आयकर अपीलीय अधिकरण "L" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER
AND SHRI VIVEK VARMA, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.5750/Mum/2010
(**निर्धारण वर्ष /** Assessment Year : 2003-2004
आयकर अपील सं./I.T.A. No.5751/Mum/2010
(**निर्धारण वर्ष /** Assessment Year : 2004-2005
आयकर अपील सं./I.T.A. No.8705/Mum/2011
(**निर्धारण वर्ष /** Assessment Year : 2005-2006

Blue Star Infotech Ltd., 4th floor, Band Box House, Dr. Annie Besant Road, Worli, Mumbai – 400 030.	**बनाम**/ Vs.	ACIT, 6(1), Mumbai.
स्थायी लेखा सं./PAN : AAACB6385J		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Appellant by	Shri S.C. Tiwari
Respondent by :	Shri Vivek A. Peranpurna

सुनवाई की तारीख /**Date of Hearing : 18-02-2015**
घोषणा की तारीख /**Date of Pronouncement : 17-04-2015**

आदेश / O R D E R

PER R.C. SHARMA, A.M. :

These are the appeals filed by the assessee against the order of ld. CIT(A), Mumbai dated 20-05-2010 and 24-11-2011 for the assessment years 2003-04, 2004-05 and 2005-06 respectively in the matter of order passed u/s 154 r.w.s. 143(1)/143(3) of the Income Tax Act, 1961.

2. The grounds raised by the assessee in A.Y. 2003-04 read as under:-

"1. The learned (ld) CIT(A)-XIV, Mumbai, erred in upholding the order passed by the Assessing Officer (AO) under section 154 of the Income-Tax Act, 1961 (the Act), for the A Y 2003-04.

2. The ld CIT(A) erred in reckoning the time limit under section 154(7) of the Act, from the date of Intimation under section 143(1)(a) of the Act, dt. 12.3.2004, because the aforesaid Intimation cannot be treated as an "order" as contemplated under section 154 of the Act.

3. The ld CIT(A) erred in not reckoning the time limit from the date of order under section 143(3) of the Act, dt. 28.2.2006, or the order dt. 23.1.2008, giving effect to the appellate order of the CIT(A).

4. The ld. CIT(A) erred in not taking into consideration the fact that the aforesaid order under section 154 of the Act, was passed by the AO in view of a Grievances Petition filed by the appellant before the CIT-6, Mumbai, vide letter dt.29.12.2007.

5. The Id. CIT(A) erred in not taking into consideration the fact that the impugned application under section 154 was filed by the appellant before the AO as a request of the AO in his letter dt. 29.4.2008.

6. The Id CIT(A) erred in holding the claim of the appellant in respect of credit for foreign TDS as a debatable issue, when this issue had never been touched or dealt with by the AO.

7. The Id CIT(A) erred in not appreciating that as per section 199 of the Act, any TDS shall be treated as a payment of tax on behalf of the tax-deductee, viz. the appellant in the present case and the AO is duty-bound to consider the claim for credit in respect of TDS in the assessment order.

8. The Id CIT(A) erred in rejecting the claim of the appellant in respect of credit for foreign TDS.

9. All the aforesaid Grounds of Appeal are without prejudice to one another.

3. The grounds raised by the assessee in A.Y. 2004-05 read as under:-

"1. The learned (ld) CIT(A)-XIV, Mumbai, erred in upholding the order passed by the Assessing Officer (AO) under section 154 of the Income-Tax Act, 1961 (the Act), for the AY 2004-05.

2. The ld. CIT(A) erred in not taking into consideration the fact that the aforesaid order under section 154 of the Act, was passed by the AO

in view of a Grievances Petition filed by the appellant before the CIT-6, Mumbai, vide letter dt.29.12.2007.

3. The Id. CIT(A) erred in not taking into consideration the fact that the impugned application under section 154 was filed by the appellant before the AO as a request of the AO in his letter, dt. 29.4.2008.

4. The ld CIT(A) erred in holding the claim of the appellant in respect of credit for foreign TDS, as a debatable issue, when this issue had never been touched or dealt with by the AO.

5. The ld CIT(A) erred ill not appreciating that as per section 199 of the Act, any TDS shall be treated as a payment of tax on behalf of the tax-deductee, viz the appellant in the present case and the AO is duty-bound to consider the claim for credit in respect of TDS in the assessment order.

6. The Id CIT(A) erred in rejecting the claim of the appellant in respect of credit for foreign TDS.

7. The Id CIT(A) grossly erred in deciding the aforesaid appeal on the basis of the facts for the A Y 2003-04 and not the facts for the current A Y, 2004-05.

8. All the aforesaid Grounds of Appeal are without prejudice to one another.

4. The grounds raised by the assessee in A.Y. 2005-06 read as under:-

"1. The learned (ld) CIT(A)-14, Mumbai, erred in upholding the order passed by the Assessing Officer (AO), under section 154 of the Income-Tax Act, 1961 (the Act), for the A.Y. 2005-06.

2. The ld CIT(A) erred in holding that grant of credit for foreign TDS by the A.D., at the time of assessment was a mistake apparent from the record and the same was not a debatable issue.

3. The ld CIT(A) erred in not deciding the issue regarding the credit for foreign TDS on merits, in spite of detailed written submissions furnished before him, which have also been reproduced in the appellate order passed by the CIT(A).

4. The ld CIT(A) erred in ignoring the detailed written submissions made by the appellant, in support of its claim regarding credit for foreign TDS, by simply stating the fact that such a claim was not allowed by the CIT(A) for the AY 2004-05.

> 5. The ld CIT(A) failed to appreciate that there were two different issues involved in the appeal before him, the one, whether the issue under consideration was a debatable one and the other, whether on merits, the appellant was entitled to the credit in respect of foreign TDS.
>
> 6. The ld CIT(A) failed to appreciate that even if the action of the AO under section 154 was justified, the claim of the appellant regarding credit for foreign IDS was required to be adjudicated upon, on merits, which the CIT(A) did not do.
>
> 7. The ld CIT(A) failed to notice that similar orders passed by the AO under section 154 of the Act, denying the claim of the appellant regarding credit for foreign TDS, were held to be debatable by his predecessor for the AYs 2003-04 and 2004-05, in the case of the appellant."

5. In all these appeals, the assessee is aggrieved for not giving credit of tax deducted at Japan in respect of its income which had also brought in the tax net in India. The assessee is also aggrieved by the action of the lower authorities for holding that there was no mistake in the order passed u/s 143(1) and 143(3) of the Act for assessment years 2003-04 and 2004-05 insofar as there was an omission on the part of the A.O. to consider and make order on the assessee's claim of deduction of foreign tax made in the return of income which was duly deducted by Hitachi, Japan.

6. Rival contentions have been heard and record perused. Facts in brief in respect of A.Y. 2003-04 are that in the return filed on 28-11-2003, the assessee has claimed credit of foreign tax paid Rs. 449,911/-. However, along with the return of income TDS documents of Rs. 43,12,672/- was filed. During the course of assessment proceedings, the A.O. did not make any observation with regard to the assessee's claim nor given any credit for the foreign tax while issuing demand notice. Similarly, return of income for A.Y. 2004-05 was filed on 30-10-2004 wherein credit for foreign tax of Rs. 2,47,21,726/- was claimed. TDS Certificates were filed on 12-01-2005 which was misplaced by the A.O. and therefore, subsequently photo copies were filed. The A.O. passed the assessment order u/s 143(3) of the Act on 20-12-

2006 without giving any credit for foreign tax. Since in both the assessment years there was omission on the part of the A.O. to consider the assessee's claim for credit of foreign tax, the assessee filed application u/s 154 of the Act, however, the same was dismissed by the A.O. on the plea that it was a debatable issue, hence, it was not a mistake rectifiable u/s 154 of the Act.

7. The contention of ld. A.R. was that while finalising the assessment for assessment years 2003-04 and 2004-05 u/s 143(1) and 143(3) of the Act, the A.O. has omitted to consider the assessee's claim for deduction of foreign tax and accordingly there was an apparent mistake in the order which is liable for rectification u/s 154 of the Act.

