आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL, INDORE BENCH, INDORE

BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER AND HON'BLE MANISH BORAD, ACCOUNTANT MEMBER

ITA No.282/Ind/2017

Assessment Year 2012-13

M/s. Flexituff International Ltd, C-41-50, SEZ, Sector-3, Pithampur, Dist. Dhar	Vs.	Pr. Commissioner of Income Tax-1 Indore
(Appellant)		(Respondent)
PAN AAACN5986H		

Revenue by	Smt. Ashima Gupta, CIT
Assessee by	Shri Manjit Sachdeva & Avinash Gaur, Advocates
Date of Hearing	26.03.2019
Date of Pronouncement	14.05.2019

O R D E R

PER MANISH BORAD, AM.

The above captioned appeal is filed at the instance of assessee pertaining to Assessment Year 2011-12 and is directed against the orders of Ld. Commissioner of Income Tax (Appeals)-1 (in short 'Ld.CIT(A)'], Indore dated 21.3.2016 framed u/s 263 of the Income Tax Act 1961(In short the 'Act').

2. Briefly stated facts as culled out from the records are that the assessee is a Pvt. Ltd company engaged in manufacturing and trading of HDPE/PE Woven Sacks and FIBC Jumbo Bags. E-return for Assessment Year 2012-13 filed on 27.9.2012 declaring Nil income after claiming loss for the current year at Rs.3,17,87,340/-. Case selected for scrutiny assessment by way of serving notice u/s 143(2) of the Act. Assessee company was running 3 units namely DTA Division, SEZ Division and Kashipur Division. Income from SEZ Division is exempt u/s 10A(1A) of the Act. Assessee incurred loss in Kashipur Division but while computing income assessee has first claimed exemption u/s 10A(1A) of the Act and remaining income was used to set off current and brought forward loss. This claim of the assessee allowed by the Ld. A.O on the basis of his understanding of provisions of Income Tax Act and CBDT circulars issued on this issue and documents filed before him. However, Ld. A.O made disallowance u/s 14A of the Act at Rs.61,43,940/- and also made disallowance for interest paid on Income Tax at Rs.15,82,154/- and assessed loss at Rs.2,40,10,826/-. Subsequently Ld. Principle Commissioner of Income Tax assuming jurisdiction u/s 263 of the Act perused the records and observed that the order passed by Ld. A.O u/s 143(3) of the Act dated 30.3.2015 is erroneous and prejudicial to the

interest of revenue because it was made without proper enquiry, non application of mind and based on insufficient material.

3. Now the assessee is in appeal challenging the order of Principle Commissioner of Income Tax u/s 263 of the Act for wrongly assuming the jurisdiction even when proper enquiry was made by Ld. A.O. Following grounds have been raised;

"01. That on the facts and in the circumstance of the case the learned Pr. Commissioner of Income tax was wrong in invoking the power of revision u/s 263 of the Income tax Act.

02. That, the learned Pr. Commissioner of Income tax-I, Indore failed to appreciate that the necessary documents pertaining to the claim of deduction under section 10A(lA), interest on income tax and additional depreciation were before the Assessing Officer.

03. That, the learned Assessing Officer after applying his mind and verifying the details and submission of the assessee company allowed deduction under section 10A(lA), interest on income tax and additional depreciation.

04.That the Learned Pr. Commissioner of Income Tax-I without appreciating the submission of the assessee company, treated the assessment order as erroneous and prejudicial to the interest of revenue and passed order under section 263 of the Income Tax.

05.That the assessee company craves leave to add, alter, amend and or delete any grounds of appeal."

4. Ld. Counsel for the assesse vehemently argued referring to following written submissions given for the grounds raised in these appeals;

"That the assessment order under section 143(3) of the Income Tax Act of the assessee company was completed for the assessment year 2012-13 on 30.03.2015 determining total loss at Rs.24010830/-.

That thereafter proceedings under section 263 of the Income Tax Act were initiated considering the assessment order as erroneous and prejudicial to the interest of revenue and show cause notice was issued to the assessee on 25.07.2016.

That the learned Principal Commissioner of Income Tax Act passed the order under section 263 of the Income Tax Act and set aside the assessment order passed under section 143(3) of the Income Tax Act.

That aggrieved by the order passed under section 263 of the Income Tax Act by the learned Principal Commissioner of Income Tax Act, the assessee company has filed appeal before the Honorable Income Tax Appellate Tribunal, Indore Bench, Indore and this is assessee appeal before the honorable bench.

