IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.1311/Mum/2015
(Assessment Year 2010-11)

M/s. Shrenuj Gems & Jewellery Ltd.,
Plot No.GJ-09, SEEPZ++,
Marol Industrial Area,
SEEPZ-SEZ, Andheri(E),
Mumbai 400096
PAN:AAJCS4265M ..... Appellant

Vs.

The Income Tax Officer 8(3)(1),
Mumbai. .... Respondent

Appellant by : Shri Hiro Rai
Respondent by : Shri D.Prabhakar Reddy

Date of hearing : 02/11/2016
Date of pronouncement : 16/11/2016

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the assessee pertaining to assessment year 2010-11 is directed against an order passed by CIT(A)-58, Mumbai dated 12/12/2014, which in turn, arises out of an order passed by the Assessing Officer under section 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961 (in short 'the Act') dated 28/01/2014.

2. In this appeal, assessee has raised the following Grounds of appeal:-

As regards addition towards upward adjustment of Rs. 18,68,812 in respect of value of international transactions made by the appellant with its associate enterprises:

"1. The Learned Commissioner of Income Tax (Appeals) erred in sustaining addition of notional interest of Rs.18,68,812 u/s.92CA in respect of international transactions of your appellant with associated enterprises.

2. The Learned Commissioner of Income Tax (Appeals) erred in ignoring the fact that the appellant has not charged interest to any of its customers, whether Associated Enterprise or not, on delayed payment of sale consideration by them.

3. The Learned Commissioner of Income Tax (Appeals) erred in not appreciating the fact that the learned Assessing Officer had made the addition without establishing the fact of charging of interest by the appellant to customers making payment after expiry of credit period.

4. The Learned Commissioner of Income Tax (Appeals) erred in rejecting reliance placed by the appellant on A.P.(DIR Series) Circular No. 91 dated April 1,2003 stating that there shall be no prescription of any time limit for realization of exports made by units in SEZ.

5. The Learned Commissioner of Income Tax (Appeals) erred in stating that the appellant did not have a uniform practice of charging interest to debtors, whether Associated Enterprise or non AE.

6. The Learned Commissioner of Income Tax (Appeals) erred in not dealing with Ground no. 3 of the appeal in relation to whether adjustment to international transaction of sale to Associated Enterprises could have been made without rejecting TNMM method followed by the appellant while justifying ALP.

As regards set off of Brought Forward losses of Rs.2,14,77,088 of AY 2009-10 before allowing exemption u/s 10AA :

7. The Learned Commissioner of Income Tax (Appeals) erred in setting off brought forward losses amounting to Rs. 2,14,77,088 of A.Y. 2009-10 from the business income, before allowing the exemption u/s 10AA.

8. The Learned Commissioner of Income Tax (Appeals) failed to appreciate that the exemption u/s.10AA, falling under Chapter III (and not under Chapter VIA), had to take precedence over the provisions for set off of losses, which fall under Chanter VI of the Income Tax Act.

9. The learned Commissioner of Income Tax (Appeals) erred in not disposing off the Ground in relation to non grant of credit of FBT of Rs.25,OOO paid on 15.6.2009

towards regular income tax by the assessing officer without giving any reasons for the same.

As regards addition made on account of Bogus Purchase of Rs. 2,813

10. The learned Commissioner of Income Tax (Appeals) has erred in confirming rejection by the assessing officer of purchase of consumables of Rs. 2,813 from G. M. International in a routine manner simply because the name of the vendor appeared in the list of "suspicious Dealers" who had issued false bills without delivery of goods as uploaded on the website www.mahavat.gov.in. without any other evidence.

3. The appellant is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of manufacture and export of jewellery. For assessment year 2010-11, it filed a return of income declaring 'nil' income after claiming deduction of Rs.2,06,33,299/- under section 10AA Of the Act and set-off of brought forward loses of Rs.63,96,770/- pertaining to assessment year 2009-10. The Assessing Officer has determined the income at Rs.21,98,230/- after making certain disallowances which are the subject matter of appeal before the Tribunal in terms of the above stated Grounds of appeal, which shall be dealt with by us in seriatim.