8. With regard to the merit of the assessee's claim, he contended that the income of the assessee was not exempt u/s 10A of the Act insofar as there was amendment by the Finance Act, 2000, w.e.f. 01-04-2001. As per the ld. A.R. w.e.f. A.Y. 2001-02, the profits and gains to which the provisions of section 10A apply were not excluded from total income and instead "a deduction of such profits and gains.... shall be allowed from the total income of the assessee". Reliance was placed on the decision of Hon'ble jurisdictional High Court in the case of Hindustan Unilever Limited vs. DCIT, 325 ITR 102 (Bom) wherein it was held that "*There is merit in the submission which has been urged on behalf of the assessee that the AO has while reopening the assessment ex facia proceeded on the erroneous premise that s. 10B is a provision in the nature of an exemption. Plainly, s. 10B as it stands is not a provision in the nature of an exemption but provides for a deduction*".

9. The ld. A.R. further highlighted the following observations of the Hon'ble Bombay High Court negating the contention on the ground that section 10B was not a provision in the nature of an exemption but only provided for a deduction:-

> "'The AO 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 s. 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 s. 10B."

10. He further relied on the decision of the judgment of Hon'ble Karnataka High Court in the case of ITO & Anr. V. Stumpp, Schedule & Somappa (P) Ltd. (1997) 106 ITR 399 (Kar) wherein it was held that a deduction does not mean that corresponding income has not been charged to tax. In the words of Hon'ble High Court:

> *"The heading of Chapter III of the IT Act is "Incomes which do not form part of total income." Chapter IV deals with the computation of total income. It classifies the income under different heads and the deductions to be made in respect of the different heads of income. Chapter V bears the heading "Income of other persons included in assessee's total income" and the sections in that Chapter make provision in this behalf. In the IT Act, the expression "income includible in the total income" has a definite connotation. The expression "deductions and allowances", have also particular connotations. Income connotes what comes in and in general receipts by an assessee. Receipts are classified as capital or revenue, and receipts of revenue nature are treated as income. Capital receipts except in so far as they are liable for capital gains, and deemed to be income for that purpose, are not treated as income. Sec. 2(9) of the Act provides that the words and expressions used in the Act but not defined in it and defined in the IT Act shall have the meanings respectively assigned to them in that Act (IT Act - Therefore, when r. 4 of the Second Schedule refers to part of the income, profits and gains of a company not includible in its total income as computed under the IT Act, the expression 'not includible' should be understood and interpreted in the light of the provisions in the IT Act. Relief granted under ss. 80-1 and 80J cannot be said to be income, profits or gains not includible in the total income."*

11. As per the ld. A.R., the assessee is on still stronger footing than the case decided by Hon'ble Karnataka High Court (supra). In that case deduction was under Chapter VI-A which provides for deduction in the course of computation of total income. The heading of Chapter VI-A is "Deductions to be made in computing total income" whereas deduction u/s. 10A with effect

from assessment year 2001-02 is from total income i.e. after computation of income chargeable to tax is complete.

12. The ld. A.R. heavily relied on the decision of Hon'ble Supreme Court in the case of Union of India v. Azadi Bachao Andolan 263 ITR 706 (SC) wherein Hon'ble Supreme Court has in Para 73 cited with approval the following observations of the Federal Court in the case of John N. Gladden v. Her Majesty the Queen 85 DTC 5188:

> *"Contrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basis object of the treaty might be defeated or frustrated in so far as the particular item under consideration is concerned."*

13. At Para 70 of the judgment Hon'ble Supreme Court quoted from the commentary of Phillip Baker on Article 4 of the DECD Double Tax Convention:

> *"It seems clear that a person does not have to be actually paying tax to be "liable to tax" - otherwise a person who had deductible losses or allowances, which reduced his tax bill to zero would find himself unable to enjoy the benefits of the convention. It also seems clear that a person who would otherwise be subject to comprehensive taxing but who enjoys a specific exemption from tax is nevertheless liable to tax, if the exemption were repealed, or the person no longer qualified for the exemption, the person would be liable to comprehensive taxation. "*
>
> *Finally at Para 76 Hon'ble Supreme Court holds:*
>
> *76. It is, therefore, not possible for us to accept the contentions so strenuously urged on behalf of the respondents that avoidance of double taxation can arise only when tax is actually paid in one of the Contracting States."*

14. The judgment of Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra) has been followed by ITAT Bangalore in the case of Wipro Ltd. v. DCIT (2005) 96 ITJ (Bang) 211. Wipro Limited, like the assessee herein, enjoyed in India exemption/ deduction u/s. 10A/80HHE of the Act. The question arose whether Wipro was eligible for tax credit of the income tax

it paid in United States of America. The Tribunal remitted the case to the Assessing Officer because he had not discussed this issue. While doing so the Bench observed that what is to be seen is the assessee's eligibility for foreign tax credit in computing the tax liability in India.

15. The ld. A.R. further contended that the tax credit is intended to be given without discrimination that Double Taxation Avoidance Convention between India and Japan provided for notional deduction of tax as respects incentive provisions of Income Tax Act, 1961 of India. This position is clear from Paragraph 3c. of Article 23 of the Convention. This Sub-Para in relation to the assessment years under consideration reads as under:

> *"c. For the purposes of the credit referred to in sub-paragraphs (a) and (b) above, there shall be deemed to have been paid by the taxpayer the amount which would have been paid as Indian tax under the laws of India and in accordance with this Convention if the Indian tax had not been reduced or relieved in accordance with the special incentive measures designed to promote economic development in India, effective on the date of signature of this Convention or which may be introduced in future in the Indian tax laws in modification of or in addition to the existing measures, provided that an agreement is made between the two Governments in respect of the scope of the benefit accorded to the taxpayer by the said measures."*

16. He further submitted that the provision of section 10A is covered by the above quoted Article has been made explicit by the exchange of letter between Government of India and Government of Japan as would be seen from the letter dated 07.03.1989 addressed to Mr. Fijiro Noda, ambassador of Japan to India by Mr. G.N. Gupta, Chairman CBDT and replied on the same date by Mr. Fijiro Noda to Mr. G. N. Gupta. This correspondence is placed at page 51 to 53 of the assessee's compilation.

17. As per the ld. A.R. it should be treated to have paid tax in India without giving effect to the provision of section 10A for the reason also of Article 24 of Double Taxation Avoidance Convention between India and Japan. Paragraph 3 of Article 24 is as under:

> *"3. Except where the provisions of Article 9, paragraph 8 of Article 11, or paragraph 7 of Article 12, apply interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned Contracting State."*

As per the ld. A.R. Article 24 of the Convention envisages parity of tax liability between the residents of India and Japan. By virtue of Paragraph 3c of Article 23 the resident of Japan obtains tax relief as if the Indian tax has not been reduced by the provisions of section 10A. On the same logic the tax relief to the resident of India should be calculated as if the Indian tax has not been reduced in his case by the provisions of section 10A.

18. Reliance was also placed by the ld. A.R. on the decision of ITAT Delhi Bench in the case of Mitsubishi Corporation India Pvt. Ltd. vs. DCIT ITA No. 5042/Del/2011 dated 21-10-2014 wherein the observation of the Bench at para No. 116 are as under:-

> *"116. It is thus clear that no disallowance can be made in respect of payments made to a resident assessee, even without applicable deduction of tax at source, as long as related payments are taken into account by the recipients in computation of their income, and taxes in respect of such income are duly paid and related income tax returns are duly filed by the resident recipients under section 139(1). However, as section 40(a)(i) does not have an exclusion clause similar to second proviso to Section 40(a)(ia), so far as payments made to nonresidents, without deduction of applicable tax deduction at source, are concerned, such payments will be disallowable even in a situation, as is the admitted factual position in this case, even when the non-resident recipient has taken into account such payments in computation of his income, has paid taxes on the same and duly filed, under section 139(1), related income tax return. It is also elementary that so far examining discrimination to the non - resident Japanese taxpayers is concerned, the right comparator will be a resident Indian taxpayer. As we are examining the issue of deduction parity, we have to examine the position of deductibility in respect of a similar payment, i.e. without deduction of tax at source, made to a resident Indian taxpayer. To this extent, in the light of the legal position prevailing as on now and as there is no binding judicial precedent contrary to coordinate bench decision in the case of Rajeev Kumar Agarwal (supra), there is indeed an element of discrimination, in terms of*

Article 24(3) of the India Japan DTAA, in the deductibility of payments made to resident entities vis-a-vis non-resident Japanese entities."

