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IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "C", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

	I.T.A. No. 2841/DEL/2016	
	A.Y. : 2011-12	
M/S VISION IKNOWLEDGE SOLUTIONS PVT. LTD., 97A, POCKET-I, MAYUR VIHAR, DELHI – 110 091 (PAN: AACCV6437H)	VS.	PR. CIT-9, NEW DELHI
(APPELLANT)		**(RESPONDENT)**

Assessee by : Sh. Pawan Jand, CA
Department by : Smt. Simran Bhullar, CIT(DR)

ORDER

PER H.S. SIDHU : JM

This Appeal filed by the Assessee is directed against the Order passed by the Ld. Pr. Commissioner of Income Tax-9, New Delhi u/s. 263 of the Income Tax Act, 1961 (hereinafter referred as the Act)

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relevant for the assessment year 2011-12.

2. The grounds raised in the Appeal read as under:-

> *"1. That the ld. Pr. CIT erred in law and on facts in directing the Ld. AO to first adjust the brought forward unabsorbed depreciation before allowing deduction under section 10A.*
>
> *2. That the order of the Ld. Pr. CIT is bad in law may be set aside.*
>
> *3. The Appellant Company craves right to add, / amend any of grounds of appeal."*

3. The brief facts of the case are that assessee filed its e-return u/s. 139 of the Income Tax Act, 1961 on 29.11.2011, declaring NIL income after claiming the exemption u/s. 10A of the Act. However, the assessee company has paid tax under MAT provisions declaring book profits at Rs. 21,23,520/- on which tax amounting to Rs. 3,93,701/- and interest of Rs. 37,002/- has been paid. The case of the assessee was

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selected for scrutiny. Notice u/s.143(2) and 142(1) of the Act was issued on 25.9.2012 and the same were complied with on 03.10.2013. In response to further notices u/s. 143(2) and 142(1) of the Act, the ARs of the assessee appeared from time to time and filed the information. The assessee company was engaged in the business of providing IT enable services (BPO) (Medical billing). During the year under consideration, the assessee company has declared foreign receipts at Rs.97.43 lacs and Foreign Exchange outgoings at Rs. 6.45. Books of accounts produced were test checked. Thereafter, the income of the assessee was assessed at NIL. However, income declared u/s. 115JB of the Act was assessed at Rs. 21,23,520/- and allowed credit for prepaid taxes vide order dated 27.2.2014 passed u/s. 143(3) of the Act.

4. Vide letter F.No. ITO-W26(4)/2015-16/1205 dated 17.2.2016 the AO informed that the assessee company had reduced the exemption u/s. 10A of the Act before partially setting off unabsorbed

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depreciation against income from other sources. The Ld. Pr. CIT-9, New Delhi examined the record and issued the notice u/s. 263 of the Act and observed that on examination of the records, it was noticed that the assessee had reduced exemption of Rs. 21,36,056/- u/s. 10A of the Act before partially setting off unabsorbed depreciation losses of Rs. 13,51,195/- against the income of Rs. 1,82,857/- from other sources. He further observed that this claim was erroneously accepted by the AO without examination and held that the assessment order dated 27.02.2014 for AY 2011-12 is erroneous in so far as it is prejudicial to the interests of revenue. Accordingly, the assessment order was modified by the Pr. CIT and AO was directed to compute the income of the assessee by first setting off the unabsorbed depreciation losses of Rs. 13,51,195/- against the income of Rs. 21,36,056/- of the eligible unit and thereafter allow the deduction u/s. 10A on the remaining income of Rs. 7,84,861/- vide order dated 16.3.2016 passed u/s. 263 of the Act.

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5. Against the aforesaid order of the Ld. Pr. CIT passed u/s. 263 of the Act dated 16.3.2016, assessee is in appeal before the Tribunal.

6. Ld. Counsel of the assessee has stated Ld. Pr. CIT has wrongly directed the AO to first adjust the brought forward unabsorbed depreciation before allowing deduction under section 10A of the Act, hence, the order of the Ld. Pr. CIT may be set aside. He further stated that Section 10A provide for deduction from the total income of the assessee. He further stated that as per CBDT Circular No. 794 dated 09.08.2000 the unabsorbed amounts cannot be carried forward or wet off against profits of subsequent years and deduction u/s. 10A is to be allowed from total income as computed under Chapter IV of the Income Tax Act, 1961 and not at the stage of computation of total income under Chapter VI of the Income Tax Act, 1961. To support this contention he relied upon the following case laws:-

- CIT & Anr. Vs. Yokogawa India Ltd. 2017-391 ITR 274 (SC)

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- CIT vs. TEI Technologies Pvt. Ltd. 2012 25 Taaxmann.com 5 (Delhi)
- Canam International Pvt. Ltd. vs. ACIT, Circle 3(1) 2014 ITA No. 1885/Del/2010 (ITAT, Delhi).

7. On the other hand, Ld. CIT(DR) controverted the various submissions and arguments advanced by the Ld. AR of the Assessee. He has strongly relied upon the impugned Order passed u/s. 263 by the Ld. Pr. CIT and has invited our attention to the finding recorded by the learned Pr. CIT in his impugned order. Accordingly, he stated that the order passed by the AO is erroneous as well as prejudicial to the interest of the Revenue. Accordingly, he requested that the impugned order passed u/s. 263 of the Act passed by the Ld. CIT may be upheld and appeal of the assessee may be dismissed.

8. We have carefully considered the rival submissions and perused the relevant records

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available with us, especially the impugned order passed by the Ld. CIT u/s. 263 of the Act alongwith the legal position on the relevant issues which emanates from the various decisions cited before us. We find that in this case the Assessing officer was directed by the Pr. CIT to compute the income of the assessee by first setting off the unabsorbed depreciation losses of Rs.13,51,195/- against the income of Rs.21,36,056/- of the eligible unit and thereafter allow the deduction u/s 10A on the remaining income of Rs.7,84,861/-. Before adjudicating the issue, we may gainfully refer the provisions of section 10A(1) of the Act as under:-

> *"10A(1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking*

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begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee"

8.1 After perusing the provisions of Section 10A(1), as aforesaid, it is clear that section 10A provide for deduction from the total income of the assessee.

8.2 We further find that Department Circular No 794 dated 09.08.2000 deals with the amendments to Section 10A. For the sake of clarity, we are reproducing para no. 15.10 of the aforesaid Circular as under:-

> *"The scheme of the substituted section retains parts of the earlier provisions. Where an assessee avails of benefit of section 10A (or section 10B), it will not be eligible for other tax concessions available under other provisions of the Act, during the period of ten years, or at any time after the expiry of this*

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period For this purpose, sub-section (6) provides that the provisions for depreciation under section 32, investment allowance under section 32A, development rebate under section 33, expenditure on scientific research under section 35 and capital expenditure in relation to family planning under section 36(J)(ix) shall apply as if all allowances or deduction specified therein have been given full effect to. Consequently, the respective unabsorbed amounts cannot be carried forward or set off against profits of any subsequent year. In other words, it is presumed that the allowances for depreciation, investment allowance, development rebate, capital expenditure on scientific research or family planning

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> *were fully absorbed in these ten years and that no amount of unabsorbed allowance or deduction is to be carried forward following the ten-year period. Similarly no loss under the head "Profits and gains of business or profession" under section 72(1) or under the head "Capital gains" under section 74(1) in respect of the relevant assessment years, will be carried forward or set off in computing the income of the undertaking after the period of benefit."*

8.3 After perusing the aforesaid Circular, we note that in para 15.10 it is explicitly provided that the unabsorbed amounts cannot be carried forward or set off against profits of subsequent year. We also note that a combined reading of the above provisions of the law as well as Circular clearly show that deduction u/s 10A is to be allowed from total income

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as computed under chapter IV of the Income Tax Act, 1961 and not at the stage of computation of total income under chapter VI of the Income Tax Act, 1961. Therefore from this it is clear that while claiming deduction u/s 10A unabsorbed depreciation is not to be adjusted.

8.4 We further note that the above position of law has been accepted by various courts including the Hon'ble Supreme Court of India. Some of these decisions are briefly discussed here under:

> **Commissioner of Income Tax and Another Vs Yokogawa India ltd. 2017-3911TR 274 (SC), the Hon'ble Supreme Court** held that the deduction under section 10A is to be given before adjusting unabsorbed depreciation or losses as per chapter VI of the income Tax Act, 1961. Their lordship while concluding the case observed in Para 17 and we quote:
>
> > "If the specific provisions of the Act provide [first proviso to Sections

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10A(l); 10A (1A) and 10A(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) 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.

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Commissioner of Income T ax Vs TEI technologies Pvt. Ltd. (2012) 25 Taxmann.com 5 (Delhi)

In this case the Hon'ble Delhi High Court held that the business loss of non eligible units could not be set off against profits of undertaking eligible for exemption u/s 10A.

Canam International Pvt. ltd. Vs ACIT, Circle 3(1) 2014 ITA No1885/Del/2010 (ITAT Delhi)

In this case the Assessing Officer had reduced the unabsorbed business loss and depreciation before allowing deduction u/s 10A. The Bench dealt with this issue as well as various judgments in detail including the judgment in the case of CIT Vs Himatasingke Seide Ltd relied upon by the Principal CIT while passing the order. The Bench after going

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through in detail all the judgment held in para 12 that deduction u/s 10A is to be allowed before reducing unabsorbed loss and depreciation.

8.5 We further find that Ld. Principal Commissioner of Income Tax while passing order u/s 263 of the Act only relied upon the judgment in the case of CIT vs Himatasingike Seide Ltd. of Hon'ble Karnataka High Court. This judgement does not hold good as this judgement pertains to assessment year 1994-1995 and is based on the old law. This judgment was distinguished by the ITAT Bangalore (Karnataka) in the case of KPIT Cummins Infosystems (Bangalore) (P.) Ltd. (2008) 26 SOT 529 (Bangalore). The Bench discussed the judgement of CIT vs Himatasingike Seide Ltd. in para 22 of the order and observed as under:

> "The lower authorities in support of their stand have relied on the decision of Karnataka High Court in the case of Himatasingika Seide Ltd.

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(supra). The Karnataka High Court held that unabsorbed depreciation and investment allowance have to be set off against income of eligible units before the computation of exemption under section 10B. It was also held that the income eligible for exemption has to be computed as per the provision of the Income-tax Act and not on a commercial basis. The case before the Karnataka High Court pertained to assessment year 1994-95. Section 10B at the relevant time excluded certain incomes in the process of arriving at the total income. Section 10B at the relevant time operated as an exemption section. The terminology of section lOB has not been changed. The section currently provides for a deduction from total

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income. This change was brought about when section 10B was substituted. Thus, the decision of the Karnataka High Court having rendered in the context of old section 10B, cannot be made applicable to the present case. Also the various citations referred and relied by the Hon'ble Karnataka High Court pertain to deductions conferred under Chapter VI-A of the Income Tax Act 1961. Section 10A is placed in Chapter III - Incomes do not form part of total income and not in Chapter VI-A. The judicial principles rendered in the context of sections conferring deductions under Chapter VI-A cannot be considered while allowing deduction under section 10A. Thus, the decision in Himatasingika Seide Ltd. 's case

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(supra) being rendered, relying on case laws pertaining to Chapter VI-A deductions and without considering the various implications of section 10A as have been detailed hereinabove cannot be made applicable to the present case. The decision did not take into consideration the matter of computation of total income as provided by the CBDT in the case of Siemens Information System Ltd. v. Asstt. CIT [2007J 293 JTR 548 (Bom.) and Siemens Information System Ltd. v. Asstt. CIT [2007J 295 ITR 333 (Bom.) has impliedly doubted the correctness of the aforesaid decision. Further, the aforesaid decision does not follow the earlier decision of the same court in CIT v. H.M. T. Ltd. [1993J

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199 ITR 235 (Kar.). The decision as reported does not contain reference to any elaborate arguments. The decision is distinguishable on facts and law."

8.6 The Bench based on the above and other arguments held in para 23 that unabsorbed depreciation is not to be reduced while working out deduction u/s 10A of the Act.

8.7 It is also noted that the above decision of Bangalore ITAT was relied upon by the Delhi, ITAT in the case of Canam International Pvt. Ltd. supra,(para 10(iii)of the order) while holding that deduction of section 10A is to be allowed before adjusting unabsorbed loss and depreciation.

9. In the background of the aforesaid discussions and respectfully following the precedents, as referred above, we hold that the impugned order passed by the learned Pr. CIT u/s.263 of the I.T. Act is not sustainable in the eyes of law. Accordingly, the

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impugned order is hereby quashed.

10. In the result, the Appeal filed by the Assessee stands allowed.

Order pronounced on 01/03/2018.

Sd/-	**Sd/-**
(L.P. SAHU) **ACCOUNTANT MEMBER**	**(H.S. SIDHU)** **JUDICIAL MEMBER**

Dated: 01/03/2018

SR BHATNAGAR

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

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By Order,

ASSISTANT REGISTRAR