4. In so far as, Grounds of appeal No.1 to 6 are concerned, they relate to a single issue pertaining to the addition of Rs.18,68,812/- made by the Assessing Officer on account of transfer pricing adjustment. The relevant facts in this regard are that assessee is in the business of manufacturing and exporting of Plain/studded jewellery and it is a 100% Export Oriented Unit(EOU). It was noticed that during the year under consideration, assessee had entered into international transactions with its associated enterprises within the meaning of section 92B of the Act on account of purchase of raw material and fixed assets, sale of finished goods and other services. As a consequence, in terms of section 92(1) of the Act, income from international transactions was required

to be computed having regard to the arm's length price and, therefore, the Assessing Officer made a reference to the Transfer Pricing Officer under section 92CA(1) of the Act for computation of arm's length price in relation to the international transactions entered into by the assessee with its associated enterprises. In terms of order passed under section 92CA(3) of the Act dated 09/05/2013 the Transfer Pricing Officer has not made adjustment in respect of any of the any of the international transactions entered into by the assessee with its associated enterprises. However, the Transfer Pricing Officer noted that the assessee was making export sales to its associated enterprises as well as to non-associated enterprises. Assessee had made total exports of Rs.39,77,07,330/- to its associated enterprises. The Transfer Pricing Officer has observed in his order that in the case of both associated enterprises as well as non-associated enterprises, recovery of sale proceeds was made after the credit period stated in the invoices. The Transfer Pricing Officer noted that as per industry average a credit period of 365 days was allowable. Considering the aforesaid credit period as a normal incidence of business, the Transfer Pricing Officer held that wherever assessee had provided credit period to the associated enterprises beyond the period 365 days, in all such cases interest was required to be imputed. Further, the Transfer Pricing Officer determined the arms' length interest rate at 10.75% considering the rate of interest incurred by the assessee on obtaining working capital facilities and after putting a mark-up of 200% basis points on such rate of interest to cover currency risk, entity risk, etc. In terms of Annexure-1 of his order, the Transfer Pricing Officer computed the interest on the delayed export receivables from the associated enterprises beyond the period of 365 days at Rs.18,68,812/-. According to the Transfer Pricing Officer, the said sum represented benefit

passed on by the assessee to its associated enterprises and thus he proposed an adjustment of Rs.18,68,812/- to the international transactions of the assessee. The Assessing Officer has passed the assessment order making an addition of Rs.18,68,812/- in conformity with the order of the Transfer Pricing Officer, and which has also been affirmed by the CIT(A).

5. Before us, the Ld. Representative for the assessee made a preliminary argument, which is based on the judgement of the Hon'ble Bombay High Court in the case of CIT v. Indo American Jewellery Ltd. 223 Taxman 8 (Bom) In the case before the Hon'ble Bombay High Court, the issue related to imputing of interest on amounts outstanding from the associated enterprises in terms of section 92(1) of the Act. The Hon'ble High Court noted that there was complete uniformity in the act of the assessee inasmuch as it was not charging interest from both associated enterprises as well as non-associated enterprise debtors and that the delay in realization of export proceeds in both the cases was same. Under these circumstances, the Hon'ble High Court upheld the decision of the Tribunal, whereby the addition made by way of notional interest on outstanding amount of export proceeds realized belatedly from the associated enterprises was deleted. On the strength of the said judgment, the Ld. Representative for the assessee sought to point out that in the present case too, it is clear that assessee has not charged interest on belated recovery of its sale proceeds either from the associated enterprises or from non- associated enterprises. In this connection our attention has been drawn to the Statement of Facts furnished before the CIT(A), wherein is placed a tabulation showing the time lines in the recovery of sale proceeds from associated enterprises and non- associated enterprises.

5.1 We have perused the said details in the light of the principle approved by the Hon'ble Bombay High Court in the case of Indo American Jewellery (supra). It was a common point between the parties that there was uniformity in the act of the assessee in not charging interest for the belated recovery from its associated enterprises as well as non-associated enterprises, but in so far as the issue as to whether the delay in ultimate realization of export proceeds in both cases is same or not is also required to be verified, having regard to the judgment of the Hon'ble High Court in the case of Indo-American Jewellery (supra). A perusal of the said details reveal that the Transfer Pricing Officer has culled out the delay in excess of 365 days in the cases of associated enterprises and for such delay he has imputed interest @ 10.75%. So however, in the case of non-associated enterprises also there is a delay in recovery beyond the period of 365 days. So however, the extent of such delay is not emerging from the discussion in the orders of the authorities below because the Transfer Pricing Officer has confined his working to the delay in the case of associated enterprises alone. The rival counsels agreed that for this purpose, the matter may be restored back to the file of the Transfer Pricing Officer/Assessing Officer.

