23 to 26#

% 27.1.2011

Present: Mr. Deepak Chopra, Advocate for the appellant/Revenue.
Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate for the respondent/assessee.

+ ITA 2003/2010, 2004/2010,2025/2010 & 2027/2010

(common orders)

* In three appeals, one common issue which is raised and pertains to the assessment years, 2001-02, 2003-04 and 2004-05 is as follows:-

> "Whether the ITAT was correct in law while concluding that the deduction under Section 10A would be allowable to the assessee in the subsequent years even though the assessee had exercised its option under Section 10A (7) for the non applicability of the provisions of Section 10A?

The assessee on the premise that it is in the business of development and export of computer software and human resources services claimed benefit of Section 10A of the Income-Tax Act, 1961 (hereinafter referred to as the 'Act'), in the assessment year 2001-02. The Assessing Officer disallowed the said benefit invoking the provisions of sub Section (7) of Section 10A of the Act on the ground that in the previous assessment year i.e. 2000-01 the assessee had opted for not claiming the deduction under this provision. The CIT (A), however, allowed the said benefit and ITAT has confirmed the same The Tribunal has, in its consolidated order in respect of all these three years, has relied upon the decision in the case of ***Legato Systems India (P) Ltd.*** *Vs. ITO 93 TTJ 828* holding that the declaration as required to be made under Section 10A of the Act is only for the year

in which the assessee does not desire application of provision of Section 10A of the Act. The Tribunal also recorded a finding of fact that in the year under consideration the assessee had not made any such declaration and, therefore, the reason given by the Assessing Officer for denying exemption was permissible. Under Section 10A of the Act, tax holiday period of ten years is granted and once the option is exercised by an assessee who fulfills the conditions laid down therein, for successive ten years, the benefit of Section 10A is to be given to the assessee.

It is pointed out by Shri C.S. Aggarwal, learned Sr. Counsel appearing for the respondent/assessee that the assessee was given the benefit under Section 10A of the Act in the very next assessment year i.e. 2002-03 and even from 2004-05, 2006-07, 2007-08. This benefit is allowed to the assessee. He has also produced the copy of return filed by the assessee in the assessment year 2000-01 and perusal thereof show that a specific note was appended by the assessee stating as under:-

> "1. The assessee company is registered as a 100% Export Oriented Unit (EOU) for manufacture & export of computer software for export purposes. The assessee being eligible for 100% tax holiday u/s 10A of the Income Tax Act, 1961, has exercised this optio9n not to claim this exemption for this year in accordance with provision of sub Section 7 to Section 10A of the Act."

It is thus clear from the above that it cannot be said that the assessee had opted not to take the benefit of Section 10A of the Act. On the contrary, it was specifically mentioned that the assessee was

eligible for 100% tax holidays period under Section 10A of the Act but in the year in question since there were losses, the assessee was not claiming the exemption in that particular year. Moreover, as pointed out above, when the assessee has been given this benefit in some of the years of the same tax holiday period, there is no reason to deny the assessee benefit in these three assessment years. We, thus, are of the opinion that no question of law in this behalf in the instant case.

In so far as assessment year 2002-03 is concerned, in ITAT 2004/2010 the Revenue has sought to raise the following issue:-

> "Whether the Tribunal was correct in law in concluding that the assessee was eligible to carry forward the business loss of the eligible unit under the provisions of Section 10A (6) (ii) of the Act.?"

We may record that the Assessing Officer had rejected the claim of the assessee for carry forward the business of loss against which the assessee had filed the appeal before the CIT (A) which allowed the entire claim of carry forward of loss. The contention of the assessee before the CIT (A) was that there is a specific provision in Section 10A of the Act which permits the carry forward of loss relating to STP unit within the tax holiday period. The CIT (A) accepted this plea of the assessee having regard to the provisions of sub Section (6) of Section 10A of the Act. The CIT (A) further held that the Assessing Officer has wrongly invoked Section 92 of the Act. The Revenue preferred appeal against this order of CIT (A) and after taking note of the view taken by the Assessing Officer as well as CIT (A) and referring to clause (ii) of

sub Section (6) of Section 10A of the Act, the ITAT dispose of this ground in the following manner:-

> "8.4 A reading of the above supports the assessee's claim that section 10A permits carry forward of loss relating to STP unit within tax holiday period. However, a finding on this issue also depends upon adjudication of quantum of carry forward loss within tax holiday period and is consequential to earlier years assessment. In the interest of justice we remit this issue to the files of the AO and AO examine the same and give a finding as per law. Needless to add that the assessee should be given adequate opportunity of being heard.
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> 9. in the result, these appeals file by the revenue are allowed for statistical purposes."

It is clear from the above that ITAT has not commented upon the legality or otherwise of the CIT (A) which has simply referred the matter back to the AO to examine the issue and give a finding as per law. As in the opinion of the Tribunal a finding on this issue depends upon adjudication of quantity of carry forward loss within tax holiday period and is consequential to earlier year's assessment. In view thereof, when the matter is set at large before the AO to examine the issue keeping in view the focus mentioned in para 8.4, we are unable to appreciate the grievance of the Revenue. No question of law arises. These appeals are accordingly dismissed.

A.K. SIKRI, J.

M.L. MEHTA, J.

JANUARY 27, 2011/skb