That the learned Principal Commissioner of Income Tax Act initiated proceedings under section 263 of the Income Tax Act on the ground of the order passed by Assessing Officer to be erroneous as well as prejudicial to the interest of revenue on account of the failure on the part of the Assessing Officer to make necessary enquiries and passed order under section 263 of the Income Tax Act without appreciating the submission of the assessee company.

Sir, we are filing herewith the following submission, which shall go to show that the Assessing Officer did not err while allowing the exemption, because he had fully applied his mind to the facts of the case.

Ld. Counsel for the assessee submitted that specific enquiry were made by the Ld. A.O relating to claim of exemption u/s 10A of the Act and the same was replied in detail along with supporting documents on 3.2.2015 in support of the claim that firstly the exemption is claimed u/s 10A of the Act and the provisions of Section 71 & 72 relating to brought forward and carry forward losses are followed thereafter."

That the assessee company also filed auditor's report under section l0A of the Income Tax Act, 1961 in Form No.S6F in response to the query during the assessment proceedings in which detailed calculation of deduction under section 1OA was given. Copy of the same is enclosed at page no. 100 to 102 of the paper book. That in the reply the assessee has referred to section 10A(IA) and had explained that the deduction has been claimed on the profit of the SEZ unit and not on the total income of the assessee company.

That the learned Assessing Officer after scrutinizing the reply and details submitted in respect of claim under section 10A(lAL allowed the exemption under section 10A(lA).

That, from the aforestated facts, itself, it is evident that the learned Assessing Officer after applying his mind to the facts of the case proceeded to complete the assessment.

That, reference to the CBDT circular would not be applicable in a case where the Assessing Officer, having knowledge of the same proceeded to complete the assessment.

That, the exemption had been allowed in the earlier years too, and taking cognizance to the same the learned Assessing Officer after making the necessary enquiries accepted the claim of the assessee company.

That in respect of interest on income tax, it is submitted that the books of

accounts, vouchers, ledgers were produced during the assessment proceedings for verification of the learned Assessing Officer and after scrutinizing the books of accounts, vouchers, ledgers, expenses the learned Assessing Officer added interest on income tax in calculation of normal profit of the assessee company during the assessment and proceeded to complete assessment.

That it itself shows that the learned Assessing Officer was live to the facts and after applying his mind made addition of interest paid on income tax and made the assessment."

Ld. Counsel for the assessee has placed and relied on following judgments and decisions;

a. CIT Vs. Shri Govindram Sckscria Charity Trust [166 I.T.R 580(M.P)

b. C.I.T. Vs. Ratlam Coal Ash Company; [1711TR 141 (M.P.H.C.)

c. ITAT Indore Bench (53 TTJ 433) Vidisha Tractors Vs. Assistant CIT

d. CIT Vs. Mehrotra Brothers 270 ITR 157 (MP)

e. Pr. Commissioner of Income Tax Vs. Narayan Balmukund Dubey (2017) 30 ITJ 335 (MP)

f. CIT Vs. Ramesh Singh High Court of Madhya Pradesh (2012) 73 DTR (MP) 297

g. Abhishan Enterprises VS CIT (2016) 28 ITJ 139 (THIB. - INDORE)

h.M/s. Gupta Spinning mills Pvt ltd *vjs:* Cl'F Delhi ITA no/ 338/De1/2010

i. Anil Shah vs. Assistant Commissioner of Income Tax, Range 24(1), Mumbai

j. Bhartia Industries Ltd VS. CIT (2011) 243 CTR (Ca)) 328 (High Court of Calcutta)

k. Khajrho Builders & Construction Co.Ltd VS. CIT (2016) 29 ITJ 76 (TRIB. – AGRA)

l. Uttam Construction Company VS. Asstt. Commissioner of Income Tax (2016) 28 ITJ 121 (TRIB. - RAIPUR)

m. Commissioner of Income Tax & Anr V/s. *M/s.* Yokogawa India Ltd. 2016-TIO-228-SC-IT 391 ITR 274

n. Decision Craft Analytics Ltd. *vis.* Deputy Commissioner of Income Tax 2019-TIOL-542-ITAT-AHM.

o. M/s. Scintillating Jewellery *v/s* Pr. Commissioner of Income Tax-19, Mumbai 2019- TIOL-S70-ITA T -MUM.

p. M/s. Bharoomal and Company Vs. Pr. Commissioner of Income Tax-22, Mumbai. 2019- TIOL-602 ITAT -MUM.

q. Sanspareils Greenlands Pvt Ltd V/s Commissioner of Income Tax, Meerut and others 2019 TIOL-379-ITAT-DEL.

r. Commissioner of Income Tax vs. IYCO Electronics Tools India (P)Ltd (2012)80 CCH 0275 Kar HC (2012) 205 Taxman 0403.