5.2 As the aforesaid discussion reveals, the preliminary plea of the assessee based on the judgment of the Hon'ble Bombay High Court in the case of Indo American Jewellery (supra) can be meaningfully addressed only after comparing the period of delay in the case of associated enterprises vis-à-vis that in the case of non-associated enterprises. Since the aforesaid pertains to a factual appreciation of affairs, it is deemed appropriate that the matter is restored back to the file of Transfer Pricing Officer/Assessing Officer to carry

out the said exercise, keeping in mind the ratio of the decision of the Hon'ble Bombay High Court in the case of Indo American Jewellers(supra).

5.3 Before parting, we may also note that assessee has raised various other points in order to assail the impugned addition. Since the matter is being remanded back on the preliminary plea based on the judgment of the Hon'ble Bombay High Court in the case of Indo American Jewellery (supra), all other arguments that may be raised by the assessee relating to the efficacy of such addition, including the efficacy of interest rate of 10.75% applied by the Transfer Pricing Officer are kept open. In the ensuing remand proceedings, it would be open for the assessee to raise all the issues afresh, which shall be adjudicated by the Assessing Officer /Transfer Pricing Officer in accordance with law. Needless to mention, the aforesaid exercise shall be carried out by the Assessing Officer /Transfer Pricing Officer after allowing the assessee a reasonable opportunity of being heard in accordance with law.

5.4 Thus, so far as Grounds to appeal No.1 to 6 are concerned, the assessee succeeds for statistical purposes.

6. In so far as, Grounds of appeal No.7 & 8 are concerned, the same arises from the action of the lower authorities in holding that brought forward losses amounting to Rs.2,14,77,088/- pertaining to assessment year 2009-10 are required to be reduced from the business income before allowing the deduction under section 10AA of the Act .

6.1 In this context, relevant facts are that in the computation of income assessee had brought forward business loss from assessment year 2009-10 of Rs.2,14,77,088/-, which was available for set-off. Out of this, assessee

company claimed a set-off of Rs.63,96,770/-, after claiming deduction under section 10AA of the Act. However, the Assessing Officer set-off the brought forward loss of Rs.2,14,77,088/- before allowing deduction under section10AA of the Act. As a consequence the Assessing Officer restricted the claim for deduction under section 10AA to Rs.52,42,006/- as against an amount of Rs.2,06,33,279/- claimed in the return of income. The aforesaid decision of the Assessing Officer has since been affirmed by the CIT(A) also, against which assessee is in further appeal before us.

6.2 Before the lower authorities as well as before us, the pertinent plea of the assessee is that the exemption provided in section 10AA of the Act falls under Chapter III of the Act and, therefore, it takes precedence over the provisions prescribing for set off of losses, which fall under Chapter VI of the Act.

6.3 At the time of hearing, Ld. Representative for the assessee emphasized that the approach of the income tax authorities is misconceived since the exemption under section 10AA of the Act is not a part of Chapter VI of the Act and, therefore, the set-ff of loss would not take precedence. In particular, reliance has been placed on the judgment of the Hon'ble Bombay High Court in the case of CIT VS Black And Veatch Consulting Pvt. Ltd. (2012) *348 ITR 72* (Bom) and also the following decisions of the Mumbai Bench of the Tribunal:-

(i) G.Jewelcraft Ltd. v. ITO, 56Taxmann.com 192(Mum-Trib)

(ii) Rave Technologies (India) P. Ltd. vs. ACIT,41 CCH 267 (Mum Trib)

6.3 On the other hand, Ld. Departmental Representative has defended the orders of the authorities below and in particular reliance has been placed on the order of CIT(A), wherein the judgment of the Hon'ble Bombay High Court in the case Black And Veatch Consulting Pvt. Ltd.(supra) has been distinguished.

6.4 We have carefully considered the rival submissions. At the outset, we may say that the controversy in question is liable to be decided in the light of the ratio laid down by the Hon'ble Bombay High Court in the case of Black And Veatch Consulting Pvt. Ltd.(supra). The issue before the Hon'ble Bombay High Court related to the claim of exemption under section 10A of the Act. The question of law, which was raised before the Hon'ble Bombay High Court read as under:-

> *"(A) Whether, on the facts and in the circumstances of the case and in law, the Income-tax Appellate Tribunal was correct in holding that the brought forward unabsorbed depreciation and losses of the unit the income which is not eligible for deduction under section 10A of the Act cannot be set off against the current profit of the eligible unit for computing the deduction under section 10A of the Income-tax Act."*

6.4.1 In the case of Black And Veatch Consulting Pvt. Ltd.(supra), the Assessing Officer adjusted the brought forward loss of earlier years before the arriving at the income eligible for the deduction under section 10B of the Act. The Hon'ble High Court considered the objection of the Assessing Officer and found it untenable by making the following discussion:-

> *"Section 10A is a provision which is in the nature of a decision and not an exemption. This was emphasised in a judgment of a Division Bench of this court, while construing the provisions of section 10B, in Hindustan Uniliver Ltd. vs. Deputy CIT (2010) 325 ITR 102 (Bom) at paragraph 24. The submission of the Revenue placed its reliance on the literal reading of section 10A under which 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 is to be allowed from the*

total income of the assessee. The deduction under section 10A, in our view, has to be given effect to at the stage of computing the profits and gains of business. This is anterior to the application of the provisions of section 72 which has been made by the Legislature while incorporating the provisions of Chapter VI-A. Section 80A(1) stipulates that in computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of the Chapter the deductions specified in sections 80C to 80U. Section 80B(5) defines for the purposes of Chapter VI-A "gross total income" to mean the total income computed in accordance with the provisions of the Act, before making any deduction under the Chapter. What the Revenue in essence seeks to attain is to telescope the provisions of Chapter VI-A in the context of the deduction which is allowable under section 10A, which would not be permissible unless a specific statutory provisions to that effect were to be made. In the absence thereof, such an approach cannot be accepted. In the circumstances, the decision of the Tribunal would have to be affirmed since it is plain and evident that the deduction under section 10A has to be given at the stage when the profits and gains of business are computed in the first instance."

6.4.2 Quite clearly, as per the Hon'ble High Court, the deduction envisaged under section 10A of the Act is to be given effect at the stage of computing profits and gains of business, which is anterior to the application of the provisions to section 72 of the Act , which deals with the carry forward and set-off of business losses. Therefore, it upheld the stand of the assessee that the deduction under section 10A of the Act has to be allowed before setting off brought forward losses. The assessee relied on the judgment of the Hon'ble Bombay High Court before the CIT(A), but the CIT(A) observed that the same was inapplicable in the instant case. According to the CIT(A), what has been held in the case of Black And Veatch Consulting Pvt. Ltd.(supra) is that brought forward losses of a non-10A unit cannot be set-off from the income of a 10A eligible unit before allowing the deduction under section 10A of the Act, whereas in the instant case, the assessee had claimed deduction under section 10AA of the Act before setting off of brought forward loses of the same eligible unit. The aforesaid reasoning of the CIT(A), in our view, is not tenable

because the rationale laid down by the Hon'ble Bombay High Court in the case of Black And Veatch Consulting Pvt. Ltd.(supra), which we have reproduced above, makes no distinction with regard to the deduction allowable under section 10A of the Act as to whether the set-off of business loss pertains to the eligible or non-eligible unit. Nevertheless, the objection of the Revenue stands settled by the Hon'ble Bombay High Court in subsequent decision in the case CIT vs. Techno Trap and Polymers Pvt. Ltd., ITA No.2134 of 2013, dated 5th December, 2015. In the said case, the question of law before the Hon'ble High Court was as under:-

> *"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the brought forward unabsorbed loss/depreciation of the assessee's 10B unit was not liable for set off against the current year's profit of the same 10B unit."*

A perusal of the aforesaid would show that in the case of Techno Trap and Polymers Pvt. Ltd. (supra), the brought forward loss related to the very same unit, for which the claim of deduction under section 10B was under consideration. The Hon'ble High Court dismissed the stand of the Revenue and the following discussion is reproduced in this context:-

> *"4. Mr. Suresh Kumar, learned Counsel for the Revenue does not dispute that the question as framed is covered by the decision of this Court in Black & Veatch Consulting (P) Ltd. (supra) & "Ganesh Polychem Ltd. vs. ITO"(supra). However, he submits that the question as framed would require consideration as the contrary view taken by Karnataka High Court in "CIT vs. Himatasingike Seide Ltd.[(2006) 156 Taxman 151 (Kar)]"has now been upheld by the Apex Court in its order dated 19 September 2013 as under:-*
>
> > *"1. We have heard the learned Counsel for the parties to the lis.*
> > *2. Having perused the records and in view of the facts and circumstances of the case, we are of the opinion that the Civil Appeal being devoid of any merit deserves to be dismissed and is dismissed accordingly.*
> > *Ordered accordingly"*
>
> *5. We find that the decision of Karnataka High Court in Himatasingike Seide Ltd. (supra) which was undisturbed by the Apex Court was in respect of Assessment Year 1994-95. Thus, it dealt with the provisions of Section 10B of the Act as existing prior*

to 1 April 2001 which was admittedly different from Section 10B as in force during Assessment Year 2009-10 involved in this appeal. Section 10B of the Act as existing prior to 1 April 2001 provided for an exemption in respect of profits and gains derived from export by 100% Export Oriented Undertaking and now it provides for deduction of profits and gains derived from a 100% Exported Oriented Units..

