

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF JANUARY, 2015

PRESENT

THE HON' BLE MR. JUSTICE N. KUMAR

AND

THE HON' BLE MR. JUSTICE B. VEERAPPA

ITA No. 447/2009

C/W.

ITA No.446/2009

ITA No. 447/2009:

BETWEEN:

M/S. MAX HEALTHSCRIBE LTD.
(PRESENTLY KNOWN AS SPHERIS INDIA PVT. LTD.)
ONE, SPHERIS PLAZA, 8TH BLOCK
KORAMANGALA, BANGALORE-560 095.
(REPRESENTED BY ITS MANAGING DIRECTOR,
SRI. SURESH NAIR,
AGED ABOUT 48 YEARS
S/O. LATE N. SHIVASHANKARAN)

.. APPELLANT

(BY SRI. CHYTHANYA K.K., ADVOCATE)

AND:

THE INCOME TAX OFFICER
WARD – 12(1)
BANGALORE.

... RESPONDENT

(BY SRI. K.V. ARVIND, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF THE INCOME TAX ACT, 1961 ARISING OUT OF ORDER DATED 12.06.2009 PASSED IN ITA NO. 1094/BNG/2008, FOR THE ASSESSMENT YEAR 2003-04 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN AND TO ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE IN ITA No.1094/BNG/2008, DATED 12-06-2009 IN THE INTEREST OF JUSTICE AND EQUITY.

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THESE INCOME TAX APPEALS COMING ON FOR HEARING THIS DAY, N. KUMAR J., DELIVERED THE FOLLOWING:

JUDGMENT

These two appeals arise out of common order passed by the Tribunal in respect of the same assessee for two assessment years, where the Tribunal upheld the orders passed by the lower authorities holding that the assessee is not eligible to carry forward unabsorbed loss and depreciation relating to the assessment years when appellant had opted out of Section 10A in the said years.

2. The substantial questions of law that arise for our consideration are as under:

“1) Whether on the facts and in the circumstances of the case, the Honourable Tribunal was right in law in holding that the carried forward business losses and unabsorbed depreciation of the assessment years 1998-1999 and 2000-2001 (during which years, the appellant had opted out of section 10A by exercising option under Section 10A(7) could not be set off while computing the total income of the appellant for the impugned assessment year?

2) Whether on the facts and in the circumstances of the case, the Honourable Tribunal was right in law in not holding that the prohibition contained in section 10A(6) shall apply only in respect of previous years relevant to the assessment years succeeding the tax holiday period?”

3. The assessee is a company engaged in medical transcription. The assessee's case is selected for scrutiny. The assessing authority passed an order under Section 143(3) of the Act, treating the relief under Section 10(A) as a deduction instead of exemption, by computing book profits under Section 115JB, by not taking various deductions contemplated under explanation to the said Section, computing the relief under Section 10A by restricting the benefit of carry forward business loss and depreciation.

4. Aggrieved by the said order, the assessee preferred an appeal to the Commissioner of Income-tax (Appeals) and he, in turn, has partly allowed the appeal.

5. Aggrieved by the said order, assessee preferred second appeal to the Tribunal, which came to be dismissed.

6. For the assessment year 1998-1999 the assessee claimed business loss of Rs.1,59,31,197/- and depreciation of Rs.7,59,667/- and in respect to the assessment year 2000-2001 the business loss claimed was Rs.51,79,426/- and the depreciation was Rs.1,11,71,979. In respect of these two years, the assessee had opted out of Section 10A of the Act by invoking the provisions of the erstwhile Section 10A(7). The said provision reads as under:

“(7) Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the due date for furnishing the return of income under sub-section (1) of Section 139 furnishes to the Assessing Officer a declaration in writing that

the provisions of this section may not be made applicable to him, the provisions of this section shall not apply to him for any of the relevant assessment years.”

7. The newly recast Section 10A substituted by the Finance Act, 2000 came into effect from 01.04.2001 in the amended provisions it is numbered as sub Section (8) found in the identical language, which reads as under:

“(8) Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the due date for furnishing the return of income under sub-section (1) of section 139 furnishes to the Assessing Officer a declaration in writing that the provisions of this section may not be made applicable to him, the provisions of this section shall not apply to him for any of the relevant assessment years.”

8. The said provisions clearly provided for an assessee opting out of the provisions under Section 10A for any of the relevant assessment years, the provisions of Section 10A would not apply to him for these years. It may be noted that in the year of opting out, the entire Section 10A which inter alia includes the provisions of sub Section (6) would not apply to the assessee. If in any year of loss, the assessee opts out of Section 10A, the prohibition contained in Sub Section (6) in respect of carry forward of such loss would not apply. In other words, the loss suffered by such assessee in such year of opting out would be available to him for future set off as per the normal provisions of the Act like Section 32(2) of the Act in respect of depreciation and Section 72(1) in respect of business loss. In fact, in circular issued by the CBDT

No.308, dated 29.06.1981 at Para No.6 it reads as under:

“6.7 A special provision has been made in sub-section (7) of the new section 10A to give an option to an assessee who derives profits and gains from an industrial undertaking situated in the free trade zone not to avail of this tax concession. Such an assessee will be required to furnish a declaration in writing before the expiry of the time allowed under section 139(1) or under section 139(2), whether fixed originally or on extension, to furnish the return of income for the first assessment year for which the tax holiday under the new scheme is available to him, that the provisions of this section may not be made applicable to him and if he does so, the provisions of this section 10A will not apply to him for any of the five assessment years for which the tax holiday provisions would have normally applied to him. The dispensation has been made on the

consideration that some assesseees may find the general tax concessions available in relation to industries in the rest of India more attractive than the new scheme.”

9. In fact, the said question arose for consideration before this Court in the case of **Commissioner of Income-tax v. Yokogawa India Limited** reported in **(2012) 341 ITR 385 (KAR)** wherein in Paragraph 32 it was held as under:

“The provisions of this sub-section will apply even in the case where an assessee has opted out of section 10A by exercising his option under sub-section (8). As discussed, it is permissible for an assessee to opt in and opt out of section 10A. In the year when the assessee has opted out, the normal provisions of the Act would apply. The profits derived by him from the STP undertaking would suffer tax in the normal course subject to various provisions of the Act including

those of Chapter VI-A. If in such a year, the assessee has suffered losses, such losses would be subject to inter source and inter head set off. The balance, if any, thereafter can be carried forward for being set off against profits of the subsequent assessment years in the normal course. Unabsorbed depreciation also merits a similar treatment.”

10. In that view of the aforesaid legal position, the impugned orders passed by the authorities cannot be sustained. The assessee is entitled to the benefit of carry forward of unabsorbed depreciation or loss relating to the assessment years when the appellant had opted out of Section 10A.

11. Therefore, the substantial questions of law are answered in favour of the assessee and against the revenue. Hence, we pass the following:

ORDER

- (a) Appeals are allowed.
- (b) Impugned orders are hereby set aside.
- (c) The appellants are entitled to the benefit of depreciation and business loss, in accordance with law.

**SD/-
JUDGE**

**SD/-
JUDGE**

Sbs*