* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on:26th April, 2012
% *Date of Decision:27th August, 2012*

\+ **ITA Nos.347/2011 & 2067/2010**

CIT .....Appellant
Through: Ms.Suruchi Agarwal, Adv.

Versus

TEI TECHNOLOGIES PVT. LTD. …..Respondent
Through: Mr. K.M.Gupta and Mr.Ravi Sharma, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

These are two appeals filed by the Commissioner of Income Tax under Section 260A of the Income Tax Act, 1961, which is herein after referred to as 'Act'. The appeals are directed against the orders passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'Tribunal'). The appeals relate to the assessment years 2002-2003 and 2003-2004. The Tribunal has passed separate orders for each year, though both of them are dated 18th June, 2010.

2. On 26th April, 2012 the following substantial questions of law were framed: -

ITA No.2067/2010 (assessment year 2002-2003)

"Whether the Income Tax Appellate Tribunal is right in holding that for the purpose of Section 10A of the Income Tax Act, 1961 the losses suffered in

the Non-EPZ Unit need not be set off from the profit/income of the EPZ Unit?"

ITA No.347/2011 (assessment year 2003-2004)

"Whether the Income Tax Appellate Tribunal is right in holding that for computing deduction under Section 10A of the Income Tax Act, 1961 in respect of EPZ Unit brought forward losses of the Non-EPZ Unit should be first deducted or reduced?"

3. The brief facts relating to the appeal for the assessment year 2002-2003 may be noted. The assessee is a private limited company incorporated on 4th May, 2000. It is engaged in the business of design, manufacture and sale of writing harnesses, cable assembly, remote control, degaussing coils, CRT sockets, power cords and other electrical and electronic components related thereto. It is a joint venture between a Korean company and a company based in Mauritius. In respect of the assessment year 2002-2003 it filed a return of income declaring income of ₹15,71,607 on 31st October, 2002. In the return, the assessee claimed exemption of ₹16,41,505/- under Section 10A of the Act in respect of the profits derived from the unit located in the export promotion zone (EPZ), Noida where the manufacture and export of eligible goods commenced in the previous year relating to the assessment year 2002-2003. The assessee also had another unit which was located in Non EPZ area the profits from which were not entitled to any exemption. In respect of the non-eligible unit, the assessee incurred a loss of ₹19,20,480/-. In making the assessment under Section 143(3) of the Act by order dated 31st March, 2005, the Assessing Officer set off the loss from the non-eligible unit against the profit of the eligible unit. It would appear that he had computed profit of the eligible unit at ₹19,90,278/-. After setting off the loss from the non-eligible unit, the balance profit of ₹69,799/- was arrived at. To this figure, the Assessing Officer added an amount of ₹1,22,34,928/- being the aggregate amount of the disallowance of the technical support fees, provision for write back and donation. After making the add back, the gross total income was computed at ₹1,23,04,727/- against which the loss for the assessment year 2001-2002 were brought

forward and adjusted in terms of Section 72. Thus the total income was assessed at ₹ Nil. Towards the end of the assessment order the Assessing Officer made the following remarks:-

> *"Assessed at Nil income since the net income of the assessee is assessed at Nil deduction u/s 10A of the Act claimed by the assessee is not considered."*

4. The assessee filed an appeal against the assessment order before the CIT (Appeals) on various grounds and in the course of the appeal proceedings raised an additional ground as follows:-

> *"Additional Ground (Ground No.6)*
>
> *(a) "That the Ld. Assessing Officer has erred in not allowing deduction under Section 10A of the Income Tax Act, 1961 (Act) in respect of profits derived by the undertaking registered under Noida Export Processing Zone (EPZ) from exports.*
>
> *(b) That the Ld. Assessing Officer has grievously erred in not allowing deduction under Section 10A claimed in the return of income on the purported ground that as the net income of the assessee after setting off of brought forward loss/ unabsorbed depreciation was nil, the deduction under section 10A of the Act was not considered.*
>
> *(c) That deduction under section 10A is allowable in respect of profits of eligible undertaking, derived from exports irrespective of profit/ loss of other undertakings or total income after set off of brought forward business losses/ unabsorbed depreciation. That admittedly in this case export profit of eligible undertaking is ₹1,644,405/-, which is eligible for deduction under section 10A of the Act."*

5. In support of the above additional ground the assessee filed written submissions before the CIT (Appeals). The CIT (Appeals) admitted the additional ground on the basis of the judgments of the Supreme Court in *Jute Corporation of India Ltd. v. CIT*, (1991) 187 ITR 688 and *National Thermal Power Co. Ltd. v. CIT*, (1998) 229 ITR 383. As regards the merits of the additional grounds, the CIT

(Appeals) dismissed the same, following an order of the Bangalore Bench of the Tribunal in the case of *Mindtree Consulting (P) Ltd. vs. ACIT (102 TTJ 691)*. The CIT (Appeals) held, following the aforesaid order of the Tribunal, as follows:-

> *"In view of this decision which is also followed by Hon'ble ITAT, Delhi in other cases, the appellant is eligible to set off the loss of such unit. In the facts and circumstances of the case and the decision quoted above, I am of the view that the income of unit eligible for deduction u/s 10A is merely a deduction and not exemption. In view of the same, if the company concern becomes eligible to set off the loss and ultimately the gross total income becomes NIL, the claim of deduction u/s 10A cannot be entertained if the company does not have any positive income. According to the view taken by the Hon'ble ITAT, Delhi and Hon'ble ITAT, Bangalore, it becomes clear that the benefit allowed u/s 10A of the I.T. Act is by way of deduction and not exemption. If the appellant as in this case does not have any positive income, deduction u/s 10A cannot be allowed. The view taken by the AO that the assessee has only NIL income u/s 10A cannot be allowed is, therefore, right and I confirm his view. In this particular year, the appellant has no positive income to avail the benefits of deduction u/s 10A and, therefore, the claim of the appellant to the tune of ₹16,41,405/- is not allowed. The decision of the AO on this issue is sustained."*

