

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 604 of 2008****With****TAX APPEAL NO. 605 of 2008****TO****TAX APPEAL NO. 606 of 2008****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE A.J. SHASTRI**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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THE COMMISSIONER OF INCOME TAX-II....Appellant(s)

Versus

MASTEK LTD.....Opponent(s)

=====A

Appearance:**MRS MAUNA M BHATT, ADVOCATE for the Appellant(s) No. 1****MRS SWATI SOPARKAR, ADVOCATE for the Opponent(s) No. 1****CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE A.J. SHASTRI****Date : 16/09/2016**

CAV JUDGMENT**(PER : HONOURABLE MR.JUSTICE A.J. SHASTRI)**

1. Present three Tax Appeals are filed by the Income-tax department challenging the consolidated order passed by the Income-Tax Appellate Tribunal, Ahmedabad dated 7.8.2007 in three appeals in common with respect to Assessment Years 1996-97, 1997-98 and 1998-99. The present appeals are raising common issue of law and fact and therefore, same are being dealt with and disposed of by present common order by treating Tax Appeal No.606 of 2008 as a lead matter. So far as Tax Appeal No.604 of 2008 is concerned, the same is directed against the same common order dated 7.8.2007 passed by Income Tax Tribunal, Ahmedabad in connection with ITA-1867/Ahd/2001 for Assessment year 1998-99. In this appeal assessee had originally claimed exemption u/s 10A which was disallowed by Assessment Officer. Against the said disallowance, in an appeal filed by assessee CIT(A) directed to allow exemption u/s 10A of the Act in respect of Unit no.107 which came to be upheld by the Tribunal against which this tax appeal came to be filed by Revenue.

1.1 Similarly, in case of Tax Appeal No.605 of 2998 is concerned, similar is the position in which challenge is made to a common order dated 7.8.2007 in connection with ITA 368 of 2001 for Assessment Year 1997-98. In this appeal also Tribunal upheld the decision of CIT(A) in which it was concluded that Unit 107 was a new unit and eligible for exemption under Section 10A of the Act. Since the facts are almost similar and the issues involved in the appeals are also identical, the facts are taken up from Tax Appeal No.606 of 2008 for deciding the controversy in question.

2. This Court vide order dated 2.9.2008 has admitted the appeal, namely Tax Appeal No.606 of 2008 for consideration of following substantial questions of law which are reproduced hereinafter.

“(1) Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) in deleting additions made on accounts of exemptions under section 10A?

(2) Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) in deleting the additions made on accounts of R&D Expenses?

3. From the aforesaid substantial questions of law, question No.2 of identical nature is already dealt with and disposed of vide order dated 21/28.8.2012 in Tax Appeal No.242 of 2000 and therefore, the appellant – department has candidly submitted not to consider the same and therefore, present judgment and order is restricted to consideration of substantial question of law which is framed as question No.1.

4. Brief facts are that the assessee company is dealing in the business of development of software and packaged software product which is divided into four groups, namely, customerized software, packaged software product, agency product and exports. The assessee company is carrying on its activity in India as well as abroad which is detailed out and reflected from assessment order. The assessee company which is dealing in customerized software has developed software packages for various sectors and these services are provided by the company in Indian market to various parties

and the software projects are for manufacturing, marketing, financial information systems, payroll and export marketing etc. Similarly, packaged software which is developed by the assessee company with the help of R & D Unit at Pune and these products are marketed in India. The agency products for which the assessee company has acquired right to duplicate softwares and marketed them in India on behalf of the foreign principal wherein, the softwares such as Ingress, Comshare and LBMS are marketed. So far as exports related market is concerned, the main area of the assessee company of exports are USA, U.K., Singapore, New Zealand and in these foreign countries, the company is providing software services in the field of development of software. In response to the activities which are undertaken by the assessee company, the activities center is set up by the company at three places of various locations (i) Mastek, Unit-106 and Unit-107. Under the set up of this nature, the assessee company has filed its return of income declaring total income at Rs.Nil on 29.11.1996 and while submitting this return of income, the assessee company has claimed that its profit in respect of Unit-107 is exempted under Section 10A of the Income-Tax Act, 1961 (for short 'the Act') and further stated that upto the Assessment Year 1995-96, the profits of the Unit-106 was claimed as exempt under Section 10A of the Act and now, in respect of Unit-106 the benefit under Section 80HHE may be allowed. In the present proceedings, we are not concerned with other claims submitted by the assessee company but, only question which is called for consideration is in respect of exemption claimed under Section 10A of the Act and it is in this context a substantial question of law put for consideration. First of all a bare look at the relevant

portion of statutory provision of Section 10A is worth to be taken note of, hence reproduced hereinafter :

“[Special provision in respect of newly established undertakings in free trade zone, etc.