6. In any view of the matter, the decision of the Karnataka High Court in Himatasingike Seide Ltd. (supra) which was undisturbed by the Apex Court dealt with the provision of law different from that which was dealt with in the impugned Order. A decision has to be considered in the context of the law as arising for consideration and a change in law would render the decision under the old law inapplicable while considering the amended law.

7. The issue as raised stands concluded by the decision of this Court in Black & Veatch Consulting (P) Ltd.(supra) and "Ganesh Polychem Ltd. vs. ITO" against the Revenue. Therefore, the question of law as proposed for our consideration does not give rise to any substantial question of law."

6.4.3 Quite clearly, the judgment of the Hon'ble Bombay High Court in the case of Techno Trap and Polymers Pvt. Ltd. (supra) squarely militates against the stand of the CIT(A) in denying the claim of the assessee. Furthermore, the CIT(A) has also referred to the judgment of the Hon'ble Karnataka High Court in the case of CIT vs. Himatasingike Seide Ltd *286 ITR 255* (Kar). It has also been noted by the CIT(A) that the said decision of the Hon'ble Karnataka High Court has been upheld by the Hon'ble Supreme Court. In this context, it may only be said that this facet of the controversy has also been taken note of by the Hon'ble Bombay High Court in the case of Techno Trap and Polymers Pvt. Ltd. (supra) as is evident from the extract of the decision reproduced above. According to the Hon'ble Bombay High Court, the decision of the Hon'ble Karnataka High Court in the case of Himatasingike Seide Ltd*.(supra)* deals with the provision of law different from the law applicable in the subsequent period, which is also a fact position in the case before us.

6.4.4 Apart therefrom, it is also abundantly clear that the decision in the case of Himatasingike Seide Ltd.(supra) related to set-off of brought forward

unabsorbed depreciation, which stands on a different footing. For all the above reasons, and having regard to the judgments of the Hon'ble High Court in the case of Black And Veatch Consulting Pvt. Ltd.(supra) and Techno Trap and Polymers Pvt. Ltd. (supra), it has to be held that income tax authorities erred in setting-off of losses amounting to Rs.2,14,77,088/- of assessment year 2009-10 from the business income of the current year before allowing exemption under section 10AA of the Act. Accordingly, we set-aside the order of the CIT(A) and direct the Assessing Officer to recompute the deduction allowable under section 10AA of the Act, as above. Thus, on this aspect assessee succeeds.

7. In Ground of appeal No.9, the grievance of the assessee is against the action of the lower authorities in not granting credit for the Fringe Benefit Tax (FBT) of Rs.25,000/- paid on 15/6/2010 towards regular income tax. The grievance of the assessee is that the Assessing Officer has not given credit for the aforesaid payment while computing the income tax liability during the course of finalization of assessment under section 143(3) of the Act. Explaining the background Ld. Representative for the assessee pointed out that Finance Act, 2009 provided for deletion of FBT. The Finance Act, 2009 was passed by Lok Sabha on27/07/2009 and it received the assent of the Hon'ble President on 19/08/2009. In the meanwhile on 15/06/2009, assessee made a payment of FBT of Rs.25,000/-. To overcome the difficulty in such cases, where tax payers have paid first instalment of FBT, the CBDT issued Circular No.2120 dated 29/1/2010 allowing the grant of credit of advance tax of FBT towards recovery of income tax instalments.

8. According to the Ld. Representative for the assessee, necessary credit deserves to be allowed to the assessee in terms of the CBDT Circular dated 29/1/2010. On this aspect of the matter, the Ld. Departmental Representative had no objection and accordingly the matter is restored back to the file of Assessing Officer, who shall allow appropriate relief in accordance with law. Thus, Ground of appeal No.9 of the assessee succeeds for statistical purposes.

9. The last Ground relates to an addition on account of bogus purchase of Rs.2,813/- has not been addressed and is accordingly dismissed.

10. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 16/11/2016

Sd/-	Sd/-
(RAM LAL NEGI)	(G.S. PANNU)
JUDICIAL MEMBER	ACCOCUNTANT MEMBER

Mumbai, Dated 16/11/2016
Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai