the Tribunal is that aforementioned amounts or incomes do not meet the test of having been "derived by an undertaking from the export of articles" as contained in section 10A of the Act.

15. The Assessee relied upon the Tribunal''s order in the case of Livingstones Jewellery Pvt. Ltd. v/s. DCIT, and following that the Commissioner''s order was upheld by the Tribunal in this case.

16. Mr. Tejveer Singh has attempted to support the finding of the Assessing Officer by urging that section 10A and section 80HH have to be seen and read together for the purposes of computation of deduction. He took us through section 10A and section 80HH to support his above argument.

17. Two provisions read as under:

[Special provision in respect of newly established undertakings in free trade zone, etc. 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 subsection 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 subsection 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 subsection 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 subsection (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 Reinvestment Allowance Reserve Account") to be created and utilised for the purposes of the business of the assessee in the manner laid down in subsection (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 subsection (1) of section 139.] (1B) The deduction under clause (ii) of subsection (1A) shall be allowed only if the following conditions are fulfilled, namely:-

(a) the amount credited to the Special Economic Zone Reinvestment 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 Reinvestment Allowance Reserve Account under clause (ii) of subsection (1A),-(a) has been utilised for any purpose other than those referred to in subsection (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 subsection (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 subsection (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 reestablishment, 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 subsection (2) of section 80I shall apply for the purposes of clause (iii) of this subsection as they apply for the purposes of clause (ii) of that subsection.

(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 subsection, 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 subsection 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 [subsections (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 subsection (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 subsection (2) of section 32, clause (ii) of subsection (3) of section 32A, clause (ii) of subsection (2) of section 33, subsection (4) of section 35 or the second proviso to clause (ix) of subsection (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 subsection (1) of section 72 or subsection (1) or subsection (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 80I or section 80IA or section 80IB 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 subsection (8) and subsection (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 subsection (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. 142004.]

(9A) [Omitted by the Finance Act, 2003, w.e.f. 142004.] 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 subsection (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 semiprecious stones.]

Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas. 80HH.

(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty per cent thereof.

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

(i) it has begun or begins to manufacture or produce articles after the 31st day of December, 1970 [but before the 1st day of April, 1990], in any backward area;

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

Provided that this condition shall not apply in respect of any industrial undertaking which is formed as a result of the reestablishment, reconstruction or revival by the assessee of the business of any such industrial undertaking 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 in any backward area;(iv) it employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power.

Explanation.-Where any machinery or plant or any part thereof previously used for any purpose in any backward area is transferred to a new business in that area or in any other backward area and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (iii) of this subsection, the condition specified therein shall be deemed to have been fulfilled.

(3) This section applies to the business of any hotel, where all the following conditions are fulfilled, namely :-

(i) the business of the hotel has started or starts functioning after the 31st day of December, 1970 [but before the 1st day of April, 1990], in any backward area;

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

(iii) the hotel is for the time being approved for the purposes of this subsection by the Central Government.

(4) The deduction specified in subsection (1) shall be allowed in computing the total income in respect of each of the ten assessment years beginning with the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or the business of the hotel starts functioning :

Provided that,-

(i) in the case of an industrial undertaking which has begun to manufacture or produce articles, and (ii) in the case of the business of a hotel which has started functioning, after the 31st day of December, 1970, but before the 1st day of April, 1973, this subsection shall have effect as if the reference to ten assessment years were a reference to ten assessment years as reduced by the number of assessment years which expired before the 1st day of April, 1974.