6. Aggrieved by the order of the CIT (Appeals) the assessee preferred further appeal before the Tribunal and raised grounds to the effect that the deduction under Section 10A in respect of the Noida unit has to be allowed notwithstanding any current or brought forward loss of the non-eligible unit and that the income tax authorities overlooked that Section 10A continues to be placed under Chapter-III of the Act which deals with *"incomes which do not form part of total income"*. In effect, what was contended was that the losses from the non-eligible units cannot be adjusted against the eligible unit for the purposes of Section 10A. Several orders of the various Benches of the Tribunal including the order of the Tribunal in the case of *ACIT vs. Yokogava India Limited (2007) 111 TTJ 548*, were relied upon by the assessee. The Tribunal, on a consideration of the assessee's submissions based on those authorities, held that the facts of the assessee's case and the claim made by it were similar to the controversy decided by the Bangalore Bench of the Tribunal in the case of *ACIT vs.*

Yokogava India Limited (supra) and following the said order and other orders of the coordinate Benches held that the business loss of the undertakings or units whose income is not exempt under Section 10A cannot be set off against the profits of an undertaking which was eligible for the exemption under section 10A thereby reducing the exemption. The point was thus decided in favour of the assessee.

7. In respect of the assessment year 2003-2004, the facts are these. The assessee filed its return of income declaring *"Nil"* income after setting off the brought forward losses of ₹81,91,655/-. The Assessing Officer computed the income at ₹1,98,96,654/- in the following manner:-

*"**Profit and Gains of Business***

As per computation of income filed with return	*:*	*₹1,02,22,214/-*
Add: Technical Support Fees	*:*	*₹1,32,05,273/-*
Gross Total Income	*:*	*₹2,34,26,941/-*
Less: Exemption u/s 10 [3213829-607911 as discussed above + 924369 (technical fee as computed by assessee though it was not computed correctly as per agreement]	*:*	*₹35,30,287/-*
Income Assessed		*₹1,98,96,654/-"*

The assessee filed an appeal against the assessment order before the CIT(Appeals) and took up the point of re-computation of the claim under Section 10A of the Act. The CIT(Appeals) held that the loss from the non-eligible unit can be set off against the profit from the unit eligible for Section 10A relief and in so holding, followed an order of the Bangalore Bench of the Tribunal in the case of *Mindtree Consulting (P) Ltd. vs. ACIT (supra).* The CIT (Appeals) also expressed the view that the provisions of Section 10A provide merely for a deduction and not exemption. He also held that if the assessee becomes eligible to set off the brought forward losses thereby reducing

the gross total income of the year to Nil, the claim for deduction under Section 10A cannot be entertained. In this view of the matter the point was decided against the assessee.

8. The assessee preferred a further appeal before the Tribunal. The Tribunal, relying on its decision in the assessee's own case for the assessment year 2002-2003, accepted the assessee's plea and directed the Assessing Officer to allow the deduction under Section 10A without setting off the brought forward losses. Thus the point was decided in favour of the assessee.

9. It is against the above orders of the Tribunal that the Revenue has filed the present appeals.

10. A point of difference that may be noticed between the assessment year 2002-2003 and the assessment year 2003-2004 is that in respect of the former, the assessee's claim is that the losses suffered by the non-eligible unit cannot be set off against the profits of the eligible, whereas in the latter the assessee's claim is that the brought forward losses of the non-eligible units should not be set off against the profits of the unit eligible under Section 10A. We may notice that the substantial question of law framed on 26th April, 2012 in ITA 347/2011 for the assessment year 2003-2004, should more appropriately read as under:-

> *"Whether the Income Tax Appellate Tribunal is right in holding that for computing deduction under Section 10A of the Income Tax Act, 1961 in respect of EPZ Unit, the brought forward losses of the Non-EPZ Unit should not be deducted or reduced?"*

11. Section 10A of the Act has had a checkered history and has probably received more amendments than any other section of the Act. It was first introduced by the Finance Act, 1981 with effect from 1st April, 1981. In its original form it consisted of only 7 sub-sections. The Section provided for a complete tax holiday for industrial units situated in Free Trade Zones. The rationale behind the Section was explained

by the CBDT in circular No.308 dated 29th June, 1981 (1981 131 ITR St. 124). It may not be necessary to reproduce the circular in full but a perusal thereof shows that with the advent of the Kandla Free Trade Zone in the year 1965 and other similar zones set up in India, encouragement of the establishment of export oriented industries in the Free Trade Zones was considered necessary. It was with this object that Section 10A was introduced as a special provision in respect of newly established industrial undertakings in Free Trade Zones. Paragraph 6.4. of the circular describes the new Section as providing *"for a complete tax exemption"* in respect of the profits derived from an industrial undertaking set up in any Free Trade Zone for a period of 5 initial assessment years. Originally the expression "*Free Trade Zone"* meant the Kandla Free Trade Zone and Santa Cruz Electronics Export Processing Zone and included any other such zone notified by the Central Government in the official gazette for the purposes of the Section. It is relevant to note that sub-section (4) of Section 10A made certain provisions to ensure that the assessee who availed of the benefit of the exemption will not be eligible for any other tax concessions in relation to the industrial undertaking in the Free Trade Zone either during the course of the five year tax holiday period or at any time after the end of the said period. It may be useful to reproduce paragraph 6.6. of the circular referred to above in which the provisions of sub-section (4) have been explained: -

> *"6.6 The scheme of the new section is that the assessee who avails of the benefit of this tax concession will not be eligible for the other tax concessions in relation to the industrial undertakings in the free trade zone either during the course of the 5-year tax holiday period or at any time after the end of the tax holiday period. To secure this objective, sub-section (4) of the new section 10A has made the following provisions in regard to the computation of the total income of the assessee for the previous year relevant to the assessment year immediately succeeding the last assessment year or the tax holiday period or of any previous year relevant to any subsequent assessment year :-*
>
> *(i) the provisions relating to depreciation under section 32, investment allowance under section 32A, development rebate under*

section 33, expenditure on scientific research under section 35 and capital expenditure in relation to family planning under the first proviso to section 36(1)(ix) shall apply as if every allowance or deduction referred to in that section and relating to or allowable for any of the assessment years comprised in tax holiday period in relation to building, machinery, plant or furniture used for the purpose of the business of the undertaking or any expenditure incurred for the purposes of such business in any of such previous years had been given full effect to for that assessment year itself. The natural consequence of this provision is that any amount representing the unabsorbed depreciation under Section 32(2), the unabsorbed investment allowance under section 32A(3)(ii), the unabsorbed capital expenditure on scientific research under section 35(4), or the unexpired capital expenditure in relation to the family planning under the first proviso to section 36(1)(ix) in relation to the tax holiday period will not be carried forward or set off against profits for any subsequent assessment year. In other words, it is presumed that the allowances for depreciation, investment allowance, development rebate, capital expenditure on scientific research or for family planning were fully absorbed by the income of the industrial undertaking in any of the previous years relevant to the five initial assessment years and that no amount of unabsorbed allowance or deduction is to be carried forward to any assessment year following the five-year tax holiday period;

(ii) No loss under the head "Profits and gains of business or profession" under section 72(1) or under the head "Capital gains" under section 74(1) and no tax holiday deficiency under section 80J(3) in respect of any of the assessment years comprised in the tax holiday period will, in so far as such loss or deficiency relates to the business of industrial undertaking, be carried forward or set off in computing the income of the assessment year immediately succeeding the last of the assessment years comprised in the tax holiday period or in any subsequent assessment year;

(iii) the assessee will not be eligible for deduction under section 80HH (relating to deduction in respect of profits and gains from newly established industrial undertakings in backward areas) or under section 80HHA (relating to deduction in respect of profits and gains from newly established small-scale industrial undertakings in rural areas) or in respect of tax holiday under section 80J or under section 80-I in relation to the profits and gains of the industrial undertaking for any previous year relevant to the assessment year immediately

succeeding the last assessment year comprised in the tax holiday period or any subsequent assessment year; 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 industrial undertaking for the assessment year immediately succeeding the last assessment year comprised in the tax holiday period and every subsequent assessment year will be computed as if the assessee had claimed and had been actually allowed the depreciation allowance for each of the assessment years comprised in the tax holiday period."

Several amendments were made to the Section by the Finance Acts, 1987, 1988,1993, 1995, 2000, 2001, 2002, 2003, 2008, 2009 and so on. The Finance Act, 1993 is significant in the sense that it amended the Section to provide for a tax holiday to the profits derived from units set up in software technology parks and electronic hardware technology parks approved by the Inter-Ministerial Standing Committee set up under a scheme notified by the Ministry of Commerce and administered by the Department of Electronics. The amendment made by the Finance Act, 2000 with effect from 1st April, 2001 was somewhat more drastic. These amendments were carried out with the avowed object of rationalizing the concessions and *"to phase these out by the end of the assessment year 2009-2010"*. In order to fulfill this object, both Sections 10A and 10B were substituted by new provisions and these provisions were explained by the CBDT in circular No.794 dated 9.8.2000 [(2000) 245 ITR ST 21]. Paragraph 15.3 of the circular says that the new provisions *"provide for deduction in respect of profits and gains"* derived by an undertaking. From 5 years which was earlier granted, the tax holiday was extended to a period of 10 consecutive assessment years in a graded manner. Section 10A(1) reads as follows, prior to the amendment made by the Finance Act, 2000 with effect from 1st April, 2001: -

"Subject to the provisions of this Section, any profits and gains derived by an assessee from an industrial undertaking to which this Section applies shall not be included in the total income of the assessee".

From 1st April, 2001, sub-section (1) was amended to read as follows:-

> *"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:"*

It may be noted that there is a significant difference in the language between sub-section(1) as it existed prior to being amended by the Finance Act, 2000 with effect from 1st April, 2001 and after being amended by the said Act. Whereas before the amendment the language conformed to the heading of Chapter-III, namely, *"incomes which do not form part of total income"* by providing that the profits of the original undertaking shall not be included in the total income of the assessee, after the amendment the language underwent a change and it was provided that a "*deduction of such profits*" will be allowed *"from the total income of the assessee"*.

12. By the Finance Act, 2002, for one assessment year only, namely, the assessment year 2003-2004, the deduction under sub-section (1) was restricted to 90% of the profits derived by the industrial undertaking, [as against 100% deduction given earlier] and this move was explained in para 19.4 of the circular No.8 of 2002 dated 27th August, 2002 [(2002) 258 ITR St. 13] to be necessitated by resource mobilization in the short run. A third proviso was therefore inserted to achieve this object by restricting the deduction to 90% for the assessment year 2003-2004 only.

13. The Finance Act, 2003 made significant changes both with prospective and retrospective effect from the assessment year 2001-2002. The significant retrospective amendment was the one which was made in sub-section (6) of Section 10A. This sub-section contained provisions for ensuring that an assessee who enjoys the tax holiday under Section 10A does not enjoy any other tax concession. This aspect was earlier

taken care of by sub-section (4), but when the entire Section was substituted and recast by the Finance Act, 2000 with effect from 1st April, 2001, sub-section (4) became sub-section (6) but the essence and substance of the provisions of these sub-sections remained the same. The effect was that from 1st April, 2001 (assessment year 2001-2002) once the tax holiday ended, the bar or prohibition on enjoying other tax benefits such as carry forward and set off of laws and unabsorbed depreciation etc. came into force.

14. The rationale behind both sub-section (4) and sub-section (6) is not far to seek. The legislature obviously wanted to ensure that if the profits from the eligible undertaking are allowed to enjoy the benefits of Section 10A, they should not enjoy any further reliefs or benefits which are available under the provisions of the Act. We have already referred to this aspect when we referred to para 6.6 of the Circular No.308 dated 29.06.1981 (supra) which explained sub-section (4) of Section 10A when the section was introduced by the Finance Act, 1981. The same rationale holds good for sub-section (6) also. If the profits of the eligible undertaking do not enter the field of taxation for a particular period known as the tax holiday period, it stands to reason that when the profits enter the field of taxation after the period of the tax holiday, those profits should not be reduced or set off by other reliefs provided in the Act such as brought forward losses, brought forward unabsorbed depreciation, etc. The mandate of these sub-sections is that all such allowances and reliefs would be deemed to have been exhausted during the tax holiday period itself and no part thereof would survive for consideration after the tax holiday period. The amendment made by the Finance Act, 2003 to sub-section (6) with retrospective effect from 01.04.2001 made a significant departure from the legislative thinking outlined above. It provided that from the assessment year 2001-02, the right to carry forward the losses will be recognized. The result of this retrospective amendment is that even the bar on claiming the benefits of carried forward losses and allowances after the period of tax holiday is over was lifted and from the assessment year 2001-02, irrespective of the

fact that the profits from the eligible unit do not enter the field of taxation, the assessee would be still entitled to claim those allowances and reliefs against the profits of the eligible undertaking. This has resulted in the position that a double benefit has been conferred on the eligible profits from the assessment year 2001-02, which the section initially did not want to confer.

15. With the aforesaid background, we shall first proceed to examine the computation of the income for the assessment year 2002-03 as per the assessment order. The same is as follows: -

			₹
"Profits and Gains of Business			69,799
As per computation of income filed with return			
Add:	Technical support fees	1,13,29,407	
	Provision for write back	8,88,521	
	Donation	17,000	
			1,22,34,928
Gross total income			1,23,04,727
Less: B/F losses for A.Y. 2001-02 adjusted u/s 72			1,23,04,727
Total income			**Nil**"

16. It needs to be explained here that the profits and gains of business computed at ₹69,799/- is the result of setting off the loss of ₹19,20,480/- from the non-eligible units against the profits of ₹19,90,278/- from the eligible unit at Noida. If the assessee's claim is accepted then the profits from the eligible Noida unit will not enter the field of taxation with the result that the loss from the non-eligible unit would be eligible to be carried forward to the subsequent years subject to fulfillment of other conditions as applicable. This right has been lost to the assessee because of the adjustment made by the Assessing Officer. Not only that, the Assessing Officer has further brought the excess of ₹69,799/- (which in reality represents the profits of eligible unit) to tax which is also stated to be contrary to Section 10A(1). In respect of

the assessment year 2003-04 the exemption claimed by the assessee in respect of the profits of the eligible unit at ₹32,13,829/- was reduced by ₹6,07,911/- by allocating certain common expenses such as salary, wages and allowances, interest and miscellaneous expenses, etc. against the profits from the eligible unit. If the profits do not enter the field of taxation at all as claimed by the assessee, it would not have been possible for the Assessing Officer to allocate a part of the common expenses against such profits and reduce the exemption which has resulted in a part of the profits from the eligible unit suffering taxation. The other grievances of the assessee against the computation of the income for the assessment year 2003-04 were articulated by it before the CIT (Appeals) in writing and the relevant portion thereof, in so far as it relates to Section 10A, is reproduced below: -

> "*At the outset, it is stated that the provisions of section 10A is a part of Chapter-III of the Act, the heading of which reads "Incomes which do not form part of total income". This means the nature of income dealt with under the provisions of Chapter-III is not dependent on gross total income (unlike deductions under Chapter-VIA). As prescribed under the statute, the profits of the eligible undertaking is first determined and then the deduction with reference to that eligible income as allowable is to be deducted there from and the balance amount can only be added to the taxable income. Therefore, profit of the eligible undertaking would form part of total income of the assessee, only after reducing the amount of exemptible profit therefrom. This is a process which falls much before reaching the gross total income. It is submitted that for this very distinction, nature of exemption allowed under Chapter-III is not dependent on the "Gross Total Income". Hon'ble Bangalore Tribunal in VXL Instruments Ltd. v. Jt. CIT, 6 SOT 371 (Bang.) held that profits of an eligible undertaking under section 10A do not form part of gross total income.*
>
> *It may be further observed that the heading of section 10A is "Special provision in respect of newly established undertaking……". Undoubtedly, these are the special provisions made for encouraging the establishment of export oriented industries in specified free trade or export processing zones. Having regard to the cardinal principal of interpretation emerged from the maxim "generalia specialibus non*

derogant", the special provision which is overriding in nature, must prevail over general provisions to the extent of its scope and limit. Pursuant to the opening non-obstante clause of sub-section (6) of section 10A, all the allowances/ set off losses etc. are available in a manner different from general applications of section 32, 32A, 33, 35, 36(1)(ix), 72, 74, etc. Therefore, we submit that the computation of the amount of exemption u/s 10A should be strictly in respect of export profits of eligible undertaking.

In this regard, it is submitted that the AO had reached at the figures of gross total income before computing the amount of exemption under section 10A of the Act. After setting off of the brought forward losses to the extent of assessed gross total income, the AO assessed total income at NIL and denied the exemption under section 10A of the Act on the ground that the total income of the appellant is reduced to NIL. The action of the AO is erroneous in denying the exemption should be determined as prescribed under section 10A itself i.e. with reference to the profit of the undertaking concerned. From the language of the heading of the Chapter-III, it is clear that the income as contemplated under section 10A is outside the scope of the total income, as a consequence it has no relevance with the 'gross total income'. Therefore, non-consideration of claim of the appellant with reference to the assessed income which is nothing but the adjusted gross total income is not in accordance with the provisions of law.

It is, therefore, prayed that claim of the appellant under section 10A merits allowances with reference to the profit of the undertaking concerned. A bare reading of provisions of sub-section (6) of section 10A suggests that various allowances under sections mentioned therein shall be deemed to have been allowed in respect of that undertaking during the exemption period and on the exhaustion of the exemption period, the rest of the allowance could be available. All the sections referred to in Section 10A (6) refer either to the eligible undertaking or business/ profits & gains of the undertaking. The provisions of section 10A refer only to the eligible undertaking and not to all the units operated by the assessee. Further, under section 10A the exemption has been prescribed to the computed separately with reference to the profits/ gains of the undertaking in question and does not contemplate computation of such exemption with reference to the aggregate profits of all the undertakings of the assessee. In this regard provision of sub-section (4) of section 10A may be referred to, which reads as under: -

> *"S.10A (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."*

17. The question whether Section 10A provides for total exemption from tax or provides for only a deduction from the income of the assessee was debated at the Bar at considerable length. The section is placed in Chapter III of the Act which is titled "*Incomes which do not form part of total income*". Sub-section (1) of this section as it stood amended by the Finance Act, 2000 w. e. f. 01.04.2001, however, provides for "*a deduction of such profits and gains as are derived by an undertaking from the export of articles or thins or computer software……from the total income of the assessee*". The language used has given rise to the argument that the section only provides for a deduction which means that the profits of the eligible undertaking will have to enter the field of taxation and be subjected to all the provisions of the Act and only the balance of profits, if any, will be deducted from the total income. This is in contrast to sub-section (1) as it stood prior to the aforesaid amendment, which provided that "*any profits and gains derived by an assessee from an industrial undertaking to which this Section applies shall not be included in the total income of the assessee*". This phraseology which we have noted earlier to conform to the title of Chapter III of the Act has given rise to the further argument from the department that w.e.f. 01.04.2001 there is a significant change and profits which were earlier exempt from income tax and were not includible in the assessee's total income are now so included, subject to deduction, and once the profits are included, all the provisions of the Act will have to be applied while arriving at the amount of deduction. In order to test this argument it is necessary to look at several aspects. Firstly, Section 10A even after being amended substantially by the Finance Act, 2000 has been retained in Chapter III of the Act, notwithstanding the change in the language of sub-section (1). If the department is right in its contention that after 01.04.2001 the section only provides for a deduction

and not an exemption, it was open to the legislature to transpose the section from Chapter III to Chapter VIA of the Act which is titled "*deductions to be made in computing total income*". This aspect of the matter has been adverted to and discussed by the Karnataka High Court in *CIT v. Yokogawa India Ltd.*, (2012) 341 ITR 385. It has been observed by the Karnataka High Court as follows: -

> "*The substituted section 10A continues to remain in Chapter III. It is titled as "Incomes which do not form part of total income". It may be noted that when section 10A was recast by the Finance Act, 2001, 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 Parliament intended that the relief under section 10A 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 80HHC, 80-IA, etc. Parliament was aware of the various restricting and limiting provisions like section 80A and section 80AB 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 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. Parliament, despite being conversant with the implications of this Chapter, has consciously chosen to retain section 10A in Chapter III.*"

18. Secondly, we find that though sub-section (1) provides for a deduction of the eligible profits, there is good reason to think that it is not to be considered as a deduction because the sub-section further says that the deduction "*shall be allowed from the total income of the assessee*". Under the Income Tax Act, 1961 the income of an assessee under the various heads of income enumerated in Section 14 have to be computed in accordance with the provisions of the Act. The aggregate of such incomes constitutes the "*gross total income*" of the assessee within the meaning of Section 80B (5) which defines "*gross total income*" as the total income computed in

accordance with the provisions of the Act before making any deduction under Chapter VIA. The expression "*total income*" is defined in Section 2 (45) of the Act to mean the total amount of income referred to in Section 5, computed in the manner laid down in the Act. Section 4 which is charging section provides for the charge of income tax in respect of the total income of the previous year of every person. The position that emerges from a harmonious reading of these provisions is that the assessee is required to pay income tax on his total income of the previous year. The determination of the total income is the last point before the tax is charged and once the total income is determined or quantified, there is absolutely no scope for making any further deduction, having regard to the provisions referred to above. If this is the true legal position, as we think it to be, then it is not possible to understand sub-section (1) of Section 10A as providing for a "deduction" of the profits of the eligible unit "*from the total income of the assessee*". The definition of the expression total income given in Section 2(45) cannot be imported into the interpretation of sub-section (1) having regard to the context in which it is used and the scheme of the Act relating to the charge of the tax. It has to be kept in mind that the definition section would not apply if the context requires otherwise; in other words, if the scheme of the Act relating to the charge of income tax clearly makes it impossible for any deduction to be allowed once the total income is determined, then it would be futile to still insist on applying the definition of the expression "*total income*" under Section 2 (45) to the interpretation of the sub-section. In other words the context in which the expression "*total income*" is used in the sub-section requires us to abandon the definition of that expression as per Section 2 (45). Again this aspect of the matter has been dealt with in the judgment of the Karnataka High Court (supra) in the following words: -

> "*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 10A is different from the one adopted in section 80A. Section 10A 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.

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 the Income-tax Act. Section 14 provides that "save as otherwise provided by the Income-tax Act, all income shall, for the purposes of charge of income-tax and computation of total income, be 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 10A is covered in Chapter III, the phrase "total income" used in section 10A cannot be understood in the same sense as in section 2(45).

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 10A 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 10A(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 10A(1) is, therefore, to be understood as the total income of the STP unit. This is clear from the first proviso to section 10A(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 10A cannot mean the total

income computed in accordance with the provisions of the Act. Instead, such a phrase in the context of section 10A, means profits and gains of the STP undertaking as understood in its commercial sense."

19. There is further indication that Section 10A provides for an exemption and not merely a deduction and this is in the form of return of income prescribed by the Income Tax Rules, 1962. The return of income in Form No.ITR-6 shows that the first step which an assessee is required while computing the income from business or profession is to commence the computation from the profit as per the profit and loss account. The second step is to adjust the profit figure by excluding receipts which are not subject to tax or which are subject to tax under other heads of income. The third step is to exclude exempt income credited to the profit and loss account. Fourth step is to add back claims which are disallowable under the various provisions of the Act. The fifth step is to claim any other allowance or deduction. This exercise gives the figure of profit or loss before deduction under Section 10A. Thereafter the assessee has to deduct the profits eligible under Section 10A. The form further prescribes the steps involved in the computation of total income. This shows that after aggregating the income from salary, house property, profits and gains from business, capital gains and income from other sources, the total is arrived at and it is from this total that the losses of the current year and the brought forward losses from the past years are to be set off. The resultant figure gives the gross total income of the assessee from which deductions under Chapter VIA are to be made in order to arrive at the total income. The steps given in the income tax return form also are an indication that it is before the adjustment of the losses of the current year and the brought forward losses from the past year that the profits eligible for the relief under Section 10A have to be given the relief. The form of return is also an indication that the relief under Section 10A has to be given before adjustment of the current as well as the past losses. This aspect of the matter is also considered by the Karnataka High Court in the judgment cited (supra) in the following manner: -

"*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 10A 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 10A 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.*"

20. We may now refer to two judgments of the Bombay High Court on the issue. The first is *Hindustan Unilever Ltd. v. Deputy Commissioner of Income-tax and Anr.*, (2010) 325 ITR 102 (Bom.). This case dealt with Section 10B of the Act which is substantially similar to Section 10A. In that case the assessment was sought to be reopened under Section 147 of the Act for several reasons. One of the reasons was that the assessee was wrongly allowed deduction under Section 10B in the amount of ₹11.11 crores in the assessment. The Assessing Officer observed that there was a loss in the crab stick unit amounting to ₹1.33 crores and since this unit was exempt from taxation under Section 10B, the losses therein were wrongly set off against the normal business income of the assessee and thus there was escapement of income to the extent of ₹1.33 crores. The reopening was challenged before the Bombay High Court which held as follows: -

"*There is merit in the submission which has been urged on behalf of the assessee that the Assessing Officer has while reopening the*

assessment ex facie proceeded on the erroneous premise that section 10B is a provision in the nature of an exemption. Plainly, section 10B as it stands is not a provision in the nature of an exemption but provides for a deduction. Section 10B was substituted by the Finance Act of 2000 with effect from April 1, 2001. Prior to the substitution of the provision, the earlier provision stipulated that any profits and gains derived by an assessee from a 100 per cent. 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 10B 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 per cent. 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 10B. 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 10B."

21. It may be observed that in the Bombay High Court case the loss suffered by the eligible unit under Section 10B was set off against the normal business profit. The view taken by the Assessing Officer in that case was that Section 10B provided for an exemption which means that it does not enter the field of taxation and, therefore, the loss arising therefrom cannot be set off against the normal business profits. Disapproving the view taken by the Assessing Officer, the High Court held that Section 10B, as substituted by the Finance Act, 2000 was a Section providing for a deduction whereas prior to the substitution the earlier provision was in the nature of an exemption. It was thus held that the basis on which the assessment was sought to be

reopened was wrong and the reassessment notice was struck down. This decision was followed by the Bombay High Court in the case of *CIT v. Black and Veatch Consulting Pvt. Ltd.* decided on 09.04.2012. In this case the precise question which arose under Section 10A was whether the Tribunal was correct in holding that the brought forward unabsorbed depreciation and losses of the unit, the income from which was not eligible for deduction under Section 10A cannot be set off against the current profit of the eligible unit for computing the deduction under Section 10A. Referring to its earlier judgment in the case of *Hindustan Unilever Ltd. (supra)* it was held as under: -

> "*2. 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 Ltd Vs. Deputy Commissioner of Income Tax (2010) 325 ITR 102 at para 24. 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 VI-A "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. So construed, the appeal by the Revenue would not give rise to any substantial question of law and shall accordingly stand dismissed. There shall be no order as to costs.*"

22. It is interesting to note that though there is a divergence of opinion between the Karnataka High Court in *Yokogava's case (supra)* and the Bombay High Court in *Hindustan Unilever (supra)* as to the nature of Section 10A – whether it provides for exemption or deduction of the profits of the eligible unit, the ultimate decision in *Black & Veatch Consulting (supra)* which purports to follow *Hindustan Unilever (supra)* was that such profits have to be eliminated at the first stage itself, that is, as soon as they are computed, suggesting that it is an exemption provision. It was held that the eligible profits are not to be subjected to the adjustment under Section 72 of the Act, and the brought forward loss from the unit eligible for the relief under Section 10B cannot be adjusted against the profits from the other three eligible units, which in effect reiterates the position that the loss does not enter the field of taxation just as the profits also do not enter the field. This, with respect, lends support more to the view that Section 10A and Section 10B are in the nature of exemption provisions, rather than provisions for deduction. In the ultimate analysis it may perhaps be wise to fall back on the observations of Justice Narasimham, J. (as he then was) speaking for a Division Bench of the Orissa High Court in *Ramachandra Mardaraj Deo v. Collector of Commercial Taxes*, (1957) 31 ITR 651 where he described the difference between "exemption" and "deduction" as "a fine distinction" and observed as under: -

> "*Whether a particular sum is claimed as an exemption or as a deduction, the net result is its immunity from taxation if the claim is allowed…….*"

23. This Court considered a somewhat similar question, though not identical, in *Commissioner of Income-Tax v. Dalmia Cement (Bharat) Ltd.*, (1980) 126 ITR 736. The question arose under the Companies (Profits) Surtax Act, 1964. Ranganathan, J.

(as he then was) referred to the judgment of E. S. Venkataramiah, J. (as he then was) of the Karnataka High Court in *Stumpp, Schuele and Somappa P. Ltd. v. ITO (Second),* (1976) 102 ITR 320 where the position was summed up as under: -

> "*(a) Any amount in respect of which deduction is claimed under any of the provisions in sections 80C to 80V is already included in the gross total income of the assessee and, therefore, cannot be stated to be not includible in the income of the assessee.*
>
> *(b) The expression "not includible" means not capable of being included. It cannot refer to an amount which already formed part of the total income. It refers to the classes of income, which Chap. III directs, "shall not be included" in the total income of the assessee.*
>
> *(c) The concept of deductions by way of expenses, rebates, allowances, etc., under Chaps. IV & VI-A is totally different from that of non-inclusion.*"

24. Thus incomes which are enumerated in Chapter III of the Act have traditionally been considered as incomes which are exempt from tax rather than as deductions in the computation of the total income. The essential difference between an exemption and deduction seems to be that an exempt income does not enter the computation of total income at all, whereas a deduction, in the very nature of things, is first included in the total income and given a deduction subject to fulfillment of several conditions. The fact that the deduction may be given in respect of the entire income does not necessarily mean that it is an exempt income. At the same time, the fact that a particular class of income is only partially exempt from taxation does not necessarily mean that it is only a deduction. In a recent judgment, the Supreme Court has elucidated on the subject – *Commissioner of Income-tax v. Williamson Financial Services and Ors.*, (2008) 297 ITR 17 (SC) where it was observed as under: -

> "*At this stage we have to analyse Chapter III which deals with incomes which do not form part of total income. Section 10 groups in one place various incomes which are exempt from tax. The incomes enumerated in section 10 are not only excluded from the taxable*

income of the assessee but also from his total income. The exemption embodied in section 10 can be divided into two categories, namely, exemption to which certain classes of income from their very nature are entitled and the second category concerns exemption which the character of the assessee entitles him to claim. In the first category is agricultural income whereas in the second category of exempted income is the income of local authorities and diplomatic officers. We are concerned with the first category.