5. Per contra Departmental Representative vehemently argued and supporting the order of Ld. Principal Commissioner of Income Tax.

6. We have heard rival contentions and perused the records placed before us and carefully gone through the judgments referred and relied by

the Ld. Counsel for the assessee. Through this appeal the assessee has challenged the action of Ld. Principal Commissioner of Income Tax assuming jurisdiction u/s 263 of the Act and holding the order of Ld. Assessing Officer as erroneous and prejudicial to the interest to the revenue. Ld. PCIT issued following show cause notice during the course of proceedings initiated u/s 263 of the Act:-

> "2. In view of the above, proceedings u/s 263 were initiated and accordingly a show cause notice was issued to the assessee on25.07.2016 fixing the case for hearing on 03.08.2016. The relevant portion of the show cause notice is reproduced as under;_
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> > "A. The assessee had claimed exemption of Rs. 12,51,79,200/- u/s 10A(1A) for unit located in SEZ, however assessee had aggregate losses of earlier years of Rs.14,52,01,717/-.
> >
> > The CBDT has issued Circular No.07/2013 dated 16.07.2013, wherein it has been clarified that losses if any, are required to be set-off against the profits of a STP/EOU/SEZ unit (eligible unit), before the deduction u/s 10A/10B of the IT Act, 1961 is allowed. Thus benefit u/s 10A/10B of the Act should be allowed after setting-off of losses as per provisions of section 71 & 72 from non-eligible units of the tax payer.
> >
> > Keeping in view of the CBDT Circular No.07/2013 dated 16.07.2013, it is noticed that the assessee has claimed exemption of Rs.12,51,79,200/- u/s 10A without set off of losses of earlier years pertaining to non eligible unit. The assessee company has shown income of one unit and profit/loss of two or more unit cannot be allowed separately for each unit. The consolidated profit or loss from all units can only be allowed.

In view of the above, excess brought forwarded losses of Rs. 12,51,79,200/- has been allowed to the assessee. The loss should be set-off from the exempted income. The assessee has taken benefit of carry forwarded loss in next year to the extent of Rs.12,51,79,200/-.

It was further noticed that the assessee is claiming exemption before setting of loss of gross income from earlier years i.e. A.Y. 2009-10, 2010-11, 2011-12 and also in this year. The assessment for the A.Y. 2009-10 and 2010-11 has been completed u/s 148 assessment for A.Y. 2011-12 has also been completed u/s 263 and the claim of assessee for section 10A has been allowed after setting of brought forward losses. Hence, the assessee's claims of exemption u/s 10A for Rs.12,51,79,200/- for the A.Y. 2012-13 should be allowed after setting off brought forward losses of earlier years. The correct calculation of carry forward of losses and exemption u/s 10A should be as under:-

A.Yr.	Gross income/loss	Addition mad (order / 153A/143(3)	Actual brought forward losses	Remaining income/loss	Deduction u/s 10A	Eligible amount for carry forward to next year
2009-10	(-)10,26,99,579/-	268,13,973/-	-	(-)758,85,606/-	No profit available	(-)758,85,606
2010-11	(-)668,72 457/-	18,80,552/-	(-) 758,85,606	649,91,905/-	-do-	(-) 14,08,77,511
2011-12	17 21,02,447/-	470,000/-	(-) 14,08,77,511	316,94,936/-	312,24,936	470,000/- other than 10A
2012-13	934,42,221/-	77,26,096/-	-	10,11,68,315	934,42,221	Rs.77,26,094

In view of the above, the exemption u/s 10A should be restricted/allowed at Rs.934,42,221/- for A.Y. 2012-13 in place of Rs. 12,51,79,200/- which was actually allowable.

B. It is further found that disallowance of Rs.15,82,154/- made under the head interest paid on income tax which was debited by the assessee in P&L A/c as finance cost. In view of section 115JB of Income Tax Act, the interest on

income tax should be added back in the book profit for calculation of MAT u/s 115JB. Hence, the omission resulted in underassessment of book profit to the extent of Rs.15,82,154/- required to be added.

