आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

आयकर अपील सं./ ITA.No.506/Ahd/2013

निर्धारण वर्ष/ Asstt. Year: 2008-2009

Sameer E-Clipse (Products) P.Ltd. (Now known as Eclipse Global Pvt. Ltd.) 903/10, GIDC Indl. Estate Makarpura Vadodara 390 010 PAN : AAGCS 7973 R	Vs	ITO, Ward-4(3) Baroda.

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri Bhavin Marfatia, CA
Revenue by :	Shri Sanjay Kumar, Sr.DR

सुनवाई की तारीख/**Date of Hearing : 14/06/2016**
घोषणा की तारीख /**Date of Pronouncement: 18/07/2016**

आदेश/O R D E R

The assessee is in appeal before the Tribunal against the order of the ld.CIT(A)-III, Baroda dated 13.12.2012 passed for the Asstt.Year 2008-09.

2. Solitary substantial grievance of the assessee is that the ld.CIT(A) has erred in denying the deduction under section 10B of the Income Tax Act on the income of Rs.16,05,675/-.

3. Brief facts of the case are that the assessee has filed its return of income electronically on 29.9.2008 declaring total income at NIL. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) of the Act was issued and served upon the assessee. The assessee at the relevant time was engaged in the business of manufacture and export of aluminum blinds. It has claimed deduction under section 10B of the Income

Tax Act. As far as the issue disputed in the present appeal is concerned, the assessee has included a sum of Rs.19,26,669/- in the turnover for the purpose of claiming exemption under section 10B. According to the AO, this amount represents to services and maintenance provided by the assessee. The ld.AO after allowing the expenditure incurred on this front, excluded the amount of Rs.15,04,869/-. The ld.AO assessed this amount under head "Income from other sources". On appeal, the ld.CIT(A) has agreed with view of the AO, but re-worked out the quantum. The finding of the ld.CIT(A) reads as under:

> *"4. I have considered the appellant's submissions and the AO's observations. The present issue involves two different types of income. So far as development charges of Rs.3,20,694/- is concerned, the same has been received by the appellant for developing the tools for manufacture of blinds as per the product requirements of the customer. Thus, the appellant's submission that the product development charges are inextricably linked with the manufacturing of the products is acceptable. Hence this income has been derived from the activity of manufacture of the industrial undertaking and accordingly deduction u/s.1OB is allowable on this income. The AO is directed to allow deduction u/s.1OB on this income. Accordingly, the proportionate expenditure for earning this income will also be taken into account while computing the deduction u/s.1OB.*
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> *4.1 The other part of disallowance is the amount of Rs.16,05,675/- earned by the appellant as maintenance charges for the products sold by it. This income cannot be said to have been derived from the activity of manufacture or production of an article or thing by the industrial unit of the appellant. This is one stage removed from the manufacturing process. Hence, deduction u/s.1OB cannot be allowed on this income. The decisions relied upon by the appellant are old decisions and have been delivered without considering the decision of Hon'ble Supreme Court in the case of Liberty India 317 ITR 218 (SC) except for the decision in the case of Total Packaging Services (supra). But the decision in case of Total Packaging Services was in relation to MODVAT credit. So far as income from maintenance or service is concerned, the issue is covered against the appellant by following decisions:*

(i) [2011] 12 taxmann.com410(Kol.) (SB), Deputy Commissioner of Income-tax, C.C. XX v. Rajesh Kumar Drolia. In this decision the Bench has held as follows:

"The assessee's argument was that an industrial undertaking was also to undertake activity of repairing and servicing, which, in turn, could complete the company's product profile so that customers are offered comprehensive services including after-sale services. But this argument of the assessee could not be accepted, as service and maintenance is not an integral part of activity of industrial undertaking and as is clear from the opening word of section 80-IB that deduction in respect of profits and gains from certain industrial undertaking is to be allowed under the provisions of section 80-IB while computing taxable income in respect of profits derived from an industrial undertaking and not from any other activity which has no immediate or direct nexus to the essential activity of the industrial undertaking. Section 80-IB uses the opening word that where the gross total income of assessee includes any profits and gains derived from any business and the deduction under this provision be allowed in computing the total income of the assessee from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section. The Apex Court has also drawn a distinction between the expression 'derived from' and 'attributable to' in the case of Cambay Electric Supply Industrial Co. Ltd. v. CIT [1978] 113 ITR 84 , wherein it is held that the expression 'attributable to' was wider in import than the expression 'derived from'. The expression of wider import, namely, 'attributable to', was used when the Legislature intended to cover receipts from sources other than the actual conduct of the business. But in the instant case, the assessee's source of income was from repairs and maintenance, i.e., after sale-services and it might have commercial connection between the profits earned and the industrial undertaking but industrial undertaking itself was not the source of this profit. This profit from repair and maintenance earned by assessee was not a direct yield from industrial undertaking as the word used in section 80-IB of profits and gains derived from."

(ii) [2012] 17 taxmann.com 259 (Mad.), Indian Additives Ltd. In this decision, the High Court has held that the assessee, engaged in manufacture and selling of additives on commission basis is not entitled to deduction under section 80-IB in respect of service income and commission. This decision of the High Court has been approved by

Hon'ble Supreme Court in its decision reported in 25 taxmann.com 412 (SC).

4.1.1 Hence, following these decisions, it is held that the AO has rightly disallowed deduction u/s.1OB on account of income received by the appellant from maintenance charges for the products sold by it."

4. Before me, the ld.counsel for the assessee contended that sub-section 4 of section 10(B) provides that deduction under this section shall be computed by apportioning the profits of the business of the undertaking in the ratio of export turnover to the total turnover. In other words, according to the ld.counsel for the assessee, it was not mandatory for the assessee to include only those profits which has resulted from manufacturing activity. The profit of the business of the undertaking is to be considered for appropriation. He further contended that this issue has been examined by the Hon'ble Delhi High Court and Special Bench of the Tribunal. He relied upon the following decisions:

i) CIT Vs. Hritnik Exports P.Ltd., ITA No.219/2014 (Delhi High Court);
ii) Maral Overseas Ltd. Vs. ACIT, 136 ITD 177 (Indore) (SB);
iii) Lubrizol Advanced Materials India P.Ltd. Vs. DCIT, 150 ITD 538 (Ahd);
iv) ITO Vs. Jewelex International Pvt.Ltd., ITA No.3302/Mum/2009.

He placed on record copies of these decisions.

5. On the other hand, the ld.DR relied upon the orders of the Revenue authorities.

6. I have duly considered rival contentions and gone through the record carefully. Before embarking upon an inquiry on the facts of the present case,

I deem it pertinent to take note of the decisions relied upon by the ld.counsel for the assessee. In the case of Hritnik Exports P.Ltd. (supra), Hon'ble Delhi High Court, while considering this issue took into consideration para-79 of the Special Bench decision in the case of Maral Overseas Ltd. (supra), wherein the Tribunal has propounded its interpretation as to how section 10(B)(1)(4) are to be construed. Hon'ble Delhi High Court, thereafter, took note of its earlier decision rendered in ITA No.438 of 2014 and recorded a finding that section 10B is not on similar footing of 80HHC and/or 80HHB. The decision of the Hon'ble Delhi High Court containing order of the ITAT, Special Bench read as under:

> *"78. Section 10B sub-section (1) allows deduction in respect of profits and gains as are derived by a 100% EOU. Section 10B(4) lays down special formula for computing the profits derived by the undertaking from export. The formula is as under :-*
>
> *Profit of the business of the Undertaking*
>
> *Export turnover X Total turnover of business carried out by the undertaking*
>
> *79. Thus, sub-section (4) of section 10B stipulated that deduction under that section shall be computed by apportioning the profits of the business of the undertaking in the ratio of turnover to the total turnover. Thus, not-with-standing the fact that sub-section (1) of section 10B refers the profits and gains as are derived by a 100% EOU, yet the manner of determining such eligible profits has been statutorily defined in sub-section (4) of section 10B of the Act. As per the formula stated above, the entire profits of the business are to be taken which are multiplied by the ratio of the export turnover to the total turnover of the business. Sub-section (4) does not require an assessee to establish a direct nexus with the business of the undertaking and once an income forms part of the business of the undertaking, the same would be included in the profits of the business of the undertaking. Thus, once an income forms part of the business of the eligible undertaking, there is no further mandate in the provisions of section 10B to exclude the same from the eligible profits. The mode of determining the eligible deduction u/s 10B is similar to the*

provisions of section 80HHC inasmuch as both the sections mandates determination of eligible profits as per the formula contained therein. The only difference is that section 80HHC contains a further mandate in terms of Explanation (baa) for exclusion of certain income from the ''profits of the business'' which is, however, conspicuous by its absence in section 10B. On the basis of the aforesaid distinction, sub-section (4) of section 10A/10B of the Act is a complete code providing the mechanism for computing the ''profits of the business'' eligible for deduction u/s 10B of the Act. Once an income forms part of the business of the income of the eligible undertaking of the assessee, the same cannot be excluded from the eligible profits for the purpose of computing deduction u/s 10B of the Act. As per the computation made by the Assessing Officer himself, there is no dispute that both these incomes have been treated by the Assessing Officer as business income. The CBDT Circular No. 564 dated 5th July, 1990 reported in 184 ITR (St.) 137 explained the scope and ambit of section 80HHC and the mode of determination of profits derived by an assessee from the export of goods. I.T.A.T., Special Bench in the case of International Research Park Laboratories v. ACIT, 212 ITR (AT) 1, after following the aforesaid Circular, held that straight jacket formula given in sub-section (3) has to be followed to determine the eligible deduction. The Hon'ble Supreme Court in the case of P.R. Prabhakar; 284 ITR 584 had approved the principle laid down in the Special Bench decision in International Reserarch Park Laboratories v. ACIT (supra). In the asses see's own case the I.T.A.T. in the preceding years, after considering the decision in the case of Liberty India held that provisions of section 10B are different from the provisions of section 80IA wherein no formula has been laid down for computing the eligible business profit.

80. In view of the above discussion, question no. 2 is answered in affirmative and in favour of the assessee. Accordingly, the assessee is eligible for claim of deduction on export incentive received by it in terms of provisions of section 10B(1) read with section 10B(4) of the Act."

The aforesaid view is in consonance with the decision of this Court dated 1st September, 2014 passed in ITA 438/2014, Commissioner of Income Tax-VII versus XLNC Fashions in which this court has held as under :-

"Deduction under Section 10B of the Income Tax Act, 1961 (Act, in short) is to be made as per the formula prescribed by Sub-Section (4), which reads as under:

"10B. Special provision in respect of newly established hundred per cent export- oriented undertakings-

……

……..

(4) For the purposes of sub-section (1), 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".

Sub-section (4), therefore, is the special provision which enables the assessee to compute the profits derived from the export of articles or things or computer software. We do not see any conflict between Sub- section (1) and Sub-section (4) to Section 10B, as Sub-section (1) states that deduction of such profits and gains as are derived by a hundred percent export-oriented undertaking from the export of articles or things or software would be eligible under the said Section. Sub- section (1) is a general provision and identifies the income which is exempt and has to be read in harmony with Sub-section (4) which is the formula for finding out or computing what is eligible for deduction under Sub-section (1). Neither of the two provisions should be made irrelevant and both have to be applied without negating the other. In other words, the manner of computing profits derived from exports under Sub-section (1), has to be determined as per the formula stipulated in Sub-Section (4), otherwise Sub-section (4) would become otise and irrelevant.

The issue in question in this appeal which pertains to the Assessment Year 2009-10, relates to duty draw back in the form of DEPB benefits. As per Section 28, clause (iii-c), any duty of customs or excise repaid or repayable as drawback to a person against exports under Customs and Central Excise Duties Draw Back Rules, 1971 is deemed to be profits and gains of business or profession. The said provision has to be given full effect to and this means and implies that the duty draw back or duty benefits would be deemed to be a part of the business income.

Thus, will be treated as profit derived from business of the undertaking. These cannot be excluded.

Even otherwise, when we apply Sub-section (4) to Section 10B, the entire amount received by way of duty draw back would not become eligible for deduction/exemption. The amount quantified as per the formula would be eligible and qualify for deduction/exemption. The position is somewhat akin or close to Section 80HHC of the Act, which also prescribes a formula for computation of deduction in respect of exports.

In view of the aforesaid, we do not find any merit in the present appeal and the same is dismissed."

Karnataka High Court in Commissioner of Income Tax, Central Circle versus Motorola India Electronics (P) Ltd., ITA No. 428/2007, decided on 11.12.2013, reported as [2014] 46 taxmann.com 167 (Karnataka) has also taken a similar view, wherein it has been held:-

> *"By Finance, Act, 2001, with effect from 01.04.2001, the present Sub- section (4) is substituted in the place of old Sub-section (4). No doubt Sub-section 10(B) speaks about deduction of such profits and gains as derived from 100% EOU from the export of articles or things or computer software. Therefore, it excludes profit and gains from export of articles. But Sub-section (4) explains what is says that profits derived from export of articles or things or computer software shall be the account which bares to the profits of the business of the undertaking and not the profits and gains from export of articles. Therefore, profits and gains derived from export of articles is different from the income derived from the profits of the business of the undertaking. The profits of the business of the undertaking includes the profits and gains from export of the articles as well as all other incidental incomes derived from the business of the undertaking. It is interesting to note that similar provisions are not there while dealing with computation of income under Section 80HHC. On the contrary there is specific provisions like Section 80HHB which expressly excludes this type of incomes. Therefore, in view of the aforesaid provisions, it is clear that, what is exempted is not merely the profits and gains from the*

export of articles but also the income from the business of the undertaking."

7. The ld.counsel for the assessee, thereafter, made reference to the order of the ITAT, Ahmedabad in the case of Lubrizol Advanced Materials India P.Ltd. (supra) and ITAT, Mumbai Bench in the case of Jewelex International P.Ltd. (supra). The ratio in both these decisions is also to the similar effect. On due consideration of the facts of the present case, in the light of the above decisions, I find that in all these decisions, the income might not been derived by the assessee from manufacturing, but was assessed as business income. For example, in the case of CIT Vs XLNC Fashions, ITA No.438 of 2014 referred by the Hon'ble Delhi High Court receipts related to DEPB benefits. The Hon'ble Court has observed that such receipts are to be treated as profit derived from business of the undertaking. In the present case, the income of the assessee from maintenance or services was not assessed as its income from business. It has been assessed as "income from other sources". It has also to be kept in mind that the assessee has nowhere pleaded that service was only provided on the items sold by it. Therefore, to my mind, the ld.Revenue authorities have rightly rejected the claim of the assessee. I do not find any error in the order of the ld.CIT(A). The appeal of the assessee is dismissed.

8. In the result, the appeal of the assessee is dismissed.

Order pronounced in the Court on 18th July, 2016 at Ahmedabad.

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 18/07/2016