In addition to the above two categories there is a third kind of income. These incomes are wholly or partly tax-free incomes on account of special deductions under Chapter VI-A. We are essentially concerned with these tax-free incomes."

25. Again at paragraph 40 at page 34 of the report it was observed as under: -

"*As stated above, there is a vital difference between income not chargeable to tax and not includible in the total income (for example, agricultural income) and income which forms part of total income but which is made tax-free. Deductions under Chapter VI-A fall in the category of tax-free incomes. In fact, history shows that some of the incomes in Chapter VI-A have been transferred from Chapter VII to Chapter VI-A. Chapter VII has been deleted. However, at the relevant time Chapter VII referred to incomes forming part of total income on which no tax was payable. That is why we have stated that there is a difference between "exempted incomes" and "tax-free incomes". This distinction is of some importance. As stated above, section 5 provides what the "total income" shall include. Chapter III refers to "incomes which do not form part of total income". Chapter IV deals with "computation of total income". It classifies the "income" under different heads and the deductions to be made in respect of each of the different heads of income. In the Income-tax Act, the expression "income includible in the total income" has a definite connotation. Similarly, the expression "deduction and allowances" have particular connotation. Therefore, on the one hand we have "agricultural income" which is neither chargeable nor includible in the total income and on the other hand we have "incomes" under Chapter VI-A which are part of total income but which are tax-free.*"

26. In the case of *TATA Power Company Ltd. v. Reliance Energy Ltd. and Ors.*, (JT) 2009 (8) SC 562, the Supreme Court was confronted with the question whether

Chapter headings and marginal notes should be taken into consideration for the purpose of interpretation of the main provisions. It was held that Chapter headings are parts of the statute and have been enacted by the Parliament and, therefore, they can be used as an aid to construction in case of ambiguity and doubt. The following observations are pertinent: -

> "*114. Chapter headings and the marginal note are parts of the statute. They have also been enacted by the Parliament. There cannot, thus, be any doubt that it can be used in aid of the construction. It is, however, well settled that if the wordings of the statutory provision are clear and unambiguous, construction of the statute with the aid of 'chapter heading' and 'marginal note' may not arise. It may be that heading and marginal note, however, are of a very limited use in interpretation because of its necessarily brief and inaccurate nature. They are, however, not irrelevant. They certainly cannot be taken into consideration if they differ from the material they describe.*"

27. After referring to the views of the learned authors in "Interpretation of Statutes" by Vepa P. Sarathi (4th Edition) and "Principles of Statutory Interpretation" by Justice G. P. Singh on the relevance of Chapter heading, the Supreme Court summarised the position as under: -

> "*120. Chapter heading, therefore, is a permitted tool of interpretation. It is considered to be a preamble of that section to which it pertains. It may be taken recourse to where an ambiguity exists. However, where there does not exist any ambiguity, it cannot be resorted to. Chapter heading and marginal note, however, can be resorted to for the purpose of resolving the doubts.*"

28. In making the aforesaid observations the Court noted that "*there is a drift from the old values in recent times, suggesting that the Courts are increasingly accepting the Chapter headings as an aid to construction or interpretation in case of ambiguity*". The caveat, however, is that where the statute is clear and unambiguous that should prevail. In interpreting sub-section (1) of Section 10A after the amendment made by

the Finance Act, 2000 w. e. f. 01.04.2001, one cannot deny that there is ambiguity or doubt, because of the language used, as to whether the sub-section provides for an exemption or a deduction. We have earlier referred to the difficulty caused by the language which says that the deduction shall be made from the total income, when the Act contains no provision to allow any deductions from the total income. The section has been interpreted by the Karnataka High Court (supra) as an exemption provision whereas the Bombay High Court has understood the same as a deduction section, though the ultimate result did not make any difference to the assessee's claim in *Black & Veatch Consulting (supra)*. Therefore, it cannot be denied that there is uncertainty and lack of clarity or precision in the language employed in sub-section (1). It is, therefore, not impermissible to rely on the heading or title of Chapter III and interpret the section as providing for an exemption rather than a deduction.

29. The key to the problem seems to lie in appreciating the difference between a provision which exempts an income and a provision which provides for a deduction of the income or a part thereof in computing the total income of the assessee. We have attempted to outline the difference between the two kinds of provisions in the light of the authorities cited above. The matter is not altogether free from difficulty. However, as S. Ranganathan, J. (as he then was) has pointed out in *CIT v. Dalmia Cement (Bharat) Ltd. (supra)*: -

> "*In the process of judicial assessment of such conflicting interpretations, there is no sensitive balance with which to weigh the pros and cons and determine with scientific accuracy which side is the weightier and, perhaps in the drawing of the ultimate inference one way or the other, the subjective element is not altogether excluded.*"

30. With this caution or disclaimer in mind we are inclined to hold that Section 10A is a provision exempting a particular kind of income even in its present form, that is to say, even after being amended by the Finance Act, 2000 w. e. f. 01.04.2001. We are inclined, with respect, to agree with the view taken by the Karnataka High Court in the case of *CIT v. Yokogava (supra)*. As noticed, the Bombay High Court reached the

same conclusion which the Karnataka High Court reached in the case of *CIT v. Yokogava (supra)*, in its judgments in *Hindustan Unilever Ltd. (supra)* and *CIT v. Black & Veatch Consulting Pvt. Ltd. (supra)*, despite taking the view that the Section provides for a deduction and not an exemption.