C. The assessee had claimed and allowed by the Assessing Officer, the additional depreciation for Rs.16,45,94,950/- (being Rs. 229,12,326/- on DTA unit, Rs.141,47,233/- on SEZ unit and Rs.12,74,35,391/- on Kashpur unit) in addition to normal depreciation. Further, it was observed that the following old and used plant machinery were purchased by the assessee:-

S.No.	Date of acquisition	Party name from whom purchased	Name of unit	Purchased amount	Additional depreciation claimed
1	31-03-2012	Pankit International PTE Ltd	Kashipur Unit	218,63,652/-	21,86,365/-
2	13-01-2012	FIL XEZ	DTA Unit	20,68,106/-	206,811/-
3	26-03-2012	Satguru Polyfab Pvt. Ltd	DTA Unit	150,51,853/-	15,05,185/-
			Total	389,83,611/-	38,98,361/-

Since, assessee has purchased old and used plant & machinery and claimed additional depreciation for the same was not allowable in view of provision of section 32. Hence, the excess depreciation of Rs.38,98,361/- requires to be added"

7. In the above show cause notices issued u/s 263 of the Act Ld. Principal Commissioner of Income Tax has made following three observations;

(1) That the assessee should have first set off the aggregate of loss of current years and brought forward losses against the available profits from various unit before claiming exemption u/s 10A(1A) of the Act.

(2) Ld. A.O erred in not correctly computing the book profit u/s 115 JB of the Act correcting without giving effect to interest paid on income tax which is debited on Profit & Loss Account.

(3) Wrong claim of additional depreciation on the old and used plant and machineries.

8. Submissions of the assessee were filed before Pr. Commissioner of Income Tax which could not convince him and he directed the Ld. A.O to reframe the assessment order u/s 143(3) of the Act with regard to the three issues referred in the show cause notice issued u/s 263 of the Act.

9. The power of Ld. Pr. Commissioner or Income Tax Commissioner of Income Tax to call for and examine the record of any proceedings under this Act are provided u/s 263 of the Act, which reads as follows;

> **263.** (1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.
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> *Explanation 1*.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—
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> (*a*) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—
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> (*i*) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(*ii*) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;

(*b*) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;

(*c*) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or] Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(*a*) the order is passed without making inquiries or verif cation which should have been made;

(*b*) the order is passed allowing any relief without inquiring into the claim;

(*c*) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(*d*) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

10. From the aforesaid provision of Section 263) of the Act, it is apparent that the power of *suomoto* revision exercisable by Pr.CIT/CIT is undoubtedly supervisory in nature. Section 263 empower Pr.CIT/CIT to call for and examine the record of any persons under the Act. Pr.

CIT/CIT has to satisfy between the twin conditions namely (i) whether the order of the Assessing Officer sought to be revised is erroneous and(ii) whether it is prejudicial to the interest of revenue. As held by Hon'ble Apex Court in the case of Malabar Industrial Company Ltd 243 ITR83(SC), that if any one of the conditions is missing i.e. if the order of the Assessing Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the interest of revenue, recourse cannot be had to provisions of Section 263(1) of the Act. Further if the Assessing Officer acting in accordance with the law, makes a certain assessment, the same cannot be branded as erroneous by Pr.CIT/CIT merely because according to him the order should have been written differently or more elaborately. The provisions of Section 263 of Act do not visualise the substitution of the judgment of the Pr.CIT/CIT for that of the Assessing Officer unless his order is not in accordance with the law. As held by Hon'ble Bombay High Court in the case of CIT V/s Gabriel India Ltd (1993) 203 ITR 108 (Bombay) that there must be some prima facie material on record to show that the tax which was lawfully eligible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what has just has been imposed.

11. Now let us examine as to whether Ld. Principal Commissioner of Income Tax was justified in invoking the power u/s 263 of the Act on the three issues mentioned in the show cause notice.

12. As far as the issue relating to exemption of claim u/s 10A of the Act is concerned, we find that the assessee is running three units of which one is eligible for exemption u/s 10A of the Act. Assessing while computing total income has first claimed exemption on the profits of the said unit u/s 10A of the Act and the losses of remaining units as well as brought forward losses have been set off against the remaining income. This claim of the assessee has been allowed by Ld. A.O whereas Ld. Principal Commissioner of Income Tax has raised objection referring to the circularNo.7/2013 dated 16.7.2013 issued by Central Board of Direct Taxes clarifying that losses if any are required to be set off against the profits of STP/EQU/SEZ units before the deduction u/s 10A/10B of the Act is allowed. Thus as per Ld. Pr. Commissioner of Income Tax the benefit of Section 10A/10B should be allowed after setting off losses as per the provisions of Section 71 & 72 from eligible units run by the tax payer whereas assessee relying on Circular No.1/2013 dated 17.1.2013 has first claimed exemption u/s 10A of the Act and thereafter followed

provisions of Section 71 & 72 of the I.T. Act relating to set off of losses.

13. We observe that during the course of proceedings u/s 143(3) of the Act specific query was raised by Ld. A.O by way of questionnaire dated 9.2.2015 regarding the justification of deduction/ exemption claimed u/s 10A of the Act. The relevant extract of questionnaire is reproduced below;

> 2. (a) Please justify the deduction claimed u/s lOA to IT Act. Whether the company has fulfilled all the conditions laid down the Income Tax Act or not. Please mention the year in which production is started and mention the year from which you are taking deduction u s 1OA.
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> (b) As per statement of total income there are DTA Division, SEZ Division and Kashipur Division and total income has been worked out for each division. In this regard it is required to file complete copy of balance sheet/ profit and loss account for the previous year 2011-12 relevant to assessment year 2012-13 for each division. It is noticed that you have not maintained head office account and it appears the related to head office/administration have not been allocated for each division it is therefore not possible to work out correct income for each division as such the claim made u/s 1OA is also not correct. To file your explanation on this issue.
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> (c) As regard claim u/s 10A the same has not been worked out in accordance with provision u/s 1OA of IT Act. It is seen from Annexure A to form no. 56F that total turnover of the business is declared as Rs. 6210438228/-/ total turnover of the undertaking at Rs. 2376488789/- and total profit derived by the business declared at Rs. 93442281/-. Therefore/ the income from industrial undertaking would be at Rs. 35756660/- i.e. (Rs.93442281/- X Rs. 2376488789/)/6210438228/- eligible amount u/s 1OA is Rs. 50 of Rs.

17878330/whereas you have made claim of Rs. 125179200/-. It is required to file your explanation on this issue."

14. Against above questionnaire letter dated 9.2.2015 assessee made submission on 6.3.2015 giving justification of the exemption claimed u/s 10A of the Act which reads as follows;

"(d) As per section 10A(IA) of the Income Tax Act 1961, an undertaking which begins to manufacture or produce article or things during the previous year relevant to the assessment year 2003-04 in any Special Economic Zone, shall be entitled to claim 100 of its profit wh le computing its total Income. The company has started its production during the financial year 2003-04 and claimed deduction under section l0A (lA) in the financial year 2005-06.

(e) Copy of Balance Sheet, Profit & Loss account for the previous year 2011-12 for OTA, SEZ & Kashipur unit is enclosed here with.

(f) As per section 10A(IA) of the Income Tax Act 1961, the amount of deduction will be computed as under:

Profit of the Business of Undertaking x Export Turnover of Undertaking x 50
Total Turnover of Business carried on by the undertaking As per Annexure A to form 56F the we have claimed deduction under section 10A of Rs.12,51,79,200/- which is computed as under-

Profit of the Business of Undertaking = Rs.27,31,06,234/-

Export Turnover of Undertaking = Rs.2.17,85,43,940/-

Total Turnover of Business carried on by the undertaking = Rs.2.37,64,88,789/-

$$\frac{\text{Rs. 27,31,06,234 x Rs. 217,85,43,940x 50}}{\text{Rs.237,64,88789}} = \text{Rs.12,51,79,200/-}$$

Therefore the amount of claim of Rs.12,5l,79,200/- is worked out in accordance with the provision under section 1OA of Income Tax Act, 1961."

15. From perusal of the extract of the questionnaire issued by Ld. A.O dated 9.2.2015 and specific reply dated 3.3.2015 clearly shows that this is not the case of 'NO ENQUIRY' rather the Ld A.O has made a "PROPER AND DETAILED ENQUIRY" and accepted the claim of the assessee by interpreting the provisions of law, judicial pronouncements as well as the Circular issued by Central Board of Direct Taxes.

16. We find that the Hon'ble Ap x Court in the case of *CIT & ANR V/s M/s. Yokogawa India Ltd (supra)* has settled the instant issue after discussing the provis ons of Section 10A & 10B in detail and also made distinction between the exemption and deduction provisions. Hon'ble Apex Court has held that exemption u/s 10A of the Act should be allowed to the assessee independently prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving on the total income of the assessee from the gross total income. Hon'ble Court further hold that though Section 10A of the Act as amended, is a provision for deduction, the stage of deduction would be while computing

the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. Relevant extract of the judgment of the Hon'ble Apex court is reproduced below;

> *"9. The amendment of Section 1OA of the Act, by the Finance Act, 2000 with effect from 1.4.2001, specifically uses the words 'deduction of profits and gains derived by an eligible unit...from the total income of the assessee'. There are other provisions of Section 10A, as amended, which could be suggestive of the fact that by the amendment made by Finance Act, 2000, Section 1OA had changed its colour from being an exemption section to a provision providing for deduction. Yet, Section 1OA continued to remain in Chapter III of the Act which Chapter deals with incomes which do not form part of the total income. There are several Circulars that have been placed before us by the contesting parties to explain the purpose and object of the amendment. Having looked at the aforesaid Circulars, issued from time to time, what we find is a fair amount of ambiguity therein as to the true nature and effect of the amendment. Specifically, we may refer to* ***Circular No. 7*** *dated 16 07.2013 as well as* ***Circular No. 01/2013*** *dated 17.01.2013 which appear to be conflicting and contradictory to each other; in the former Circular the provision, i.e., Section 1OA is referred to as providing for deductions whereas the later Circular uses the expression, exemption" while referring to the provisions of Sections l0A and l0B of the Act. Even the Income Tax-Return Forms i.e. Form No. 1 dated 17.08.2001 and Form No. 6 for the assessment year 2012-13 are equally contradictory. The appellant Revenue would, however contend that, ex facie, from the language appearing in Section l0A it is crystal clear that the aforesaid provision of the Act, as amended by Finance Act, 2000 provides for deductions from the gross total*

income, notwithstanding the use of the words 'total income' in Section lOA. Exemptions provided .for under the old Section l0A have been discontinued by the Legislature. According to the Revenue, where the purport and effect of the statute is clear from the language used there is no scope to turn to Chapter notes or the marginal notes so as to understand Section l0A to be an exemption section on the basis that the said provision is still included in Chapter III of the Act. Reliance in this regard has been placed on the decision of this Court in Tata Power Co. Ltd. vs. Reliance Energy Ltd.3 wherein at page 687, it is held that:

9. Chapter headings and the marginal notes are parts of the statute. They have also been enacted by 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."

10. The Revenue further contends that by virtue of the amendment made by Finance Act, 2000, deductions under Section l0A are required to be made and allowed at the stage of computation of total income under Chapter VI of the Act notwithstanding the absence of any specific provision in Chapter VI to the said effect. In fact, the Revenue contends that in view of the clear language of Section l0A, as brought about by the amendment, a parallel or consequential amendment in Chapter VI of the Act was wholly unnecessary.

11. On the other hand, on behalf of the assessee, it is contended that though there may be some features of deduction brought in by amendment to Section 10A, as for example, disallowance of profits in regard to domestic sales, the

legislative intent in retaining Section 10A in Chapter III of the Act would clearly demonstrate the true nature of the said provision of the Act even after amendment thereof by Finance Act of 2000. Deductions from the total income which is nowhere envisaged under the Act and the reference to the total income of the undertaking, referred to in Section 2(45) has no application to the computation under Section l0A and the reference therein is only to the total income of the eligible unit/undertaking. The provisions of Section 10A(6), as amended by Finance Act of 2003 retrospectively with effect from 1.4.2001, has also been stressed upon to contend that with effect from the assessment year 2001-02 losses and unabsorbed depreciation of eligible units would be allowable for set off immediately on the expiry of the period of tax holiday i.e. 10 years. The provisions of Sections 32, 32A, 33, 35 and part of 36 do not separately apply to an eligible unit during the period of tax holiday. During the said period the deduction under the aforesaid sections of the Act are deemed to have been made. Similarly, under Section 10A(6)(ii) losses referred to in Section 72(1) or 74(1) and 74(3) are also eligible to be carried forward to the assessment year following the end of the holiday period commencing from the assessment year 2001 02. All these, according to the learned counsels for the assessee, suggest that, though heterogeneous elements exist in Section l0A, the provision is really an exemption provision. Alternatively, according to the learned counsels, even if Section l0A is understood to be providing for deductions(the stage of such deductions would be immediately after computation of profits and gains of business and before the aggregate of incomes under different heads of other loss making eligible units or non-eligible units of the assessee are taken into account. In other words, it is immediately after the computation of profits and gains of business of the undertaking that the deduction under Section l0A is required to be made. There is no question of such deductions being computed at the stage of application of provisions of Chapter VI of the Act.

12. We have considered the submissions advanced and the provisions of Section l0A as it stood prior to the amendment made by Finance Act, 2000 with effect from 1.4.2001; the amended Section l0A thereafter and also the amendment made by Finance Act, 2003 with retrospective effect from 1.4.2001.

13. The retention of Section l0A in Chapter III of the Act after the amendment made by the Finance Act, 2000 would be merely suggestive and not determinative of what is provided by the Section as amended, in contrast to what was provided by the un-amended Section. The true and correct purport and effect of the amended Section will have to be construed from the language used and not merely from the fact that it has been retained in Chapter Ill. The introduction of the word 'deduction' in Section l0A by the amendment, in the absence of any contrary material, and in view of the scope of the deductions contemplated by Section l0A as already discussed, it has to be understood that the Section embodies a clear enunciation of the legislative decision to alter its nature from one providing for exemption to one providing for deductions.

14. The difference between the two expressions 'exemption' and 'deduction', though broadly may appear to be the same i.e. immunity from taxation, the practical effect of it in the light of the specific provisions contained in different parts of the Act would be wholly different. The above implications cannot be more obvious than from the case of Civil Appeal Nos. 8563/2013, 8564/2013 and civil appeal arising out of SLP(C) No. 18157/2015, which have been filed by loss making eligible units and/or by non-eligible assessees seeking the benefit of adjustment of losses against profits made by eligible units.

15. Sub-section 4 of Section l0A which provides for pro rata exemption, necessarily involving deduction of the profits arising out of domestic sales, is one instance of deduction provided by the amendment. Profits of an eligible

unit pertaining to domestic sales would have to enter into the computation under the head "profits and gains from business" in Chapter IV and denied the benefit of deduction. The provisions of Sub-section 6 of Section l0A, as amended by the Finance Act of 2003, granting the benefit of adjustment of losses and unabsorbed depreciation etc. commencing from the year 2001-02 on completion of the period of tax holiday also virtually works as a deduction which has to be worked out at a future point of time, namely, after the expiry of period of tax holiday. The absence of any reference to deduction under Section l0A in Chapter VI of the Act can be understand by acknowledging that any such reference or mention would have been a repetition of what has already been provided in Section l0A. The provisions of Sections 8OHHC and 80HHE of the Act providing for somewhat similar deductions would be wholly irrelevant and redundant if deductions under Section l0A were to be made at the stage of operation of Chapter VI of the Act. The retention of the said provisions of the Act i.e. Section 80HHC and 80HHE, despite the amendment of Section l0A, in our view, indicates that some additional benefits to eligible Section l0A units not contemplated by Sections 8OHHC and 8OHHE, was intended by the legislature. Such a benefit can only be understood by a legislative mandate to understand that the stages for working out the deductions under Section l0A and 80HHC and 80HHE are substantially different. This is the next aspect of the case which we would now like to turn to.

16. From a reading of the relevant provisions of Section l0A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the ***individual*** *undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that,*

"The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of true undertaking located in specified zones or 100 Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision".

17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); l0A (lA) and l0A (4)that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No.794 dated 09.08.2000) unders ood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section l0A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression total income of the assessee" in Section l0A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section l0A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section l0A as 'total income of the undertaking'.

18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section l0A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly."

17. We further find that the Co-ordinate Bench in the case of Decision Craft Analytics Ltd V/s DCIT ITA No.1161 & 1162/Ahd/2015 dated 21.1.2019 followed the above referred judgment of Hon'ble Apex Court in the case of *CIT & Anr V/s Yokogawa India Ltd (supra)* holding that there remains no ambiguity that the assessee shall work out the deduction u/s 10A of the Act from its total income before allowing the brought forward losses. Relevant portion of the decision of the Tribunal is mentioned below;

> *"16. We have heard the rival contentions and perused the materials available on record. The solitary issue in the instant case relates to the fact whether the deduction under section l0A needs to be worked out after setting off the brought forward losses. In this regard, we note that the impugned issue is well settled now by the judgment of Hon'ble supreme Court in the case of CIT & ANR. vs. M/s Yokogawa India LTD. in Civil Appeal No. 8498 of 2013=2016TlOL-228-SC-IT.. The relevant extract of the case (supra) is as under:*
>
> *"17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); l0A (lA) and l0A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporary Circular of the department (No.794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the*

incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section lOA therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income,"

16.1. From the above judgment of the Hon'ble supreme court there remains no ambiguity that the assessee shall work out the deduction under section l0A of the Act from its total income before allowing the brought forward losses. We hold accordingly. Hence the ground of appeal of the assessee is allowed".

18. From perusal of the above judgments it is well established that in the instant case the assessee made correct claim by firstly taking the benefit of Section 10A of the Act for the profits earned from SEZ units and remaining profits of other units including SEZ unit were utilised for setoff of current and brought forward losses. It remains an undisputed fact that the Assessing Officer had made adequate enquires as noted herein above adopting one of permissible view for allowing the assessee's claim for exemption u/s 10A of the Act before the claim of set off of brought forward and current year loss. The Ld. Pr. CIT took a different view of the matter. However that would not be sufficient to permit Ld. Pr. CIT to exercise the power u/s 263 of the Act because when two views are possible and Ld. Pr.CIT does not agree with the view taken by the

Assessing Officer, assessment order cannot be treated as erroneous and prejudicial to the interest of the revenue unless the view taken by the Assessing Officer not unacceptable in law. That is not the position in the present case because the view taken by Ld. A.O has been confirmed by Hon'ble Apex Court in the case of *CIT & Anr V/s Yokogawa India Ltd (supra)*. The above stated facts where sufficient enquiry have been established to have been conducted by the Ld A O before allowing the assessee's claim of exemption u/s 10A of the Act at Rs.12,51,79,200/- has not been disputed before us by the Ld. Departmental Representative. Apparently the Ld. A.O has not shrinked his responsibility of examining and investigating the case. Therefore as the Ld. A.O after making detailed enquiry allowed assessee's claim of exemption u/s 10A of the Act at Rs.12,51,79,200/-, this action of the Ld. A.O cannot be held as erroneous and prejudicial to the interest of revenue. We therefore set aside the finding of Pr. Commissioner of Income Tax on this issue as it was a mere change of opinion which would not enable Ld. Pr. Commissioner of Income Tax to exercise jurisdiction u/s 263 of the Act as the Ld. A.O had considered the details and the explanation offered by the assessee before accepting the claim. We therefore reinstate the action of the Ld. A.O allowing the assessee's claim of exemption u/s 10A of the Act at Rs.

12,51,79,200/- against the profits earned from SEZ units.

19. As regards the remaining two issues raised by Pr Commissioner of Income Tax in the order u/s 263 of the Act directing the Ld. A.O for computing the book profit u/s 115JB of the Act for not including the disallowance of interest paid to Income Tax at Rs.15,82,154/- and also directing the Ld. A.O for verifying the claim of additional depreciation of Rs.38,98,361/- on the alleged purchase of old and used plant and machinery of Rs.3,89,83,611/-, Ld. Counsel for the assessee fairly accepted that this finding of Pr. Commissioner of Income Tax is correct and the directions given to the Ld. A O to examine these issues two afresh is valid. We, therefore hold that since the Ld. A.O has not applied his mind on these two issues of correctly computation of book profit u/s 115JB of the Act as well as claim of addition of depreciation of Rs.38,98,361/- on the old and used machinery, the finding of Ld. Principal Commissioner of Income Tax's jurisdiction u/s 263 of the Act on these two issues is uphold.

20. We therefore uphold the order of Principal Commissioner of Income Tax assuming jurisdiction u/s 263 of the Act only to the extent of direction given for computation of book profit u/s 115JB after

considering the interest paid on income tax and direction to verify claim of additional depreciation on old and used machineries but we set aside the finding of Principal Commissioner of Income Tax regarding claim of exemption/deduction u/s 10A of the Act as per our finding given herein above holding that Ld. A.O has rightly allowed the benefit of exemption u/s 10A of the Act at Rs.12,51,79,200/- after conducting sufficient enquiry.

21. In the result appeal of the assessee is partly allowed.

The order pronounced in the open Court on 14.05.2019.

Sd/-	Sd/-
(KUL BHARAT)	**(MANISH BORAD)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

दिनांक /Dated : 14 May, 2019
/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore