

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 9TH DAY OF AUGUST 2011

PRESENT

THE HON'BLE MR. JUSTICE N.KUMAR

AND

THE HON'BLE MR.JUSTICE RAVI MALIMATH

ITA.NO.78 OF 2011

C/W

ITA.NO.356/2010, ITA.NO.772/2009, ITA.NO.254/2010,
ITA.NO.248/2007, ITA.NO.88/2007,
ITA.NO.1028/2008, ITA.NO.207/2009, ITA.NO.461/2010,
ITA.NO.420/2008, ITA.NO.140/2011
ITA.NO.141/2011, ITA.NO.66/2009, ITA.NO.816/2009
ITA.NO.817/2009, ITA.NO.364/2009, ITA.NO.797/2006,
ITA.NO.698/2009 ITA.NO.236/2009

ITA.NO.78/2011:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
LTU,
JSS TOWERS,
BSK III STAGE,
BANGALORE.

2. THE ASST.COMMISSIONER
OF INCOME-TAX
CIRCLE-12(5),
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/S.YOKOGAWA INDIA LTD.,
PLOT NO.96, 3RD CROSS,
ELECTRONICS CITY COMPLEX,
HOSUR ROAD,
BANGALORE - 560 100.

...RESPONDENT

(BY Sri K.P.KUMAR, Sr.COUNSEL FOR
M/s.KING & PATRIDGE, ADVOCATES)

This ITA is filed under section 260-A of I.T.Act, 1961 arising out of order dated 29.10.2010 passed in ITA.No.853/Bang/2009 for the assessment year 2003-04, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.853/Bang/2009 dated 29.10.2010 confirming the order of the appellate Commissioner and confirm the order passed by the Asst.Commissioner of Income Tax, Circle-12(5), Bangalore.

ITA.NO.207/2009:

BETWEEN:

1. THE COMMISSIONER OF
INCOME-TAX,



CENTRAL CIRCLE,
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

2. THE ASSISTANT COMMISSIONER
OF INCOME-TAX,
CIRCLE-12(5)
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY SRI M.V.SESHACHALA, ADVOCATE)

AND:

M/S TATA CONSULTANCY SERVICES LTD.,
(FORMERLY TCS BUSINESS TRANSFORMATION
SOLUTIONS LTD.)
SIM TOWERS,
18, SHESHADRI ROAD,
GANDHINAGAR,
BANGALORE – 560 009.

...RESPONDENT

(BY SRI G.SARANGAN, SR.ADVOCATE FOR
VANI H, ADVOCATES)

This ITA filed under section filed under section 260-A of I.T.Act, 1961 arising out of order dated 14.11.2008 passed in ITA.No.590/Bang/2008 for the assessment year 2003-04, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the order passed by the ITAT, Bangalore in ITA.No.590/Bang/2008 dated 14.11.2008 and confirm the order passed by the appellate Commissioner confirming the order passed by the Asst.Commissioner of Income Tax, Circle-12(5), Bangalore.

ITA.No.356/2010:

BETWEEN:

M/s. IBMJ INDIA PRIVATE LIMITED.,
SUBRAMANYA ARCADE, NO.12,
BANNERGHATTA MAIN ROAD,
BANGALORE – 560 029.

...APPELLANT

(BY Sri ARAVIND DATAR, Sr.COUNSEL, FOR
Smt.VANI H., ADVOCATES)

AND:

THE ADDITIONAL COMMISSIONER OF
INCOME TAX,
LARGE TAXPAYERS UNIT,
BANGALORE – 560 085.

...RESPONDENT

(BY Sri M.V.SESHACHALA, ADVOCATE)

This ITA is filed under section 260-A of I.T.Act, 1961 arising out of order dated 27.04.2010 passed in ITA.No.754/BNG/2009 for the assessment year 2003-04, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.754/BNG/2009 dated 27.04.2010 in respect of the order pertaining to the setting off of losses prior to claiming relief under section of the Act.

ITA.NO.772/2009:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING, QUEENS ROAD,
BANGALORE.

2. THE ASST.COMMISSIONER
OF INCOME-TAX
CIRCLE-12(1)
C.R BUILDING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/S. MINDTREE CONSULTING PVT. LTD.,
NO.42, 27TH CROSS, 2ND STAGE
BANASHANKARI,
BANGALORE - 560 070.

...RESPONDENT

(BY Sri RAGHURAM & Sri CHYTANYA, ADVOCATES)

This ITA is filed under section filed under section 260-A of I.T.Act, 1961 arising out of order dated 10.07.2009 passed in ITA.No.365/BNG/2009 for the assessment year 2004-05, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the order passed by the ITAT, Bangalore in ITA.No.365/BNG/2009 dated 10.07.2009 confirming the order of the Appellate Commissioner and confirm the order passed by the Asst.Commissioner of Income Tax, Circle-12(1), Bangalore.

ITA.NO.248/2007:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
CENTRAL CIRCLE,
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

2. THE ASSISTANT COMMISSIONER
OF INCOME TAX
CIRCLE-12(3)
C.R.BUILDING
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY SRI M.V.SESHACHALA, ADVOCATE)

AND:

M/s. YOKOGAWA INDIA LTD.,
(FORMERLY M/s.YOKOGAWA BLUE STAR LTD.,)
96, ELECTRONICS CITY COMPLEX,
HOSUR ROAD,
BANGALORE - 560 100.

...RESPONDENT

(BY SRI K.P.KUMAR, SR.ADVOCATE FOR
M/s KING & PATRIDGE, ADVOCATES)

This ITA filed under section filed under section 260-A of I.T.Act, 1961 arising out of order dated 04.08.2006 passed in ITA.No.1802/BANG/2005 for the assessment year 2002-03, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the order passed by the ITAT, Bangalore in ITA.No.1802/BANG/2005 dated 04.08.2006 confirming the order of the appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Central Circle-2(2), Bangalore.

ITA.NO.88/2007:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
CENTRAL CIRCLE,

C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

2. THE INCOME TAX OFFICER
WARD 12(2),
C.R.BUILDING
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY SRI M.V.SESHACHALA, ADVOCATE)

AND:

M/S. SCT SOFTWARE SOLUTIONS
(INDIA) PVT. LTD.,
8TH FLOOR, VAYUDHOOR CHAMBERS,
15-16, M.G.ROAD,
BANGALORE.

...RESPONDENT

(BY SRI G.SARANGAN, SR.ADVOCATE FOR VANI H.,
ADVOCATES)

This ITA filed under section filed under section 260-A of I.T.Act, 1961 arising out of order dated 19.06.2006 passed in ITA.No.1014/Bang/2004 for the assessment year 2002-03, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the order passed by the ITAT, Bangalore in ITA.No.1014/Bang/2004 dated 19.06.2006 confirming the order passed by the appellate Commissioner and confirm the order passed by the Income Tax Officer, Ward-12(2), Bangalore.

ITA.NO.254/2010:

BETWEEN:

M/s.INTELLINET TECHNOLOGIES
INDIA PRIVATE LIMITED
NO.810, 5TH CROSS, 12TH MAIN,
KORAMANGALA,
BANGALORE – 560 034.

...APPELLANT

(BY Sri RAGHURAM & Sri CHYTANYA, ADVOCATES)

AND:

THE COMMISSIONER OF INCOME TAX
BANGALORE –1,
BANGALORE.

...RESPONDENT

(BY Sri M.V.SESHACHALA, ADVOCATE)

This ITA is filed under section 260-A of I.T.Act, 1961 arising out of order dated 12.03.2010 passed in ITA.No.1021/BNG/2009 for the assessment year 2004-05, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the order passed by the ITAT, Bangalore in ITA.No.1021/BNG/2009 dated 12.03.2010.

ITA.NO.461/2010:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

2. THE ASST.COMMISSIONER
OF INCOME-TAX
CIRCLE-11(5)
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/s.KHODAY INDIA LIMITED.,
BREWERY HOUSE, 7TH MILE,
KANAKAPURA ROAD,
BANGALORE - 560 062.

...RESPONDENT

(BY Sri S.SUKUMAR, ADVOCATE)

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 10.08.2010 passed in ITA.No.944/Bang/2009 for the assessment year 2005-06, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.944/Bang/2009 dated 10.08.2010 and confirm the order of the appellate Commissioner confirming the order passed by the Asst. Commissioner of Income Tax, Circle-11(5), Bangalore.

ITA.NO.420/2008:

BETWEEN.

1. THE COMMISSIONER OF INCOME-TAX,
C.R.BUILDING
QUEENS ROAD,
BANGALORE.



2. THE ASSISTANT COMMISSIONER OF
INCOME TAX,
CIRCLE-11(3),
C.R.BUILDING
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/S.HUAWEI TECHNOLOGIES (I) (P) LTD.,
LEVEL-3, 4 & 5, LEELA GALLERIA,
THE LEELA PALACE,
NO.23, AIRPORT ROAD,
BANGALORE – 560 008.

...RESPONDENT

(BY Sri ARAVIND DATAR, Sr. COUNSEL FOR
M/S. HARISH & CO., ADVOCATES)

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 08.11.2007 passed in ITA.No.9/BNG/2007 for the assessment year 2002-03, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.9/BNG/2007 dated 08.11.2007 and confirm the order of the appellate Commissioner and Asst. Commissioner of Income Tax, Circle-11(3), Bangalore.

ITA.NO.140/2011:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

2. THE ASST.COMMISSIONER
OF INCOME-TAX
CIRCLE-11(3)
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/S.GOKULDAS IMAGES PVT. LTD.,
NO.74/2, INDUSTRIAL SUBURB,
YESHWANTHPUR,
TUMKUR ROAD,
BANGALORE – 560 022.

..RESPONDENT

(BY Sri K.P.KUMAR, Sr. COUNSEL FOR
M/S.KING & PATRIDGE, ADVOCATES)

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 16.12.2010 passed in ITA.No.1142/Bang/2009 for the assessment year 2006-07, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.1142/Bang/2009 dated 16.12.2010 confirming the order of the Appellate Commissioner and confirm the order passed by the Asst. Commissioner of Income Tax, Circle-11(3), Bangalore.

ITA.NO.141/2011:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING,

QUEENS ROAD,
BANGALORE.

2. THE ASST.COMMISSIONER OF INCOME-TAX
CIRCLE-11(3)
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/s.GOKULDAS IMAGES PVT. LTD.,
NO.74/2, INDUSTRIAL SUBURE,
12YESHWANTHPUR.
TUMKUR ROAD,
BANGALORE – 560 0022.

