IN THE HIGH COURT OF KARNATAKA

AT BANGALORE

ITA No.361/2009

1) COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE, C R BUILDING
QUEENS ROAD, BANGALORE

2) ASSTT COMMISSIONER OF INCOME TAX
CIRCLE-11(4), C R BUILDING, QUEENS ROAD
BANGALORE

Vs

M/s CHESLIND TEXTILES LTD
147, 12th MAIN, III BLOCK
KORAMANGALA
BANGALORE-560034

N Kumar and B Manohar, JJ

Dated: March 4, 2013

JUDGEMENT

The Revenue has preferred this appeal against the order passed by the Income Tax Appellate Tribunal holding that while ascertaining the profit and accounts of an undertaking, the unabsorbed depreciation of other undertaking cannot be set-off for computing deduction under Section 10B of the Act as held by the Assessing Officer and such an order could not have been interfered with by the Commissioner under Section 263 of the Act.

2. The Assessing Authority allowed deduction under Section 10B amounting to Rs.4,75,30,724/- on the business income of Rs.5,36,70,676/- without setting-off unabsorbed depreciation amount of Rs.4,26,23,711/-. The Commissioner of Income tax in his jurisdiction under Section 263 of the Income Tax Act was of the view that the same resulted in excess deduction allowed under Section 10B of the Act and incorrect determination of loss was carried forward. Therefore, he set-aside the said order and directed the Assessing Officer to re-compute the total income after setting-off the unabsorbed depreciation and correctly determine deduction allowable under Section 10B in the assessing order. Aggrieved by the same, the assessee had preferred an appeal.

3. The Tribunal held that Assessing Officer had adopted one of the permissible views and such an order cannot be said to be erroneous in view of the decision of the Apex Court in the case of *Malabar Industrial Company Ltd., V/s. CIT reported in 243 ITR 83* in which it has been held that an order is erroneous insofar as it is prejudicial to the interest of revenue if the view of the Assessing Officer is unsustainable in law and therefore, it held that the Revisional Authority was not justified in modifying the order of the Assessing Officer when the Assessing Officer has

taken a view which is permissible in law. In fact the said question arose for consideration before this Court in the case of the *Commissioner of Income Tax, LTU, V/s. M/s. Yokogawa India Ltd., in ITA No.78/2011* and connected appeals disposed of on 9th August 2011. After considering the relevant provisions of law and the decisions of various Courts, this Court held as under:

"29. After making all such computations the assessee would be entitled to the benefit of set off or carry forward of loss as provided under Section 72 of the Act. That is the benefit which is given to the assessee under the Act irrespective of the nature of business which he is carrying on. The said benefit is available even to undertakings under Section 10-B of the Act. The expression "deduction of such profits and gains as derived by an undertaking shall be allowed from the total income of the assessee", has to be understood in the context with which the said provision is inserted in Chapter-III of the Act. Sub-Section (4) of Section 10-A clarifies this position. It provides that the profits derived from export of articles or things from 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. Therefore, it is clear that though the assessee may be having more than one undertaking for the purpose of Section 10-A it is the profit derived from export of articles or things or computer software from the business of the undertaking alone that has to be taken into consideration and such profit is not to be included in the total income of the assessee. It is only after the deduction of the said profits and gains, the income of the assessee has to be computed.

30. The provisions of this sub-section will apply even in the case where an assessee has opted out of Section 10-A by exercising his option under sub-Section (8). As discussed, it is permissible for an assessee to opt in and opt out of Section 10-A. 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.

31. As the income of 10-A unit has to be excluded at source itself before arriving at the gross total income, the loss of non 10-A unit cannot be set off against the income of 10-A unit under Section 72. The loss incurred by the assessee under the head profits and gains of business or profession has to be set off against the profits and gains if any, of any business or profession carried on by such assessee. Therefore, as the profits and gains under Section 10-A is not be included in the income of the assessee at all, the question of setting off the loss of the assessee of any profits and gains of business against such profits and gains of the undertaking would not arise. Similarly, as per Section 72(2), unabsorbed business loss is to be first set off and thereafter unabsorbed depreciation treated as current years depreciation under Section 32(2) is to be set off. As deduction under Section 10-A has to be excluded from the total income of the assessee, the question of unabsorbed business loss being set off against such profit and gains of the undertaking would not arise. In that view of the matter, the approach of the assessing authority was quite contrary to the aforesaid statutory provisions and the appellate Commissioner as well as the Tribunal were fully justified in setting aside the said assessment order and granting the benefit of Section 10-A to the assessee. Hence, the main substantial question of law is answered in favour of the assessees and against the Revenue."

4. In the light of the aforesaid legal provisions, we do not see any merit in this appeal also. However, in view of the fact that no substantial question of law arises for consideration in this appeal, the additional question with regard to the jurisdiction under Section 263 of the Revisional Authority becomes purely academic and therefore, that question is not answered. Hence, the appeal stands allowed.