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 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 :

Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to deduction referred to in this sub-section only for the unexpired period of the aforesaid ten consecutive assessment years :

Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment years referred to in this sub-section shall be reckoned from the assessment year relevant to the previous year in which the [undertaking began to manufacture or produce such articles or things or computer software] in such free trade zone or export processing zone :

[Provided also that for the assessment year beginning on the 1st day of April, 2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software :]

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April,

[2012] and subsequent years.

[(1A) Notwithstanding anything contained in sub-section (1), the deduction, in computing the total income of an undertaking, which begins to manufacture or produce articles or things or computer software during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2003, in any special economic zone, shall be,—

(i) hundred per cent of profits and gains derived from the export of such articles or things or computer software for a period of five 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, and thereafter, fifty per cent of such profits and gains for further two consecutive assessment years, and thereafter;

(ii) for the next three consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the “Special Economic Zone Re-investment Allowance Reserve Account”) to be created and utilised for the purposes of the business of the assessee in the manner laid down in sub-section (1B):

[Provided] that no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sub-section (1) of Section 139]

(1B) The deduction under clause (ii) of sub-section (1A) shall be allowed only if the following conditions are fulfilled, namely:—

(a) the amount credited to the Special Economic Zone Re-investment Allowance Reserve Account is to be utilised—

(i) for the purposes of acquiring new machinery or plant which is first put to use before the expiry of a period of three years next following the previous year in which the

reserve was created; and

(ii) until the acquisition of new machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India;

(b) the particulars, as may be prescribed in this behalf, have been furnished by the assessee in respect of new machinery or plant along with the return of income for the assessment year relevant to the previous year in which such plant or machinery was first put to use.

(1C) xxx xxx xxx

(2) This section applies to any undertaking which fulfills all the following conditions, namely :—

(i) it has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year—

(a) commencing on or after the 1st day of April, 1981, in any free trade zone; or

(b) commencing on or after the 1st day of April, 1994, in any electronic hardware technology park, or, as the case may be, software technology park;

(c) commencing on or after the 1st day of April, 2001 in any special economic zone;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of any undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertakings as is referred to in section 33B, in the circumstances and within the period specified in that section;

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for

any purpose.

Explanation.—The provisions of *Explanation 1* and *Explanation 2* to sub-section (2) of section 80-I shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(3) This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation 1.—For the purposes of this sub-section, the expression “competent authority” means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

Explanation 2.—The sale proceeds referred to in this sub-section shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

[(4) For the purposes of [sub-sections (1) and (1A)], the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.]

(5) The deduction under [this section] shall not be admissible for any assessment year beginning on or after the 1st day of April, 2001, unless the assessee furnishes in the prescribed form, alongwith the return of income, the report of an accountant, as defined in the *Explanation* below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

(6) Notwithstanding anything contained in any other

provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year,—

(i) section 32, section 32A, section 33, section 35 and clause (ix) of sub-section (1) of section 36, shall apply as if every allowance or deduction referred to therein and relating to or allowable for any of the relevant assessment years [ending before the 1st day of April, 2001], in relation to any building, machinery, plant or furniture used for the purposes of the business of the undertaking in the previous year relevant to such assessment year or any expenditure incurred for the purposes of such business in such previous year had been given full effect to for that assessment year itself and accordingly sub-section (2) of section 32, clause (ii) of sub-section (3) of section 32A, clause (ii) of sub-section (2) of section 33, sub-section (4) of section 35 or the second proviso to clause (ix) of sub-section (1) of section 36, as the case may be, shall not apply in relation to any such allowance or deduction;

(ii) no loss referred to in sub-section (1) of section 72 or sub-section (1) or sub-section (3) of section 74, in so far as such loss relates to the business of the undertaking, shall be carried forward or set off where such loss relates to any of the relevant assessment years [ending before the 1st day of April, 2001];

(iii) no deduction shall be allowed under section 80HH or section 80HHA or section 80-I or section 80-IA or section 80-IB in relation to the profits and gains of the undertaking; and

(iv) in computing the depreciation allowance under section 32, the written down value of any asset used for the purposes of the business of the undertaking shall be computed as if the assessee had claimed and been actually allowed the deduction in respect of depreciation for each of the relevant assessment year.

(7) 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 this section as they apply for the purposes of the undertaking referred to in section 80-IA.

[(7A) xxx xxx xxx

[(7B) xxx xxx xxx

(8) xxx xxx xxx”

4.1 In view of aforesaid statutory provisions, a bare reading of the same indicates that so as to become eligible for benefit under Section 10A of the Act for deduction, the unit must be a separate and distinct unit not based upon either of splitting up of the existing unit or of reconstruction thereof and there must not be any intermixing or interlacing and from the context of these parameters, the issue raised by the revenue is required to be examined.

5. The Assessing Officer while framing an assessment order has dealt with this issue of claim of assessee under Section 10A of the Act in respect of Unit-107, has held upon consideration that Unit-107 is not an independent unit and activities of both the units are not separable and is not possible to hold that Unit-107 is separate and viable unit on its own as it cannot function without using infrastructure of Unit-106 in India and therefore, has held that Unit-107 is nothing but a mere extension of old Unit-106 and thereby, claim submitted by the assessee company came to be disallowed and consequently, profits of Unit-107 to the extent of 2.57 crores (rounded off) came to be added to the total income of the assessee company with initiation of penalty proceedings under Section 271(1)(c) of the Act. Along with it, other claims have also been dealt with. However, for the present controversy, the claim pertaining to Section 10A of

the Act is put for consideration, the same is being dealt with.

6. The assessee company feeling aggrieved by the said conclusion of Assessing Officer filed an appeal before the CIT (Appeals) and the CIT (Appeals) along with other issues which have been canvassed before it, has dealt with an issue related to Section 10A of the Act and has directed the Assessing Officer to allow the assessee company's claim for exemption under Section 10A of the Act as per the directions given. The relevant extract of the said conclusion is reproduced hereinafter :

"2. I have considered the rival submissions and also perused the various details filed with reference to queries raised during the course of hearing before me. As per the provisions of section 10A of the I.T.Act 1961 any industrial undertaking which fulfills all the following conditions namely:-

(i) it has begun or begins to manufacture or produce articles or things during the previous year relevant to the assessment year....

(a) commencing on or after the 1st day of April, 1981, in any free trade zone; or

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence, Provided that this condition shall not apply in respect of any industrial undertaking which is formed as a result of the reestablishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section.

(iii) It is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

is entitled for exemption u/s.10A of the I.T.Act 1961. The Assessing Officer has not conclusively established that any of the above conditions is not fulfilled in the case of the appellant company. Considering the proximity and the nature of business of the units in question, the instances cited by the Assessing Officer such as use of electricity / telephone facility and also personnels when needed are inevitable. But that alone cannot lead to the conclusion (unless any of the above conditions is violated) that the unit 107 is not an independent and cannot function without using the infrastructure of Unit-106 as arrived at by the Assessing Officer. The appellant has rebutted both through arguments and evidence the arguments / observations of the Assessing Officer on non-allowability of exemption u/s.10A. The *raison d'être* and the field and scope of operation of unit 107 is entirely different from that of unit 106 and for carrying its activities unit 107 possesses necessary infrastructure in terms of personnels / machinery etc. as is evident from the facts placed on record and was also evidenced by me during my personal visit to Units 106 and 107 to specifically verify appellant's contentions and facts placed on record in support of those contentions. Therefore, in my opinion, the appellant is entitled for deduction u/s.10A of the I.T.Act,1961.

Now coming to the next aspect as to which income qualifies for exemption u/s. 10A considering the nature of appellant's business namely that of developing software packages (customized or otherwise) and deploying the necessary expertise for its successful / execution / maintenance etc. because highly technical and sophisticated software (whether customized or otherwise) by itself will not be a salable commodity unless it is successfully executed to the users satisfaction and this latter process more often than not requires modification / alteration and for that purpose deployment of expertise is must. From the facts and circumstances explained by the appellant it is seen that the recruitment and training income shown by the appellant is the income related to the deployment of these expertise. Further it is seen that the appellant is not a recruiting agent as understood in normal parlance but it recruits and trains the personnels and deploys them for the softwares developed by the appellant only

and does not recruit and trained personnels to be deployed for some one else's requirements. It is also stated by the appellant while explaining the overall functional and management structure during my visit that the expertises deployed are the regular employees of the appellant company and on successful execution of the software/completion of the project as the case may be returned to the appellant company. Therefore as rightly pointed out by the appellant the deployment of expertise with a particular software is an integral part of the industrial activity undertaken by the appellant and therefore income derived from it is eligible for exemption u/s.10A of the I.T.Act,1961.

4. However, from the perusal of the assessment order it is seen that the appellant has also claimed reimbursement of expenses (mainly travelling expenses of the personnel) for the purpose of claiming deduction u/s.10A of the I.T.Act,1961. Since the reimbursement of expenses cannot partake the character of an income the same cannot be considered for the purpose of deduction u/s.10A of the I.T.Act,1961. Therefore, the Assessing Officer is directed to allow appellant's claim for exemption u/s.10A of the I.T.Act as per the directions given above."

7. Before coming to such conclusion, CIT (Appeals) has considered various aspects and contentions raised before it. It appears from the record that against the said decision delivered by the CIT (Appeals), the department had approached the Income-Tax Appellate Tribunal at Ahmedabad by preferring three Appeals related to three assessment years as stated above. The said appeals were numbered as Income-Tax Appeal Nos.1530/2000, 1867/2001 and 368/2001.

8. These appeals since entangled in a similar set of facts and question of law, the Tribunal consolidated the same for disposal of it and by judgment and order dated 7.8.2007, all the appeals preferred by the revenue came to be dismissed by

a common order. It is against this judgment and order passed by the Income-Tax Appellate Tribunal, present three appeals came up for consideration before this Court which are stated to have been admitted on 2.9.2008 by raising substantial question of law as mentioned above. Since these appeals are raising similar issues as stated above, by treating Tax Appeal No.606 of 2008 as a lead matter, the Court is taking up the examination of issues raised in all the appeals by way of this common judgment.

9. Learned counsel, Mrs.Mauna Bhatt for the revenue contended that Unit-107 has been formed by splitting of Unit-106 and thereby, contended that Unit-107 is nothing but an extension of Unit-106 inasmuch as the activities are almost similar in nature and many software personnel of Unit-106 are deputed to Unit-107. It was also contended that turn-over of Unit-107 is much more than in proportion to plant and machinery, furniture and fixtures as compared to Unit-106 and therefore, in view of intermixing and interlacing of expenses would make it clear that there was common control and common management of both the units. It was also contended that export sales to Mastek (UK) was done by Unit-106 inasmuch as it was also known as 'Carter Cask System Ltd.' which was re-named as Mastek (UK) vide special Resolution dated 20.10.1995. It was also contended on behalf of counsel for the revenue that the activities which were carried out by Unit-106 prior to coming into existence Unit-1067 and the software supplied by Unit-107 is nothing but software development by Unit-106 and thereby, contended that commission has been achieved by manipulating business activity and therefore, can never be said that Unit-107 is not

an independent unit so as to become eligible for deduction under Section 10A of the Act. Learned counsel further contended that Unit-107 apart from its export of software was also engaged in providing independent activities of recruitment and training to its personnel through Masket (UK) and the revenues earned are not for manufacturing of any software but merely for training purpose and these receipts are not for manufacturing of article or tins and thereby, contended that they are not entitled for exemption under Section 10A of the Act. Learned counsel relying upon some of the terms of the agreement between Laternal Profiles Ltd. and the respondent – assessee and then submitted that the status of assessee is of independent contractor and not developer of software. It was then submitted that reading the terms of the agreement clearly indicates that respondent – assessee carried out its activity for providing technical help to foreign counter parts and there is no connection with any software development. By indicating the off-shore billing figures for the Assessment Year 1996-97, it was conveyed that anomalous situation with respect to that billing figures would indicate that in the name of software, the respondent – assessee was earning huge revenue on account of services and not for export and therefore, contended that Unit-107 was established by splitting up of Unit-106 and therefore, not entitled to deduction under Section 10A of the Act and alternatively, submitted that respondent – assessee was not entitled to deduction in respect of revenue earned in the name of recruitment and training activities and reimbursement of expenses and by submitting this, learned counsel for the revenue stated that Unit-107 is not entitled to seek any benefit of provision under Section 10A of the Act. No

other submissions have been made.

10. As against this, learned counsel, Mr. Bandish Soparkar for the respondent – assessee submitted that Unit-107 is set up in a separate premises, acquired under the separate rental agreement and the said agreement is also forming part of the record which has not been disputed by Assessing Officer. It was also pointed out that premises of Unit-107 as a separate electricity meter, separate water meter, all telephones lines are being visible on the premises separately fitted and the said fact has not been disputed by the revenue. It was also contended that amount of Rs.48 lacs was invested for the furniture and fixtures for better equipments for the operation of the unit which has plant and machinery, a separate ledger is maintained for expenses exclusively incurred with respect to Unit-107 and thereby, submitted that it is an independent and exclusive unit. Learned counsel submitted that if the contention of the revenue is accepted that Unit-107 was established to take over the business of Unit-106 then in that case, business and employment of Unit-106 should decline and may come to an end. However, the record indicates that on the contrary, the strength of Unit-106 went up from 140 to 155 employees in the Assessment Year 1996-97 and corresponding revenue also has on increasing trend of Unit-106. This would clearly indicate that Unit-107 has not been established and set up at the cost of business or revenue of Unit-106. It was then submitted by counsel for the respondent – assessee that what is contemplated under Section 10A of the Act is the new industrial undertaking which should not have been formed by splitting up or reconstruction of the business already in existence. It was stated before the Court that

section nowhere talks of common management and therefore, there may be a situation that in one common management, there may be more than one unit who will be entitled and eligible for exemption provided that there are independent units and not formed by reconstruction or splitting up of the business already in existence. Learned counsel for the respondent – assessee has submitted that Unit-106 was catering and still catering the requirement of software consultancy services in respect of works to be executed for sourced from Singapore and USA which is reflected in the agreement itself. Learned counsel has submitted that in view of the terms of the agreement also, both Unit-106 and Unit-107 are totally separate units and also are operated from the different premises with different infrastructure which caters to the different markets altogether. It was also submitted that Unit-106 is having its own territory which has gone up clearly which indicates that both the units are distinct and independent units and it was submitted that these facts have not been disputed by the Assessing Officer. Learned counsel for the respondent – assessee further submitted that if some of the telephones and other expenses of Unit-106 were paid by Unit-107 on few occasions, those payments / expenses cannot be distracted from fundamental fact that both units are distinct and separate in operation, physical expenses as also revenue generation and therefore, once its established on the record that Unit-107 is separate and distinct, the revenue earned by it is eligible for exemption under Section 10A of the Act. Learned counsel further submitted and reiterated that Unit-107 has neither been set up by splitting up or reconstruction of any business in existence or by plant and machinery previously used. Learned counsel also submitted

that each one is having a separate territory for its functioning. By pointing out this, learned counsel relied upon the decision of the Supreme Court in case of **Textile Machinery Corporation Ltd. V/s. CIT**, reported in **107 ITR 195(SC)** and has submitted that if an undertaking is not formed by the reconstruction of old business, said undertaking will not be denied the benefit of Section 15C merely because it goes to expand the general business of assessee in some direction. Section 15C was dealt with by the Supreme Court in the said decision. However, the principle underlying in the said decision is almost applicable to the background of fact of the present case. It was also submitted that this very decision was relied upon by the Supreme Court in case of **Commissioner of Income-Tax V/s. Indian Aluminum Company Ltd.**, reported in **108 ITR 367 (SC)** and thereby, reiterated that Unit-107 is eligible for the benefit of Section 10A of the Act. Learned counsel placed further reliance upon the decision in case of **Commissioner of Income Tax V/s. Shree Digvijay Cement Co. Ltd.**, reported in **144 ITR 532 (Gujarat)** and contended that the unit had a separate and distinct identity and since the setting up of Unit-107 is upon investment of fresh capital and the additional labour force, the benefit of Section 10A of the Act cannot be deprived of. It was also brought to the notice of the Court another decision in case of **Commissioner of Income-Tax V/s. Rohtas Industries Ltd.**, reported in **120 ITR 110 (Calcutta)** and reiterated the submission that Unit-107 be treated as a distinct and separate establishment so as to grant benefit of Section 10A of the Act. Learned counsel has further relied upon some of the observations from the decision delivered by the Division

Bench of this Court rendered in Tax Appeal No.242 of 2000 and allied matters decided on 21/28.8.2012 and then reiterated the contention that Unit-107 is rightly treated as separate and distinct unit so as to get the benefit of Section 10A of the Act and thereby, submitted to confirm the decision delivered by the Tribunal and dismiss the Tax Appeals.

11. Having heard both the learned counsel appearing for the respective parties and having gone through the details of the case on hand, it appears that detailed examination has been undertaken by the Tribunal and has rightly come to the conclusion that Unit-107 is a separate establishment and is entitled to benefit of Section 10A of the Act. The comparison of each aspects appeared to have been undertaken by the Tribunal to ascertain whether Unit-107 is truly and new and separate unit which is not forming part of Unit-106 by splitting up or based upon any reconstruction of the business already in existence. Perusal of the record and the material has led a cogent belief of the Tribunal which has examined the terms of the agreement as also various aspects as contended which are stated hereinbefore. It was specifically ascertained that Unit-107 is housed in a separate premises and appropriate permission of SEEPZ under a separate lease agreement with a separate electricity and water meters. It is also emerging from the record that while setting up Unit-107, new investment has been made for acquiring the new furniture and fixtures as also plant and machinery, namely, computer and computer equipments and more than 10 persons have been employed by Unit-107 and these facts were not in dispute and therefore, the Tribunal has rightly observed and concluded that Unit-107 becomes an independent unit in

all physical terms. It was also concluded by ascertaining the figures of turnover, manpower, employment and it was also ascertained by the Tribunal that Unit-106 catering to USA whereas Unit-107 is having altogether a different territory and has distinctly entered into business in the area of U.K., Austria, New Zealand and Germany by way of separate agreements. It is also emerging from the record that Unit-107 has a different operational field which clearly indicated in all that Unit-107 is a separate and independent unit set up not out of reconstruction of Unit-106 in any manner.

12. From the record it is further emerging that business of Unit-106 went in upward direction in terms of its turnover, employment which is indicated that business of Unit-106 which was a unit in existence has not diverted to Unit-107. It was also emerging from the record that old unit was operating in territory of USA and allied markets through different subsidiary i.e. Masket (US) whereas Unit-107 operates in U.K. and allied market by separate agreements with Masket (U.K.). These are the factors which has led the Tribunal rightly to hold that Unit-107 was not formed by either splitting up or reconstruction of business of Unit-106 and therefore, the decision delivered by the Supreme Court in case of Textile Machinery Corporation Ltd. (Supra) as well as Indian Aluminum Co. Ltd. (Supra) as also the decision of the Gujarat High Court rendered in Tax Appeal No.242 of 2000 and allied matters are applicable in the background of present facts and circumstances. Even the record indicates that a personal visit has also been made to verify the contention of the respondent assessee and upon physical verification also of both the units, namely, Unit-106 and Unit-107, it was held and ascertained

that Unit-107 was an independent unit and not formed by way of any splitting up of Unit-106 and therefore, the conclusion arrived at by the Tribunal appears to be substantially by cogent material and the decision relied upon by counsel for the respondent appears to have been applicable and therefore, it was rightly concluded by the Tribunal that Unit-107 was a new unit and therefore, fulfills the terms and conditions laid down under Section 10A of the Act to become eligible to seek exemption benefit. Simply because some of the minor expenses are overlapping, same will not change the basic character of the unit which is found as an independent unit. The record further reveals that upon detailed examination of material the Tribunal rightly come to the conclusion that from all angles and parameters, Unit-107 is to be treated as separate and distinct unit. The Tribunal found to have also dealt with various terms of the agreement and then come to the definite conclusion as stated hereinabove and while coming to that, Article 425 has also been examined and it was rightly found by the Tribunal that clause contained therein at the most indicates the independent status of these units is not possible to be intermixed and therefore, it was noticed by the Court that conclusion arrived at by the Tribunal is appearing to be correct. The Tribunal has further considered the Circular No.694 as also the decision delivered by the Bombay Tribunal in case of M/s.S&S Consultancies Pvt. Ltd. and upon examination of it, found that receipts on account of supply of professionals for development of computer software on individual basis constituted export receipts and the object of Section 10A of the Act being benevolent, the said fact may not be interpreted so as to deny the benefit of exemption which is ultimate object by

maintaining such provision in the Act and therefore, overall examination of material on record, it is clearly emerging that Unit-107 in all respect is a separate and independent unit. Therefore, it appears that the contention raised by the revenue are not worth enough to dislodge the conclusion arrived at by the Tribunal. As stated above, learned counsel for the respondent who has relied upon a decision in case of Textile Machinery Corporation Ltd. (Supra), in which upon examination of the relevant record and similar position, dealing with Section 15C of the 1922 Act, the Supreme Court has stated that it was rightly justified by the Tribunal that new unit which was set up who has got the effect of 15C of 1922 Act and while coming to that conclusion, the Supreme Court has observed like this which worth to be taken note of :

“If any undertaking is not formed by reconstruction of the old business that undertaking will not be denied the benefit of section 15C of the 1922 Act simply because it goes to expand the general business of the assessee in some directions. As in the instant case, once the new industrial undertakings were separate and independent production units in the sense that the commodities produced or the results achieved were commercially tangible products and the undertakings could be carried on separately without complete absorption and losing their identity in the old business, they were not be treated as being formed by reconstruction of the old business.”

13. In the case of Indian Aluminum Company Ltd. (Supra), taking aid of the decision reported in 107 ITR 195, the Supreme Court took the similar view and has observed that nature of substantial investment would indicate that even if units have been set up side-by-side it cannot be said that the

units were not newly set up and thereby, extended the benefit of exemption under Section 15C of the relevant Act.

14. Yet in another case, relying upon the aforesaid two decisions of the Supreme Court, the Division Bench of this Court as in case of Digvijay Cement Co. Ltd. (Supra) has held that investment of fresh capital and employment of additional labour force are the relevant factors to hold that unit had a separate and distinct identity and the results of production increased would also lead to hold that unit has a separate and distinct identity. It was observed by the High Court relying upon aforesaid decisions of the Supreme Court that all tests laid down by the Supreme Court would lead to a situation to hold that unit has a separate and distinct unit established and is eligible to get the benefit of exemption. The factors which were considered, namely, (i) investment of fresh capital (ii) manufacture or production of articles yielding additional profit attributable to the new outlay of capital (iii) employment of requisite labour and (iv) separate and distinct identity are the tests laid down by the Supreme Court and therefore, considering that, the High Court has confirmed in that case the decision of the Tribunal to hold that the unit in that case had a separate and distinct identity and therefore, counsel for the revenue has rightly relied upon the said decision.

15. We notice that CIT (Appeals) as well as the Tribunal have, while coming to the conclusion as reflected in respective orders, considered several factors and tested the contention of the revenue from all these aspects. The

authorities have also considered the business activities of both the units; the business territory of both the units; the product in which both the units are dealing; the terms of the agreement and inasmuch as have also gone into the aspect of recruitment and training expenses as well. While coming to the conclusion, each details submitted to them have been considered minutely, so much so relationship of parties, strength of the employment, infrastructure facilities and capital investment having been brought in the new unit in respect of furniture, fixtures, computer equipments etc and also considered the parameters prescribed under Section 10A of the Act so as to become eligible for deduction. The Tribunal has also considered the relevant circular which has been placed for consideration and various authorities submitted to it and therefore, appears to this Court that the conclusion arrived at by the Tribunal is based upon sound reasoning, the orders impugned are not required to be interfered with.

16. From the aforesaid background of fact since it is clearly emerging that the conditions contained under Section 10A of the Act are established on the case on hand, the record has revealed the independent and distinct identity of Unit-107 and all other relevant factors have rightly been concluded by the Tribunal to hold that Unit-107 is a separate and distinct identity, the conclusion arrived at by the Tribunal is not worth to be dislodged or disturbed. Therefore, we are of the opinion that the decision delivered by the Tribunal does not deserve to be disturbed or set aside and therefore, having not found case in favour of the revenue, we hereby confirm the order of the Tribunal and dismiss all the Tax Appeals.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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