19. With respect to the rectification proceedings initiated by the A.O. in A.Y. 2005-06, the contention of the ld. A.R. was that the decision to allow credit for foreign tax was given in the assessment framed u/s 143(3), therefore, it was not a debatable issue. With respect to merit of assessee's claim for rebate of foreign tax, he relied on the same submission as narrated above.

20. On the other hand, it was contended by the ld. D.R. that assessee's claim for foreign tax is governed by Article 23 of India Japan DTAA, wherein Article 23(2) provides that the deduction will not exceed that part of the income tax which is attributable to the income which may be taxed in Japan. As per the ld. D.R., it is clear from Article 23(2) that deduction shall not exceed that part of the income tax which is attributable to the income which is taxed in Japan. He further contended that when it comes to allowing the deduction, what is relevant is not the "income attributable to Japan" but to the "part of income tax attributable to the income which may be taxed in Japan". As per the ld. D.R., the entire income of assessee carries the benefit of section 10A, and as such no tax has been paid in India on its income which is attributable to Japan, hence, the credit of foreign TDS cannot be allowed. In view of above, he contended that the assessee's claim should be rejected.

21. We have considered the rival contentions, orders of authorities below and deliberated upon the judicial pronouncements cited at bar by the ld. A.R. and ld. D.R. in the context of factual matrix of the case. From the record we found that in the return of income filed for A.Y. 2003-04, the assessee has claimed credit of foreign tax paid amounting to Rs. 4,49,911/-. However, along with the return of income TDS documents of Rs. 43,12,672/- were enclosed. The A.O. did not make any discussion with regard to the tax deducted at Japan for which credit was claimed by the assessee in the

assessment order framed u/s 143(3) dated 20-03-2006. Accordingly no credit was given for such foreign tax while issuing demand notice. The assessee pursued the matter with the A.O. orally and finally filed Grievance Petition with CIT -6 on 29-12-2007 both for assessment years 2003-04 and 2004-05. The A.O. written a letter dated 18-01-2008 to the assessee wherein the issue with regard to credit of foreign tax was discussed. The A.O. directed the assessee to file application u/s 154 on 29-4-2008 and accordingly the assessee filed application u/s 154 of the Act on 29-4-2008. The A.O. passed order u/s 154 of the Act on 29-7-2008 wherein credit for foreign tax was declined firstly on the plea that the application filed u/s 154 on 29-4-2008 was after expiry of 4 years from the end of financial year 2003-04 and even otherwise it was a debatable issue that could not be considered as mistake rectifiable u/s 154 of the Act.

22. The assessee approached to the ld. CIT(A) and ld. CIT(A) in his order dated 20-5-2010 observed that while along with return of income the assessee has filed certificates of tax deducted at source by Hitachi, Japan on the higher amount, however, there was claim only of Rs. 4,49,911/-. The ld. CIT(A) further observed that the TDS related to section 10A unit and income from that unit is not taxable in the assessment year under consideration. The ld. CIT(A) further stated that because of this reason, no credit was allowed for TDS claim of Rs. 449,911/- even in the intimation issued u/s 143(1) which was passed on 12-03-2004. Thus the ld. CIT(A) confirmed the action of A.O. to the effect that rectification application filed by the assessee on 29-4-2008 was beyond the time limit from the date of order passed u/s 143(1) of the Act. Even on merit, the ld. CIT(A) held that income which was taxed in Japan has not been taxed in India, therefore, there was no double taxation and the question of DTAA did not arise.

23. For A.Y. 2004-05, the assessee filed return of income on 30-10-2004 wherein foreign tax of Rs. 24,721,726/- was claimed. TDS certificates were filed on 12-1-2005 which was misplaced by the A.O. and subsequently photo copies were filed by the assessee. The A.O. passed order u/s 143(3) of the Act wherein no credit for foreign tax was given. Oral request was made by the assessee to the A.O. for giving credit and finally the assessee filed Grievance petition to CIT – VI vide letter dated 29-1`2-2007. Thereafter at the instance of A.O. the assessee filed application u/s 154 of the Act on 29-4-2008. Order u/s 154 of the Act was passed by the A.O. on 29-7-2008 wherein he observed that the claim of foreign tax made by the assessee was a debatable issue, hence, it was not a mistake rectifiable u/s 154 of the Act. In an appeal filed before the ld. CIT(A), the ld. CIT(A) vide his order dated 20-5-2010, following the same reasoning given in A.Y. 2003-04, dismissed the appeal filed by the assessee.

24. The return for A.Y. 2005-06 was filed on 31-10-2005, the A.O. framed assessment u/s 143(3) on 26-12-2008 and in the demand notice, the A.O. allowed credit of foreign TDS to the extent of Rs. 1,70,72,950/- which was part of the credit of TDS of Rs. 2,88,06,969/- allowed in Income tax Computation Form. Thereafter, the A.O. issued notice u/s 154 of the Act dated 31-8-2009 wherein it was alleged that credit of foreign tax was wrongly given. However, the A.O. passed order u/s 154 read with section 143(3) and 250 of the Act dated 3-6-2010 withdrawing the claim for credit of foreign TDS. The A.O. further observed that no tax was attributable in India based on Article 23 of DTAA between India and Japan meaning thereby income on which tax has been paid in Japan was exempted under Chapter III of the Act and it did not form part of total income of the assessee.

25. In an appeal filed before the ld. CIT(A), the ld. CIT(A) confirmed the action of the A.O. by observing that in the assessment year 2004-05 the

assessee was not allowed credit of foreign tax paid in Japan. The contention of the assessee was that it was a debatable issue. Stating that so far as the records of the A.O. are concerned, it is evident that there was a mistake apparent from record and TDS credit was wrongly allowed, however, this issue cannot be said to be a debatable issue so far as the A.O. is concerned. Based on this reasoning, the ld. CIT(A) rejected appeal filed by the assessee.

26. With regard to the A.O. and the ld. CIT(A)'s observation for A.Y. 2003-04 to the effect that assessee's application filed u/s 154 was barred by limitation, we found that the A.O. has reckoned the period of 4 years from the last day of financial year 2003-04 which is without any basis or support from the provisions of section 154 of the Act. However, the ld. CIT(A) has reckoned the period of 4 years from the date of intimation u/s 143(1) of the Act which intimation was undated. However, in the instant case, the assessee has sought for rectification in the order u/s 143(3) passed by the A.O. on 26-12-2008 which is within the period of 4 years from the end of the financial year in which the assessment order was passed. Accordingly we hold that the application u/s 154 of the Act was within the time limit laid down u/s 154(7) of the Act.

27. Now we come to the merit of the disallowance made by the lower authorities on the plea that the income on which the assessee was charged tax in Japan was not chargeable to tax in India being exempt under the provision of section 10A of the Act and therefore assessee was not eligible to claim credit for the tax deducted in Japan. This view of the lower authorities are not in consonance with the provisions of section 10A as amended by Finance Act 2000 w.e.f. 1-4-2001 and do not take into account the sea change made in the provision after the aforesaid amendment. Prior to the amendment by Finance Act 2000, the Act provided that any profits and gains to which the provisions of section 10A apply "shall not be included in the total

income of the assessee". However, after the amendment w.e.f. A.Y. 2001-02 the profits and gains to which the provisions of section 10A apply are not excluded from total income and instead "a deduction of such profits and gains....." shall be allowed from the total income of the assessee". It means "total income" must first be determined from which deduction u/s 10A shall be allowed. The expression 'total income' is defined in the provisions of section 2(45) of the Act as meaning the total amount of income computed in the manner laid down in this Act. The provisions of section 4 of the Act which is the charging section postulates that income tax shall be charged for any assessment year at the rates prescribed for that year in respect of the total income of the previous year of every person. As we have seen the effect of section 10A is to allow a deduction from 'total income'. How can it be said that the profits and gains to which section 10A applies are not charged to tax? This position has been explained by the Hon'ble jurisdictional High Court in the case of Hindustan Unilever Limited v. DCIT 3251TR 102 (Bom) in the following words:

> *"24. There is merit in the submission which has been urged on behalf of the assessee that the AO has while reopening the assessment ex facie proceeded on the erroneous premise that s. 10B is a provision in the nature of an exemption. Plainly, s. 10B as it stands is not a provision in the nature of an exemption but provides for a deduction."*

28. In the case of Hindustan Unilever Limited vs. DCIT 325 ITR 302 (Bom) the assessee had 4 units eligible u/s. 10B. The assessee made profit in 3 units and loss in 1 unit. According to Assessing Officer since the income of the unit was exempt from taxation, the loss of the unit could not have been set off against the normal business income. Negating this contention on the ground that section 10B was not a provision in the nature of an exemption but only provided for a deduction Hon'ble Bombay High Court held as under:

> *"The AO 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 s. 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 s. 10B."*

29. ITAT, Mumbai In the case of Capegemini India (P) Ltd. vs. Addl. CIT (2011) 141 TTJ (Mumbai) (UO) 33 by following the above judgment of Hon'ble Bombay High Court held that loss from section 10A unit cannot be adjusted against the profits of other section 10A units and has to be adjusted against taxable profits after allowing deduction u/s. 10A to the profits of each eligible 10A unit because the provisions of section 10A do not exempt any unit from taxation but only allow deduction from taxable income. It therefore follows that it cannot be said that the assessee's income which was charged to tax in Japan has not, by virtue of the provisions of section 10A, been taxed or exempted in India.

30. The Hon'ble Karnataka High Court in the case of Stumpp, Schedule & Somappa (P) Ltd. (supra) held that proceeds on the basis that a deduction does not alter the basic fact that the gross amount has been charged to tax. Accordingly Hon'ble Karnataka High Court further observes:

> *"If the contention for the appellants is to be accepted as correct then even) kind of deduction or allowance for expenses made in the computation of the total income under the IT Act would have to be treated as income not includible in the total income ... "*

31. The decision of Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra) as discussed above is that it is liability to tax and not actual payment to tax that is determinative of relief under a double taxation avoidance convention. In Para 68 of the judgment Hon'ble Supreme Court observes:

> *"68. In our view, the contention of the respondents proceeds on the fallacious premise that liability to taxation is the same as payment of tax. Liability to*

taxation is a legal situation; payment of tax is a fiscal fact. For the purpose of application of Art. 4 of the DTAC, what is relevant is the legal situation, namely, liability to taxation, and not the fiscal fact of actual payment of tax."

32. It is clear from the above discussion that after amendment by Finance Act, 2000 w.e.f. 1-4-2001 deduction u/s 10A being from the total income leads to the conclusion that there is charge of income tax in India also on the income that has been subjected to tax in Japan. The tax liability of the assessee is equal to the tax payable in India at normal rates. Accordingly assessee qualifies for tax relief under para 2a of Article 23 of Double Tax Avoidance Convention between India and Japan as applicable to the assessment years under consideration. Since here we are concerned with the treatment to be given to the resident of India in relation to taxes paid in Japan., the same is covered by Paragraph 2 of Article 23 and not by paragraph 3 of Article 23 which provides for treatment to be given in relation to taxes paid in India by resident of Japan. In this respect the decision of ITAT Delhi in the case of Mitsubishi Corporation India Pvt. Ltd. v. DCIT ITA No. 5042/Del/2011 pronounced on 21.10.2014 clinches the issue. In that case the assessee Mitsubishi Corporation India Pvt. Ltd (MCI) was assessed to tax in India as a company resident in India. It was wholly owned subsidiary of Mitsubishi Corporation Japan (MCJ) who too was assessed to tax in India on account of PE in India but as a non-resident company. MCI paid certain amounts to MCJ on which tax was not deducted at source and therefore in the assessment of MCI their assessing officer sought to make a disallowance u/s. 40 (a)(i) of the Act. MCJ, however, filed its return of income and paid all its taxes. In its assessment MCI pleaded that it was entitled to have benefit similar to the payment made without deduction of tax at source in which cases under the amended provisions of section 40(a)(ia) by virtue of deductees payment of taxes the deductor assessee is deemed to have deducted and paid the tax on such sums. Revenue argued that the relevant amendment had been made in the provisions of section 40(a)(ia) but there was no similar

amendment in the provisions of section 40(a)(i) applicable to the payments made to non-residents. In this manner the Revenue argued that MCI was not protected against the mischief of section 40(a)(i) and the payments made to MCJ were liable to be disallowed for non-deduction of tax at source. MCI argued that it was a case of discrimination and invoked the provisions of Article 24 of Double Tax Avoidance Convention between India and Japan. Hon'ble Bench referred to the decision of ITAT Pune in the case of Daimler Chrysler India Pvt. Ltd v. DCIT 120 IT) (Pun e) 803 and emphasized the following findings in that decision:

> *"In the remaining two situations, i.e. non-discrimination against payments made to the residents of the other Contracting State i.e. under Article 24(3), non-discrimination against capital held by the residents of the other Contracting State i.e. under Article 24(4). It is not at all necessary that the assessees, in whose cases this non-discrimination is invoked, should be resident of, or even a national of, the other contracting state. In this view of the matter, we are unable to accept the plea of Mr. Kapila that since assessee before us is not resident of the other contracting state, the assessee cannot seek treaty protection against discrimination even if there be any."*
>
> Immediately thereafter Hon'ble Bench in the case of Mitsubishi concurs with the above findings of Pune Bench in the case of Daimler Chrysler India Pvt Ltd in the following words:
>
> *"We are in considered agreement with the view so expressed by the co-ordinate bench. In any case, the stand of the Assessing Officer proceeds on the fallacy that non-discrimination protection is being invoked for the assessee before us, though, as a matter of fact, non-discrimination protection is being invoked in respect of the payments made to a tax resident of treaty partner country, i.e. Japan in this case. What is being sought by the assessee in the present case is deduction neutrality so far as payments made to the resident tax payers in India vis-a-vis payments made to non-residents fiscally domiciled in Japan are concerned. The treaty protection is thus being sought in respect of the Japanese tax residents even though it does affect deductibility of payments made to them in India, and to that limited extent, it has impact on determination of taxable income in the hands of the Indian tax residents."*

33. It was also the contention of the ld. A.R. that the treatment given to the assessee by the authorities below results into double discrimination. On the one hand the assessee is being discriminated against a resident of Japan to

whom the incentive of section 10A is expressly passed over in the double taxation relief granted to him against his tax liability in Japan. On the other hand the assessee is being discriminated against an Indian resident who does not earn export income and does business in domestic market only. Thus the treatment sought to be given by Revenue in the case of the assessee yields absurd result.

34. Accordingly assessee should be treated to have paid tax in India without giving effect to the provision of section 10A for the reason also of Article 24 of Double Taxation Avoidance Convention between India and Japan. Paragraph 3 of Article 24 is as under:

> *"3. Except where the provisions of Article 9, paragraph 8 of Article 11, or paragraph 7 of Article 12, apply interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned Contracting State."*

Furthermore Article 24 of the Convention envisages parity of tax liability between the residents of India and Japan. By virtue of Paragraph 3c of Article 23 the resident of Japan obtains tax relief as if the Indian tax has not been reduced by the provisions of section 10A. On the same logic the tax relief to the resident of India should be calculated as if the Indian tax has not been reduced in his case by the provisions of section 10A.

35. In view of above discussion, we direct the A.O. to allow credit for foreign TDS against the tax levied on the corresponding income eligible for deduction u/s 10B of the Act in India for all the three years under consideration i.e. assessment years 2003-04, 2004-05 and 2005-06. We direct accordingly.

36. In the result, all the appeals are allowed in part.

Order pronounced in the open court on 17th April, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांकः 17-04-2015 को की गई ।

Sd/-	sd/-
(VIVEK VARMA)	(R.C. SHARMA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 17-04-2015

व.नि.स./ RK , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A) –20,, Mumbai
4. आयकर आयुक्त / CIT –-9, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai J Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**