31. Reference was made by the revenue to sub-section (4) of Section 80A which reads as under: -

> "*(4) Notwithstanding anything to the contrary contained in section 10A or section 10AA or section 10B or section 10BA or in any provisions of this Chapter under the heading "C – Deductions in respect of certain incomes", where, in the case of an assessee, any amount of profits and gains of an undertaking or unit or enterprise or eligible business is claimed and allowed as a deduction under any of those provisions for any assessment year, deduction in respect of, and to the extent of, such profits and gains shall not be allowed under any other provisions of this Act for such assessment year and shall in no case exceed the profits and gains of such undertaking or unit or enterprise or eligible business, as the case may be.*"

This Section seems to indicate, as contended by the Revenue, that Section 10A or Section 10B are only deduction provisions. No doubt, the assumption underlying the sub-section is that Section 10A and Section 10B are deduction provisions and once a deduction is allowed to the assessee under those sections, the same profits shall not be allowed as a deduction under any other provision of this Act for the same assessment year and that in any case the deduction shall not exceed the profits and gains of the eligible undertaking or unit or enterprise or business, as the case may be. Even if Section 10A/ Section 10B are construed as exemption provisions, sub-section (4) of Section 80A cannot defeat such construction. The sole object of the sub-section is to ensure that double benefit does not result to an assessee in respect of the same income, once under Section 10A or Section 10B or under any of the provisions of Chapter VI-A and again under any other provision of the Act. This sub-section does not militate against the view that Section 10A or Section 10B is an exemption provision. The sub-

section is not inconsistent with such an interpretation because even if those sections are construed as exemption provisions, it is still possible to invoke the sub-section and ensure that the assessee does not obtain a deduction in respect of the exempted income under any other provision of the Act. The only object of the sub-section is to ensure that there is no double benefit arising to the assessee in respect of the same income.

32. Sub-section (4) of Section 80A was inserted by the Finance (No.2) Act, 2009 with retrospective effect from 01.04.2003. Circular No.5/2010 issued by the CBDT on 3rd June, 2010 explained the sub-section as follows: -

> "*25. Amendment in Chapter VIA to prevent abuse of tax incentives*
>
> *25.1 The profit linked deductions in Chapter VIA are prone to considerable misuse. Further, since the scope of the deductions under various provisions of Chapter VIA overlap, the taxpayers, at times, claim multiple deductions for the same profits.*
>
> *25.2 With a view to preventing such misuse, the provisions of section 80A of the Income-tax Act have been amended to provide the following, namely: -*
>
> > *(i) deduction in respect of profits and gains shall not be allowed under any provisions of section 10A or section 10AA or Section 10B or section 10BA or under any provisions of Chapter VIA under the heading "C. Deductions in respect of certain incomes" in any assessment year, if a deduction in respect of same amount under any of the aforesaid has been allowed in the same assessment year.*
> >
> > *(ii) the aggregate of the deductions under the various provisions referred to in (i) above, shall not exceed the profits and gains of the undertaking or unit or enterprise or eligible business, as the case may be;*
> >
> > *(iii) no deductions under the various provisions referred to in (i) above, shall be allowed if the deduction has not been claimed in the return of income;*

25.3 Applicability – This amendment has taken effect retrospectively from 1st April, 2003, and will accordingly apply in relation to assessment year 2003-04 and subsequent years."

33. The contents of the circular accord with our view of the sub-section. Merely because there is a reference to Section 10A and Section 10B in the sub-section, it cannot control the interpretation of those Sections.

34. Our attention was invited by the Revenue to three judgments of the Supreme Court which are; (i) *Cambay Electric supply Industrial Co. Ltd. v. CIT*, (1978) 113 ITR 84, (ii) *IPCA Laboratory Ltd. v. Deputy CIT*, (2004) 266 ITR 521 & (iii) *Synco Industries Ltd. v. AO (IT) & Others*, (2008) 299 ITR 444.

35. In *Cambay (supra)* the Supreme Court was concerned with the question as to whether Section 72 of the Act can be considered as part of the computation provisions of the Act. It was held that it was so and that before allowing the deduction under Section 80E of the Act from the gross total income of the assessee, the brought forward losses relating to the business have to be set off against the profits of the eligible unit because Section 72 which permits the set off is part of the computation provisions of the Act. In the case of *IPCA (supra)* the Supreme Court was concerned with Section 80HHC of the Act and the question was whether the loss in the trading activity has to be set off against the profits of the manufacturing activity while computing the deduction under the Section in respect of the export profits. Both the manufacturing as well as trading activity were eligible for the deduction. It was held by the Supreme Court that the loss has to be adjusted against the eligible profits. The third decision in the case of *Synco Industries (supra)* was also concerned with two Sections in Chapter VI-A of the Act, i.e. Section 80HH and Section 80I. There it was held that the loss from the oil division was required to be adjusted against the profits of the chemical division before determining the gross total income and since the gross total income was nil, the assessee was not entitled to claim the deductions under

Chapter VI-A, viz., deductions under Sections 80HH and 80I. In all these three decisions the Supreme Court examined the scope of the expression "gross total income" in the light of the definition in Section 80B(5) as also under Section 80AB. The "gross total income" has been defined as the total income computed in accordance with the provisions of the Act, before making any deduction under Chapter VI-A. Section 80A(2) provides that the aggregate amount of deductions under the said chapter cannot in any case exceed the gross total income. This means that the total income cannot be brought down to a negative figure because of the deductions available under Chapter VI-A, which are to be adjusted against the gross total income. Section 80AB provides that the deductions available under Chapter VI-A in respect of certain incomes enumerated in the Chapter under the sub-head "*C. – Deductions in respect of certain incomes*" shall be computed in accordance with the provisions of the Act and it is only the income which is so computed that will be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income. All the three decisions thus deal with the provisions of Chapter VI-A of the Act which provides for "deductions to be made in computing total income". These provisions come into play for the purpose of allowing deductions under the said Chapter from the gross total income. The amount of deductions shall be arrived at by computing the income in accordance with the provisions of the Act, which means that it is not the gross income or receipt which would be eligible for deduction, but it is only the net income i.e. to say, the gross receipts or profits minus expenditure incurred to earn those profits that will be eligible for the deduction. These are provisions which will come into operation if the section with which we are dealing is construed as a provision for allowing deduction. We have already seen that Section 10A, as it presently stands, though worded as deduction provision, is essentially and in substance an exemption provision. We have also held that the implication of an exemption provision is that the particular income which is exempt from tax does not enter the field of taxation and is not subject to any computation. The computation provisions of the Act do not get attracted at all to the

exempted income. These judgments, therefore, are not apposite to the controversy before us.

36. In view of the foregoing discussion we are of the view that the substantial questions of law have to be answered in the affirmative, in favour of the assessee and against the Revenue. We do so and dismiss the appeals filed by the Revenue. In the circumstances there will be no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

AUGUST 27, 2012
Bisht/hs