(5) Where the assessee is a person other than a company or a cooperative society, the deduction under subsection (1) shall not be admissible unless the accounts of the industrial undertaking or the business of the hotel for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant as defined in the Explanation below subsection (2) of section 288 and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

(6) Where any goods held for the purposes of the business of the industrial undertaking or the hotel are transferred to any other business carried on by the assessee, or where any goods held for the purposes of any other business carried on by the assessee are transferred to the business of the industrial undertaking or the hotel and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the business of the industrial undertaking or the hotel does not correspond to the market value of such goods as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of the industrial undertaking or the business of the hotel shall be computed as if the transfer, in either case, had been made at the market value of such goods as on that date : Provided that where, in the opinion of the [Assessing] Officer, the computation of the profits and gains of the industrial undertaking or the business of the hotel in the manner hereinbefore specified presents exceptional difficulties, the Assessing] Officer may compute such profits and gains on such reasonable basis as he may deem fit. Explanation.-In this subsection, "market value" in relation to any goods means the price that such goods would ordinarily fetch on sale in the open market.

(7) Where it appears to the [Assessing] Officer that, owing to the close

connection between the assessee carrying on the business of the industrial undertaking or the hotel to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in the business of the industrial undertaking or the hotel, the [Assessing] Officer shall, in computing the profits and gains of the industrial undertaking or the hotel for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom.

(8) [***]

(9) In a case where the assessee is entitled also to the deduction under [section 80I or] section 80J in relation to the profits and gains of an industrial undertaking or the business of a hotel to which this section applies, effect shall first be given to the provisions of this section. [(9A) Where a deduction in relation to the profits and gains of a small scale industrial undertaking to which section 80HHA applies is claimed and allowed under that section for any assessment year, deduction in relation to such profits and gains shall not be allowed under this section for the same or any other assessment year.]

(10) Nothing contained in this section shall apply in relation to any undertaking engaged in mining.

[(11) For the purposes of this section, "backward area" means such area as the Central Government may, having regard to the stage of development of that area, by notification in the Official Gazette, specify in this behalf :

Provided that any notification under this subsection may be issued so as to have retrospective effect to a date not earlier than the 1st day of April, 1983.]

18. Section 10A is setting out a special provision in respect of newly established undertakings in free trade zone. Sub-section 1 thereof states that subject to provisions of this section, a deduction of such profits and gain as are derived by an undertaking from 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 total income of the Assessee. Sub-section 4 thereof states that for the purpose of sub-section 1 and 1A the profits derived from the 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 out by the undertaking.

19. There is some substance in the contention of Mr. Kaka that if the deduction shall be allowed from the total income of the Assessee in the manner set out by section 10A and the computation is also provided in that provision itself namely

sub-section 4, then there is a complete Code which is evolved and formulated by the Legislature.

20. In relation to this, we also find support in the judgment of this Court in the case of Black and Veatch Consulting Pvt. Ltd. This Court has observed and held as under:

"Section 10A is a provision which is in the nature of a deduction and not an exemption. This was emphasised in a judgment of a Division Bench of this Court, while construing the provisions of Section 10B, in Hindustan Unilever Limited Vs. Deputy Commissioner of Income Tax and Union of India (UOI), . The submission of the Revenue placed its reliance on the literal reading of Section 10A under which 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 is to be allowed from the total income of the assessee. The deduction under Section 10A, in our view, has to be given effect to at the stage of computing the profits and gains of business. This is anterior to the application of the provisions of Section 72 which deals with the carry forward and set off of business losses. A distinction has been made by the Legislature while incorporating the provisions of Chapter VI-A. Section 80A(1) stipulates that in computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of the Chapter, the deductions specified in Sections 80C to 80U. Section 80B(5) defines for the purposes of Chapter VIA "gross total income" to mean the total income computed in accordance with the provisions of the Act, before making any deduction under the Chapter. What the Revenue in essence seeks to attain is to telescope the provisions of Chapter VI-A in the context of the deduction which is allowable under Section 10A, which would not be permissible unless a specific statutory provision to that effect were to be made. In the absence thereof, such an approach cannot be accepted. In the circumstances, the decision of the Tribunal would have to be affirmed since it is plain and evident that the deduction under Section 10A has to be given at the stage when the profits and gains of business are computed in the first instance".

21. Therefore, when this Court has held that Chapter VIA provides for deduction to be made in computing the total income and section 80HH deals with deduction in respect of profit and gains from the newly established undertaking or Hotel business in backward areas, then the attempt of the Revenue to telescope Chapter VIA in the context of the deduction, which is permissible under section 10A falling in Chapter III, cannot be countenance.

22. It is essentially this approach which enables the Tribunal to conclude and consequently uphold the exercise of the Commissioner. The Commissioner has in relation to this question held that the Revenue is seeking to deny deduction by making computation contrary to section 10A itself. That is how he proceeds in para 7.4 of his order. He proceeds to hold that in excluding income of Rs. 92,33,705/- from the profits derived from export activities, the Assessing Officer

has relied upon the judgment in the case of Commissioner of Income Tax, Karnataka Vs. Sterling Foods, Mangalore, rendered by the Hon''ble Supreme Court, but that is interpreting section 80HH. The Commissioner held that while applying ratio of this decision, one will have to bear in mind the distinction between section 80HH and section 10A. That cannot be lost sight of. Section 10A categorically clarifies that the profits derived from export of computer software, which is what is the activity referred to in the present case, shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such computer software bears to the total turnover of the business carried out by the Assessee. This is the deduction and computation of that deduction is to be found in section 10A itself. That is how the Commissioner proceeds and concludes so as to reverse the Assessing Officer''s order. We do not see how the Commissioner could have taken assistance of either section 80HH or section 80HHC as is interpreted in the decision of the Hon''ble Supreme Court. Section 80HHC pertains to deduction in respect of profit retained for export business. When there is a specific section in the Act and the enactment contains a separate Chapter in relation to the deduction of profit and gains derived by an undertaking from export and when such undertakings are established in a free trade zone, then, we do not see any basis for the complaint made by Mr. Tejveer Singh. This finding of the Commissioner has been upheld by the Tribunal. We do no see as to how in such circumstances, the Tribunal''s order can be termed as perverse or vitiated by any error of law apparent on the face of the record. The Tribunal has in arriving at the same conclusion relied upon its own order in the case of Livingstones Jewellery Pvt. Ltd. v/s. Deputy Commissioner of Income Tax. The Tribunal in that decision was concerned with the phraseology of section 10A particularly the expression ''derived from the export of articles". The Assessing Officer did not note the complete provision in this case, namely expression "profit derived from export of articles or things or computer software" as that is also appearing in sub-section 1. The manner in which the computation has to be made is to be found in sub-section 1 and particularly in sub-section 4 of section 10A. The Tribunal has, therefore, proceeded by relying upon the language of section 10A itself. It concluded in the earlier order in the case of Livingstone Jewellery that once the expression "derived from" has been specifically defined in the same section, then the meaning of such expression as understood in common parlance will not be applicable. The Tribunal may have referred to some rulings as to how such provisions have to be interpreted. However, we do not have to decide any wider controversy or question. Once we find that the view taken by the Tribunal in this case, and in upholding the conclusion of the Commissioner, is in consonance with the language of section 10A and also takes into consideration the relevant sub-section thereof namely sub-section 4 thereof, then it cannot be said that its conclusion or order is vitiated by any error of law apparent on the face of the record. The distinction and difference in the language and setting of section 80HHC, section 80HH and section 10A has been rightly noted in the present case to reject the Revenue''s grounds.

23. We are, therefore, not required to go into any further questions and particularly as noted in the case of The Commissioner of Income Tax Vs. Gem Plus Jewellery India Ltd., . The Division Bench in that case held that while computation of turnover for the purpose of section 10A, freights and insurances should be excluded. We are not required to decide such a case or issue.

24. In such circumstances, we do not find that even question 4B can be termed as a substantial question of law, so as to enable us to entertain this Appeal.

25. As a result of the above discussion, the Appeal is dismissed. There would be no order as to costs.