...RESPONDENT

(BY Sri K.P.KUMAR, Sr. COUNSEL FOR
M/ KING & PATRIDGE, ADVOCATES)

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 16.12.2010 passed in ITA.No.1141/Bang/2009 for the assessment year 2005-06, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.1141/Bang/2009 dated 16.12.2010 confirming the order of the Appellate Commissioner and confirm the order passed by the Asst.Commissioner of Income Tax, Circle-11(3), Bangalore.

ITA.NO.66/2009:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING
QUEENS ROAD,
BANGALORE.
 2. THE DEPUTY COMMISSIONER
OF INCOME-TAX
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.
- ... APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/S.YOKOGAWA INDIA LTD.,
PLOT NO.96, 3RD CROSS,
ELECTRONICS CITY COMPLEX,
HOSUR ROAD,
BANGALORE – 560 100.

...RESPONDENT

(BY Sri K.P.KUMAR, Sr. COUNSEL FOR
M/s.KING & PATRIDGE, ADVOCATES)

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 29.08.2008 passed in ITA.No.1157/BNG/2007 for the assessment year 2004-05, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.1157/BNG/2007 dated 29.08.2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Circle-12(5), Bangalore.



ITA.NO.816/2009:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING
QUEENS ROAD,
BANGALORE.
 2. THE DEPUTY COMMISSIONER OF
INCOME-TAX
CIRCLE-11(2)
C.R BUILDING
QUEENS ROAD,
BANGALORE.
- ...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

24/2 CUSTOMER PRIVATE LTD.,
EMBASSY GOLF LINKS BUSINESS PARK,
CHALLAGHATTA VILLAGE,
OFF.IMMEDIATE RING ROAD,
VARTHUR HOBLI,
BANGALORE SOUTH TALUK,
BANGALORE – 560 071.

...RESPONDENT

(BY Sri G.SARANGAN, Sr. COUNSEL FOR
Smt. VANI H, ADVOCATES)

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 07.08.2009 passed in ITA.No.295/BNG/2009 for the assessment year 2004-05, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.295/BNG/2009 dated 07.08.2009,

confirm the order of the appellate Commissioner confirming the order passed by the Deputy Commissioner of Income Tax, Circle-11(2), Bangalore.

ITA.No.817/2009:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
CENTRAL CIRCLE,
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.
 2. THE ASSISTANT COMMISSIONER
OF INCOME-TAX
CIRCLE-12(3),
BANGALORE.
- ...APPELLANTS

(BY SRI M.V.SESHACHALA, ADVOCATE)

AND:

M/s.WEBSPECTRUM SOFTWARE P.LTD.,
NO.196, OPPOSITE HSBC, SARALA GRAND
ANNEX, ARAKERE CIRCLE,
BANNERGHATTA ROAD,
BANGALORE.

...RESPONDENT

(BY SRI RAGHURAMAN & CHYTHANYA, ADVOCATES)

This ITA filed under section filed under section 260-A of I.T.Act, 1961 arising out of order dated 26.06.2007 passed in ITA.No.387/Bang/2006 for the assessment year 2003-04, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the order passed by the



ITAT, Bangalore in ITA.No.387/Bang/2006 dated 26.06.2007 and confirming the order of the appellate Commissioner and confirm the order passed by the Asst.Commissioner of Income Tax, Central Circle-12(3), Bangalore.

ITA.NO.364/2009:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
CENTRAL CIRCLE,
C.R.BUILDING
QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER OF
INCOME-TAX
CIRCLE-11(1)
C.R BUILDING
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/S. AXA BUSINESS SERVICES PVT. LTD.,
NO.16/2, RESIDENCY ROAD,
BANGALORE- 560 025.

...RESPONDENT

(BY Sri S.PARTHASARATHI, WITH Sri P.DINESH
MALLAHARAO, ADVOCATES)

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 13.2.2009 passed in

ITA.No.101/Bang/2008, for the assessment year 2003-04, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.101/Bang/2008 dated 13.2.2009 and confirm the order of the Appellate Commissioner confirming the order passed by the Deputy Commissioner of Income Tax, Circle-11(1), Bangalore.

ITA.NO.797/2006:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING
QUEENS ROAD,
BANGALORE.

2. THE ASSISTANT COMMISSIONER OF
INCOME-TAX
CIRCLE-12(I)
C.R BUILDING
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/s. MINDTREE CONSULTING PVT. LTD.,
NO.42, 27TH CROSS, 2ND STAGE,
BANASHANKARI,
BANGALORE - 560 070.

...RESPONDENT

(BY S CHYTANYA K.K., ADVOCATE)

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 25.11.2005 passed in ITA.No.606/BAN/2005 for the assessment year 2001-02, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the order passed by the ITAT, Bangalore in ITA.No.606/BAN/2005 dated 25.11.2005 confirming the order of the appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Company Circle-4(1), Bangalore.

ITA.NO.698/2009:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER
OF INCOME-TAX
CIRCLE-11(3)
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/s.GOKULDAS IMAGES PVT. LTD.,
7 & 12 INDUSTRIAL SUBURB,
YESHWANTHPUR,
TUMKUR ROAD,
BANGALORE - 560 022.

..RESPONDENT

(BY Sri K.P.KUMAR, Sr. COUNSEL FOR

M/s. KING & PATRIDGE, ADVOCATES}

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 28.05.2009 passed in ITA.No.1466/BNG/2008, for the assessment year 2005-06, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.1466/BNG/2008 dated 28.05.2009 and confirm the order of the appellate Commissioner confirming the order passed by the Deputy Commissioner of Income Tax, Circle-11(3), Bangalore.

ITA.NO.236/2009:

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING
QUEENS ROAD,
BANGALORE.
2. THE ASSISTANT COMMISSIONER
OF INCOME-TAX
C.R BUILDING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY Sri M.V.SESHACHALA, ADVOCATE)

AND:

M/s.GE INDIA EXPORTS PRIVATE LTD.,
[FORMERLY GE POWER CONTROLS
(INDIA) PVT. LTD.,]
42/1 & 45/14, ELECTRONIC CITY,
PHASE II,

BANGALORE – 561 229.

...RESPONDENT

This ITA is filed under section 260-A of I.T. Act, 1961 arising out of order dated 30.01.2009 passed in ITA.No.724/BNG/2008, for the assessment year 2003-04, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA.No.724/BNG/2008 dated 30.01.2009 and confirm the order of the appellate Commissioner confirming the order passed by the Assistant Commissioner of Income Tax, Circle-11(2), Bangalore.

ITA.No.1028/2008BETWEEN:

- 1 THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.
- 2 THE ASSISTANT COMMISSIONER
OF INCOME-TAX
CIRCLE-11(4),
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY SRI M.V.SESHACHALA, ADVOCATE)

AND:

M/S. AXA BUSINESS SERVICES
PRIVATE LIMITED,
NO.16/2, RESIDENCY ROAD,
BANGALORE – 560 025.

...RESPONDENT

(BY SRI S.PARTHASARATHI WITH SRI P.DINESH
MALLAHRAO, ADVOCATES)

This ITA filed under section filed under section 260-A of I.T.Act, 1961 arising out of order dated 27.06.2008 passed in ITA.No.749/BNG/2007 for the assessment year 2003-04, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the order passed by the ITAT, Bangalore in ITA.No.749/BNG/2007 dated 27.06.2008 and confirm the order of the appellate Commissioner confirming the order passed by the Asst. Commissioner of Income Tax, Circle-11(4), Bangalore.

These ITAs coming on for admission this day, **KUMAR J.**, delivered the following:-

J U D G M E N T

As common question of law is involved in all these appeals, they are taken up for consideration together and disposed off by this common order.

2. For the purpose of convenience the facts in ITA No.248/2007 is set out. The assessee M/s. Yokogawa India Ltd., is in the business of Manufacture and Trading of Process Control Instruments. The assessee filed return of income on 31-10-2002 declaring a total loss of Rs.5,07,03,098/-. The


return was processed and a refund of Rs.23,10,536/- was issued.

3. The case was selected for scrutiny under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act' for short). Notice under Section 143(2) was issued on 7-8-2006. The assessee Company claimed exemption of Rs.3,95,99,100/- under Section 10-A, for its STP unit. The exemption had been claimed before set off on brought losses and depreciation. According to the assessing authority the deduction under Section 10-A has to be allowed from the total income of the assessee. The total income of the assessee was arrived at as per Section 80B(5). Therefore, the exemption under Section 10-A had to be given after setting off of all brought forward losses within the context of Section 32(1) read with Section 72(2) of the Act. Accordingly, section 10-A benefit was re-computed. After such re-computation, after adjusting the assessee was held to be not entitled for exemption under Section 10-A and hence a sum of Rs.36,575/- was treated as



income from other sources. Aggrieved by the said order, the assessee preferred an appeal to the Commissioner of Income Tax (Appeals) III, Bangalore.

4. The appellate Commissioner held that Section 10-A is placed in Chapter-III which deals with incomes which do not form part of the total income. The main object of Section 10-A is not to tax export profits from STP unit. The income of 10-A unit has to be excluded before arriving at the gross total income, otherwise the provisions of Section 10-A would have been shifted to Chapter VI-A which deals with the deductions to be made from gross total income. The income has to be exempted at the source itself and not after computing the gross total income. That total income used in the provisions of Section 10-A in this context means global income of the assessee. Hence, the income eligible for exemption under Section 10-A would not enter into gross total income. It has to be exempted at source level. The said income has to be excluded at the source itself before arriving at the gross total



income. The loss of non 10-A unit cannot be set off against the income of 10-A unit. Therefore, the assessing officer was directed to allow exemption under Section 10-A without setting off the losses of non 10-A unit and consequently allow the carry forward losses and depreciation of non 10-A unit. Aggrieved by the said order the Revenue preferred an appeal before the Tribunal.

5. The Tribunal on a careful consideration of the relevant statutory provisions held that Section 10-A specifically states that the deduction has to be given. The deduction is in respect of profit and gains and the words '*such*' mentioned before the profit and gains refers to the profit and gains of the undertaking, which is engaged in the export of articles or things or computer software. Before the word '*undertaking*' it is qualified by the word "*an*" which means that it refers to a single undertaking. The word '*profit and gains*' and its computation is mentioned under Section 29 of the Act which has to be computed in accordance with the provisions

contained under Sections 30 to 43D. Section 70 of the Income Tax Act governs the setting off of the loss from one source against income from another source under the same head of income. Section 10-A is not a part of the Section mentioned in Section 29 of the Act. Hence, the business losses of the undertaking whose income is not exempt under Section 10-A cannot be set off to ascertain the profit and gains derived by an undertaking from export of computer software. Hence, business losses of other units will not be set off against the profits of the undertaking engaged in the export of computer software for the purposes of determining the allowable deduction under Section 10-A of the Income Tax Act. Unabsorbed business loss is to be set off under Section 72 of the Act and the same is not mentioned under Section 29 of the Act. Hence, unabsorbed business losses will not be set off against the profit of the undertaking engaged in the export of computer software for the purposes of ascertaining the deduction admissible under Section 10-A. As per Section 72(2), unabsorbed business loss is to be first set off and thereafter

the unabsorbed depreciation treated as current years depreciation under Section 32(2) is to be set off. For computing deduction under Section 10-A, only the profit derived from export of computer software is to be taken into consideration. The unabsorbed business losses of other units cannot be set off and therefore the unabsorbed depreciation which is to be set off after the unabsorbed business loss under Section 72(2), also cannot be set off for ascertaining the deduction under Section 10-A. Therefore, the Tribunal upheld the order of the appellate Commissioner and dismissed the appeal. Aggrieved by the same, the Revenue is in appeal.

6. The appeal was admitted to consider the following substantial questions of law: -

“(i) Whether the Appellate Authorities failed to take into consideration that the amendment to Section 10A by Finance Act of 2000 with effect from 01.04.2011, 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 under Section 10-A or 10-B 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 ITA No.772/2009, 254/2010, 461/2010, 816/2009, 264/2009, 698/2009, 207/2009 and 248/2007 the following additional substantial question of law is raised:

"Whether the Commissioner of Income-Tax was justified in revising the order passed by the assessing authority when two views are possible and in view of the fact that the main substantial

question of law is answered in favour of the assessee."

RIVAL CONTENTIONS

7. The learned counsel appearing for the Revenue assailing the impugned order contended that it is clear from Section 10-A that the profits and gains derived by an undertaking from the export of articles to which Section 10-A is attracted shall be allowed from the total income of the assessee. Therefore, in arriving at such profits, sub-Section (4) of Section 10-A provides the formula to arrive at the export profits. Then sub-Section (6) of Section 10-A expressly states that no loss referred to in sub-Section (1) of Section 72 or sub-Section (1) or sub-Section (3) of Section 74 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. Therefore, according to him, a harmonious reading of these provisions makes it clear that subsequent to 1st April, 2001, the carry forward losses of the business have to be set off

against the profits of the undertaking before arriving at the total income of the assessee. Therefore he submits that the interpretation placed by the appellate Commissioner and the Tribunal is contrary to the statutory provisions and therefore it is liable to be set aside and the order of the assessing authority is to be restored.

8. Per contra, the learned Senior counsel appearing for the assessee pointed out Chapter-III of the Act where Section 10-A finds a place, deals with the income which generally do not form part of the total income. Therefore, the profits derived under Section 10-A are not to be taken into consideration in arriving at the total income of the assessee. Under Section 72(1) what could be set off against the profits earned is the carry forward losses or depreciation which is to be taken into consideration at the stage of computation of income under Chapter-VI of the Act. Therefore, the order passed by the Tribunal and the appellate Commissioner is in

conformity with the scheme of the Act and therefore no case for interference with the said order is made out.

1st SUBSTANTIAL QUESTION OF LAW

9. The benefit of tax holiday was originally enacted as an absolute exemption under Chapter-III of the Income Tax Act, 1961. It remained as exemption for almost two decades. The Heading of Chapter-III under which the relevant provisions were placed is titled as *"Incomes which do not form part of the total income"*. The second heading read as *"Special conditions in respect of newly established industrial undertakings in free Trade Zones"*. Section 10 begins as *"In computing the total income of a previous year of any person, any income falling within any of the following Clauses shall not be included"*, whereas Section 10-A as originally enacted provided that the profits and gains of the eligible undertaking shall not be included in the total income of the assessee." The Finance Act, 2000 recasts Section 10-A. It came into effect from 1.4.2001. The second heading continues with a marginal change by way

of addition of the word "etc" to read as "*Special provisions in respect of newly established undertakings in a free Trade Zone*", etc. The new Section provides for deduction of profits and gains of eligible undertaking from the total income of the assessee.

10. Section 10-B which is also substituted by the Finance Act, 2000 and which came into effect from 1-4-2001 deals with the special provisions in respect of newly established 100% export oriented undertakings.

11. Section 10-A reads as under:-

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

computer software, as the case may be, shall be allowed from the total income of the assessee.

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

Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment years referred to in this sub-section shall be reckoned from the assessment year 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 and subsequent years.

Xx xxx

Xx xxxx

(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]

(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 buildings, 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.

Explanation 2

“(i) xx xx xx

(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 Regulation Act, 1973 (46 of 1973), 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;

12. A literal reading of the above provision requires deduction from the total income. There can be a deduction in computing the total income. However, there cannot be deduction from the total income which is the final result of the computation process. The language adopted in Section 10-A is different from the one adopted in Section 80-A. Section 10-A provides for deduction from the total income. In the scheme of the Act, while various deductions are allowed in computing the

total income, once the total income is computed, no further adjustment to the total income is envisaged. The scheme of the Act provides for deduction in computing the total income but no mechanism for any deduction from the total income already computed is provided under the Act. Once the total income is computed, the next step is determination of tax by applying the applicable rates on the total income.

13. Section 2(45) defines "*total income*" to mean the total amount of income referred to in Section 5 and computed in the manner laid down in the Income Tax Act. Section 5 defines the scope of total income and it is subject to the provisions of Income Tax Act. Section 14 provides that "*save as otherwise provided by the Income Tax Act, all income shall for the purpose of charge of Income tax and the computation of total income, classified under the following heads of income*". Therefore, the total income in its strict sense requires computation for the purpose of levy of tax. The computation of total income begins only with Chapter-IV and as Section 10-A

is covered in Chapter-III, the phrase "*total income*" used in Section 10-A cannot be understood in the same sense as in Section 2(45).

14. The phrase "*total income*" has been used in the Income Tax Act in several places with different connotations and shades. The phrase total income used in Section 10-A is one such variant. The phrase need not necessarily mean the total income as computed in accordance with the provisions of the Act. The relief under this Section is with reference to the STP undertakings and not to the assessee. In other words, the relief travels with the undertaking irrespective of who owns the same. The computation of relief as provided in Section 10-A (4) is also with reference to the undertaking. A business might have several undertakings and Section 28 does not envisage computation of income of each such undertaking. In other words, the profits of the business of the undertaking cannot be computed in isolation. The profits are computed under the head "*profits and gains of business or profession*", as under the

above head, the income from business as a whole has to be computed. The phrase "*total income*" used in Section 10-A(1) is, therefore, to be understood as the total income of the STP unit. This is clear from the first proviso to Section 10-A(1) which makes a reference to the total income of the undertaking and not to the total income of the assessee. The definition of any term given in Section 2 will apply only when the context does not otherwise require. The placement, language and setting of Section 10-A cannot mean the total income computed in accordance with the provisions of the Act. Instead, such a phrase, in the context of Section 10-A, means profits and gains of the STP undertaking as understood in its commercial sense.

15. Chapter IV deals with the computation of total income under various heads of income. Section 14 provides for classification of income under various heads of income for the purposes of charge of income tax and computation of total income. The purpose of classification of any income under any head of income is to compute the same. The twin conditions of

Section 14 are that income is subject to charge of income tax and is includible in the total income. As the relief under Section 10-A is in the nature of exemption although termed as deduction and the said relief is in respect of commercial profits, such income is neither subject to charge of income tax nor includible in the total income. Therefore, the twin provisions of Section 14 are not existing in the case of income of STP undertaking and accordingly such income is not liable to be computed under Chapter-IV. Therefore the correct view would be that the relief under Section 10-A will have to be given before Chapter-IV. The deduction shall be given first and process of computation of "*profits and gains of business or profession*" begins thereafter. This proposition is in line with the form of return. Allowing deduction at the earliest stage of business income computation almost blurs the difference between the commercial profits and tax profits.

16. The substituted Section 10-A continues to remain in Chapter-III. It is titled as "*Incomes which do not form part of the*"

total income." It may be noted that when Section 10-A was recast by the Finance Act, 2001, the Parliament was aware of the character of relief given in Chapter-III. Chapter-III deals with incomes which do not form part of total income. If the Parliament intended that the relief under Section 10-A should be by way of deduction in the normal course of computation of total income, it could have placed the same in Chapter-VI(A) which houses the Sections like 80-HHC, 80-IA, etc. The Parliament was aware of the various restricting and limiting provisions like Section 80-A and Section 80-AB which was in Chapter VI-A which do not appear in Chapter-III. The fact that even after its recast, the relief has been retained in Chapter-III indicates that the intention of Parliament it is to be regarded as an exemption and not a deduction. The Act of the Parliament in consciously retaining this Section in Chapter-III indicates its intention that the nature of relief continues to be an exemption. Chapter-VII deals with the incomes forming part of the total income on which no income tax is payable. These are the incomes which are exempted from charge, but are included

in the total income of the assessee. The Parliament, despite being conversant with the implications of this Chapter, has consciously chosen to retain Section 10-A in Chapter III.

17. If Section 10-A is to be given effect to, as a deduction from the total income as defined in Section 2(45), it would mean that Section 10-A is to be considered after Chapter VI-A deductions have been exhausted. The deductions under Chapter VI-A are to be given from out of the gross total income. The term "*gross total income*" is defined in Section 80-B (5) to mean the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter. As per the definition of gross total income, the other provisions of the Act will have to be first given effect to. There is no reason why reference to the provisions of the Act should not include Section 10-A. In other words, the gross total income would be arrived at after considering Section 10-A deduction also. Therefore, it would be inappropriate to

conclude that Section 10-A deduction is to be given effect to after Chapter VI A deductions are exhausted.

18. It is after the deduction under Chapter VI-A that the total income of an assessee as arrived at. Chapter VI-A deductions are the last stage of giving effect to all types of deductions permissible under the Act. At the end of this exercise, the total income is arrived at. Total income is thus, a figure arrived at, after giving effect to all deductions under the Act. There cannot be any further deduction from the total income as the total income is itself arrived at after all deductions.

19. From the aforesaid discussion it is clear that the income of 10-A unit has to be excluded before arriving at the gross total income of the assessee. The income of 10-A unit has to be deducted at source itself and not after computing the gross total income. The total income used in the provisions of Section 10-A in this context means the global income of the assessee and not the total income as defined in Section 2(45).

Hence, the income eligible for exemption under Section 10-A would not enter into computation as the same has to be deducted at source level.

2nd SUBSTANTIAL QUESTION OF LAW

20. Prior to the introduction of sub-Section (6) of Section 10-A and 10-B of the Finance Act 2000, which came into effect from 1-4-2001, 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, Sub-Section (2) of Section 32, Clause (ii) of sub-Section (iii), Section 32-A clause (ii) of sub-Section (3) of Section 32A, Clause (ii) of sub-section (2) of Section 33 and sub-Section (4) of Section 35 of the Act or the second proviso to Clause (ix) of sub-Section (1) of Section 36 shall not be applicable in relation to any such allowance or deduction. Similarly no loss as referred to in sub-Section(1) or in 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 was permitted to be carried forward or set off where such loss relates to any of the relevant assessment years.

21. It is in this background the Finance Act, 2003 was introduced by inserting the words “ *the year ending upto the first day of April 2001*, for that in Clauses (1) & (2) of sub-Section (6) restricting the disallowance only upto the first day of April, 2001 and granting the benefit, of those provisions even in respect of units to which Section 10-A and 10-B is applicable. The Finance Act, 2003, amended this sub-Section with retrospective effect from 1st April 2011 by lifting the embargo in the aforesaid clauses in respect of depreciation and business loss relating to the assessment year 2001-02 onwards. The amendment indicates the legislative intention of providing the benefit of carry forward of depreciation and business loss relating to any year of the tax holiday period to be set off against income of any year post tax holiday. This is

supported by Circular No.7 of 2003 wherein the Board has stated that the purpose of amendment is to entitle an assessee to the benefit of carry forward of depreciation and loss suffered during the tax holiday period. The circular dated 5.9.2003 reads as under : -

"20. Providing for carry forward of business losses and unabsorbed depreciation to units in Special Economic Zones and 100% Export Oriented Units.

20.1 Under the existing provisions of sections 10A and 10B, the undertakings operating in a special Economic Zone (under section 10A) and 100% Export Oriented Units(EQU's) (under section 10B) are not permitted to carry forward their business losses and unabsorbed depreciation.

20.2 With a view to rationalize the existing tax incentives in respect of such units sub-section (6) in section 10A and 10B has been amended to do away with the restrictions on the carry forward of business losses and unabsorbed depreciation.

The amendments have been brought into effect retrospectively from 1.4.2001 and have been made applicable to business losses or unabsorbed depreciation arising in the assessment year 2001-02 and subsequent years."

22. It is interesting to note that such relaxation has not been made in Section 10-C which provides for exemption in respect of profits of certain undertakings in north eastern region. This makes clear the legislative intention of providing relaxation wherever it deems fit and in the present case, such relaxation has been made in Section 10-A but not in Section 10-C.

23. It is to be noted that the aforesaid amendment read with the Board circular does not militate against the proposition that the benefit of relief under this section is in the nature of exemption with reference to the commercial profits. However, in order to give effect to the legislative intention of allowing the carry forward of depreciation and loss suffered in respect of any year during the tax holiday for being set off

against income post tax holiday, it is necessary that the notional computation of business income and the depreciation as per the provisions of the Act should be made for each year of the tax holiday period. While so computing, attention will have to be given to provisions of Sections 70, 71, 72 and Section 32(2). The amount of depreciation and business loss remaining unabsorbed at the end of the tax holiday period should be determined so that the same may be set off against the income post tax holiday period.

24. Chapter VI deals with the aggregation of income and set off or carry forward of loss. Section 72(1) deals with the carry forward and set off of business loss which reads as under:-

“72 (1) Where for any assessment year, the net result of the computation under the head “Profits and gains of business or profession” is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of



section 71, so much of the loss as has not been set off, or where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and-

(i) it shall be set off against the profits and gains, if any, of business or profession carried on by him and assessable for that assessment year;

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on;

Provided that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such business is re-established, reconstructed or revived by the assessee, so much of the loss as is attributable to such business shall be carried forward to the assessment year relevant to the

previous year in which the business is so re-established, reconstructed or revived, and -

- (a) it shall be set off against the profits and gains, if any, of that business or any other business carried on by him and assessable for that assessment year; and
- (b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re-established, reconstructed or revived continues to be carried on by the assessee, be carried forward to the following assessment year and so on for seven assessment years immediately succeeding."

25. In fact, the Bombay High Court in the case of **HINDUSTAN UNILEVER LTD vs. DEPUTY COMMISSIONER OF INCOME TAX AND ANOTHER** reported in (2010) 325 ITR 102 (Bom) incorporating Section 10-B as amended held as under:-

"Section 10-B as it stands is not a provision in the nature of an exemption but provides for a deduction. Section 10-B was substituted by the Finance Act of 2000, with effect from April 1, 2001. Prior to the substitution of the provision, the earlier provision has stipulated that any profits and gains derived by an assessee from a 100% export oriented undertaking, to which the Section applies "shall not be included in the total income of the assessee". The provision, therefore, as it earlier stood was in the nature of an exemption. After the substitution of Section 10-B by the Finance Act of 2000, the provision as it now stands provides for a deduction of such profits and gains as are derived by a 100% export oriented undertaking from the export of articles or things or computer software for ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce. Consequently, it is evident that the basis on which the assessment has sought to be reopened is belied by a plain reading of the provision. The assessing officer was plainly in error in proceeding on the basis that because the income is exempted, the loss was not

allowable. All the four units of the assessee were eligible under Section 10-B. Three units had returned a profit during the course of the assessment year, while the Crab Stick unit had returned a loss. The assessee was entitled to a deduction in respect of the profits of the three eligible units while the loss sustained by the fourth unit could be set off against the normal business income. In these circumstances, the basis on which the assessment is sought to be reopened is contrary to the plain language of Section 10-B."

The aforesaid principle equally applies to a case falling under Section 10-A of the Act.

26. The Madras High Court in the case Madras Machinery Tools, Maintenance Ltd., vs. Commissioner of Income Tax Ltd., reported in 75 98 ITR 119 (Madras) has explained the difference between a Company and an undertaking which is owned or run by such Company. It was held as under:-


"A Company may own or run many undertakings, some of which may be entitled to the benefit of Section 84 and others may not be so entitled. It is not, therefore, possible to equate the undertaking with the Company. When a Company owns more than one undertaking the application of Section 84 has to be with respect to the particular undertaking and not to the Company in general. When we apply Section 84 to a particular undertaking it has to be seen when that undertaking commenced the manufacture or production of articles. It is true that the word "undertaking" has not been defined under the Income-Tax Act. But in common parlance it is taken as a concern started or formed for a specific purpose or a project engaged in. In this case though the objects of the Company as set out in its Articles of Association cover a variety of objects, the object of the undertaking is only to manufacture lathes and bench grinders as is clear from the licence issued to the Company under the Industries Development and Regulation Act, 1951."

27. Form No.1 read with Rule 12 of the Income Tax Rules, 1962 provides for return of income and return of fringe benefits.

28. In Schedule No.9 at column No.7 it is clearly mentioned the amount claimed/deductible under Section 10-A/10-AA/10-B or 10-BA. Dealing with the scheme of the form it is stated that the scheme of this form follows the scheme of the law as outlined above in its basic form and with reference to schedule 1, 9, 3 and 13 it is stated that *"fill out Schedule-9 if you are claiming deduction under Section 10-A, 10-AA, 10B or 10 BA in respect of some specific business."* Item 7 of schedule 1 is to eliminate such income from computation of profits and loss and no separate declaration under Section 10-A(8) or 10-B(8) if any is required to be made.

29. After making all such computations the assessee would be entitled to the benefit of set off or carry forward of loss as provided under Section 72 of the Act. That is the benefit

which is given to the assessee under the Act irrespective of the nature of business which he is carrying on. The said benefit is available even to undertakings under Section 10-B of the Act. The expression "deduction of such profits and gains as derived by an undertaking shall be allowed from the total income of the assessee", has to be understood in the context with which the said provision is inserted in Chapter-III of the Act. Sub-Section (4) of Section 10-A clarifies this position. It provides that the profits derived from export of articles or things from 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. Therefore, it is clear that though the assessee may be having more than one undertaking for the purpose of Section 10-A it is the profit derived from export of articles or things or computer software from the business of the undertaking alone that has to be taken into consideration and such profit is not to be included in the total income of the



assessee. It is only after the deduction of the said profits and gains, the income of the assessee has to be computed.

30. The provisions of this sub-section will apply even in the case where an assessee has opted out of Section 10-A by exercising his option under sub-Section (8). As discussed, it is permissible for an assessee to opt in and opt out of Section 10-A. In the year when the assessee has opted out, the normal provisions of the Act would apply. The profits derived by him from the STP undertaking would suffer tax in the normal course subject to various provisions of the Act including those of Chapter VI-A. If in such a year, the assessee has suffered losses, such losses would be subject to inter source and inter head set off. The balance if any thereafter can be carried forward for being set off against profits of the subsequent assessment years in the normal course. Unabsorbed depreciation also merits a similar treatment.

31. As the income of 10-A unit has to be excluded at source itself before arriving at the gross total income, the loss of non 10-A unit cannot be set off against the income of 10-A unit under Section 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 under Section 10-A 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 not 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 under Section 32(2) is to be set off. As deduction under Section 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.

32. In view of the fact that the main substantial question of law is answered in favour of the assessee the additional question becomes purely academic and therefore is not answered.

(i) The following appeals are allowed.

ITA No.356/2010, 254/2010.

(ii) The following appeals are dismissed.

ITA Nos. 78/11, 88/2007, 772/09, 698/09,
420/2008, 364/2009, 1028/2008, 817/2009,
207/2009, 66/2009, 698/2009, 141/2011,

797/2006, 236/2009, 461/2010, 140/2011 &
816/2009.

In ITA No.141/2011 Sri K. P. Kumar, learned counsel appearing for M/s. King & Patridge, who was directed to take notice for respondents is permitted to file Vakalath within 4 weeks.

In ITA No 88/2007 Smt.Vani H. who was directed to take notice for respondents is permitted to file Vakalath within 4 weeks.

Sd/-
JUDGE

Sd/-
JUDGE

Rsk/-