IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

INCOME TAX APPEAL NO.3465 OF 2010

The Commissioner of Income Tax-10, Mumbai. ...Appellant.
Vs.
M/s.Galaxy Surfactants Ltd. ...Respondents.

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Mr.Vimal Gupta for the Appellant.
Mr.Percy J.Pardiwala, Senior Advocate with Mr.Atul k.Jasani for the Respondent.

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CORAM : DR.D.Y.CHANDRACHUD AND
M.S.SANKLECHA, JJ.

February 7, 2012.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961, arises out of the decision rendered by the Income Tax Appellate Tribunal on 22 September 2009 in relation to Assessment Years 2005-06. The following two questions of law have been raised by the Revenue in this appeal :

> "(A) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in deleting the addition made by the Assessing Officer towards royalty payment of Rs.2,06,77,545/- even though the Assessing Officer has given a clear finding that the payment of royalty was only a self serving arrangement to pass on substantial financial benefits to the sister

concern of the Assessee Company and further no benefit was derived by using the trade mark for which the alleged payment of royalty was made by the Assessee Company?

(B) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in allowing deduction of Rs.5,65,77,087/- claimed by the Assessee Company under Section 10B of the Income Tax Act in respect of its Export Oriented Units and thereby allowing set off against other business Units even though the Assessee Company had not opted for the provision of Section 10B to be not made applicable to it as required under Section 10B(8) of the Income Tax Act but had instead opted to take the benefit of Section 10B by claiming it in its computation of income and filing the report prescribed in Form 56G along with its Return of Income as required under Section 10B(4) of the Income Tax Act."

2. As regards the first question, the Tribunal has noted in paragraph 4 of its decision that the issue raised in the grounds of appeal is covered against the Revenue by the Tribunal's order in the case of the assessee, dated 7 February 2005 for Assessment Years 1996-97 to 1998-99. The Tribunal by its order held that the assessee had made payment for the use of trade mark which was genuine and in accordance with business exigencies. The payment was held to be allowable as business expenditure. Counsel appearing on behalf of the Revenue states that no appeal has been

filed against the decision of the Tribunal in regard to Assessment Years 1996-97 to 1998-99. In that view of the matter, since the Tribunal has followed its own decision for the earlier years which has been accepted by the Revenue, no substantial question of law would arise.

3. The second question is now to be taken up for consideration. The assessee has a hundred percent Export Oriented Unit (EOU) which is entitled to a deduction under Section 10B. The previous year relevant to Assessment Year 2005-06 was the first year of production in the unit. During the year under consideration, the assessee disclosed a total profit of Rs.16.82 crores from business. From this profit, a loss of Rs.5.56 crores sustained by the hundred percent EOU was reduced. The loss in the EOU was principally on account of current depreciation which was set off against the profits of the EOU. After reducing the loss sustained by the EOU against the profits of other units, the assessee disclosed a net taxable income of Rs.10.76 crores. The Assessing Officer held that a deduction under Section 10B has to be given in respect of the profits of the undertaking independently. The

Assessing Officer held that a loss sustained by the eligible unit could not be set off against the income of the other units. The Commissioner of Income Tax (Appeals) confirmed the order of the Assessing Officer. In appeal the Tribunal, relying inter alia on a decision of its Delhi Bench in **Honeywell International (India) Pvt. Ltd. vs. DCIT**,[1] held that there was no justification in the action of the Revenue in denying a set off of a loss of the EOU against the profits of other units as claimed by the assessee.

4. Counsel appearing on behalf of the Revenue submits that the loss which has been sustained by the EOU is principally on account of current depreciation. It was urged on behalf of the Revenue that unabsorbed depreciation can be carried forward from year to year and hence, there is no justification for the assessee in seeking to set off of a loss which has been sustained by the EOU against the profit which has resulted from the operation of the other units. Counsel appearing on behalf of the Revenue further sought to place reliance in this regard on the provisions of sub-section (6) of Section 10B. Moreover, it is urged that under sub-

1 108 TTJ (Del) 924

section (8) of Section 10B, the assessee is given an option to submit a declaration to the Assessing Officer to the effect that the provisions of the Section may not be made applicable to it in which case the provisions shall not be made applicable to the assessee for any of the relevant assessment years. In the present case, the assessee not having submitted such a declaration, it was submitted that it would be bound by the provisions of Section 10B which would preclude the setting off of a loss suffered by the eligible unit against the income of other units.

5. At the outset, while dealing with the submission which has been urged on behalf of the Revenue, it must be noted that Section 10B when it was originally introduced by the Finance Act, 1988, with effect from 1 April 1989, provided for an exemption of the profits and gains derived by the assessee from a hundred percent export oriented undertaking. The earlier provision specifically stipulated that profits and gains derived by an assessee from a hundred percent export oriented undertaking to which the section applies shall not be included in the total income of the assessee. Section 10A as at present stands, came to be substituted

by the Finance Act, 2000 with effect from 1 April 2001. The section as it now stands, is not a provision for exemption, but a provision which enables an assessee to claim a deduction. As it now stands, the section contemplates a deduction of such profits and gains as are derived by a hundred per cent export oriented undertaking from the export of articles and 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. The deduction has to be allowed from the total income of the assessee. In **Hindustan Lever Ltd. vs. Deputy Commissioner of Income Tax**,[2] a Division Bench of this Court considered the provisions of Section 10B, while considering a petition challenging the action of the Assessing Officer in purport to reopen the assessment under Section 148. The Division Bench noted that upon the substitution of the provision by the Finance Act, 2000, Section 10B was no longer a provision for exemption, but a provision for deduction. The Division Bench observed as follows:

2 (2010) 325 ITR 102 (Bom)

> "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."

This decision of the Division Bench has been followed by another Division Bench of this Court in the case of **Commissioner of**

Income Tax-II vs. Patni Computers Systems Ltd.[3]

6. Quite apart from the fact that the issue stands covered against the Revenue by the view taken by the Division Benches in the aforesaid two cases, even as a matter of first principle, we find no justification in the submission which has been urged on behalf of the Revenue. Section 70 provides for a setting off of a loss from one source falling under any head of income (other than capital gains) against income from any other source under the same head. Section 71 provides for the setting off of a loss sustained with reference to one head of income against income from another head (save and except for capital gains). Under Section 72, a provision has been made for carry forward and setting off of a loss sustained against the head of profits and gains of business or profession. Under Section 72, where a loss which has been sustained under the head of profits and gains of business or profession cannot be set off against income under any head of income under Section 71 so much of the loss as has not been set off or the entire loss where there is no income under any other head can be carried forward in

3 Income Tax Appeal 2177/10 decided on 1 July 2011.

the manner which is indicated in the provision. Section 72 which provides for a carry forward of a business loss comes into operation only when the provisions of Sections 70 and 71, as the case may be, are exhausted. There is no provision in Section 10B by which a prohibition has been introduced by the Legislature in setting off of a loss which is sustained from one source falling under the head of profits and gains of business against income from any other source under the same head. On the other hand, there is intrinsic material in Section 10B to indicate that such a prohibition was not within the contemplation of the Legislature. Sub-section (7) of Section 10B provides that the provisions of sub-section (8) and sub-section (10) of Section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in the section as they apply for the purposes of an undertaking referred to in Section 80-IA. Section 80-IA contains a specific provision in sub-section (5) to the following effect :

> "(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1)apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such

> eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

A similar provision corresponding to sub-section (5) of Section 80-IA is to be found in sub-section (6) of Section 80-I. Under sub-section (5) of Section 80-IA which begins with overriding non-obtante provisions, profits and gains of an eligible business to which sub-section (1) applies are for the purposes of determining the quantum of deduction to be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year. A provision akin to sub-section (5) of Section 80-IA or for that matter akin to sub-section (6) of Section 80-I has not been introduced by the Legislature when it enacted Section 10B. The fact that unabsorbed depreciation can be carried forward to a subsequent year does not militate against the entitlement of the assessee to set off a loss which is sustained by an eligible unit against the income arising from other units under the same head of profits and gains of business or profession. The

Legislature not having introduced a statutory prohibition, there is no reason to deprive the assessee of the normal entitlement which would flow out of the provisions of Section 70.

7. In this view of the matter, for the reasons which we have already indicated earlier, we follow the earlier decision of a Division Bench of this Court on this aspect. Consequently, no substantial question of law would arise in the appeal. The Appeal is accordingly dismissed.

(Dr.D.Y.Chandrachud, J.)

(M.S.Sanklecha, J.)