IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B' Bench, Hyderabad

Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member

ITA Nos.320 & 321/Hyd/2016
(Assessment Years: 2009-10 & 2010-11)

M/s. Value Momentum Software Services P Ltd Hyderabad PAN: AAACI 7400 H	Vs	Dy. Commissioner of Income Tax, Circle 3(3) Hyderabad

For Assessee :	Shri D. Venugopal
For Revenue:	Shri K.J. Rao, DR

Date of Hearing:	21.11.2016
Date of Pronouncement:	30.11.2016

O R D E R

Per Smt. P. Madhavi Devi, J.M.

Both are assessee's appeals for the A.Ys 2009-10 & 2010-11 respectively.

ITA No.320/Hyd/2016 A.Y.2009-10:

2. In this appeal, the only grievance is that the CIT (A) has erred in holding that the foreign exchange gain of Rs.2,75,260 derived by the assessee is not eligible for exemption u/s 10A of the Act.

3. Brief facts of the case are that the assessee company which is engaged in the business of development and designing of software products filed its return of income for the relevant assessment year on 28.09.2009 by declaring a total income of

Rs.1,08,87,970. During the assessment proceedings u/s 143(3) r.w.s. 144C of the Act, the AO observed that the assessee claimed deduction u/s 10A of the Act of forex gain of Rs.2,77,936. The details were called for and on perusal of the details filed by the assessee, the AO observed that the gain is from reinstatement of balance in EEFC A/c. Observing that keeping the funds in EEFC a/c is not compulsory, the AO held that the gain is not derived from the business of export. Therefore, he treated the income as "income from other sources" and restricted the claim of deduction u/s 10A of the Act to the export turnover only. Aggrieved, the assessee preferred an appeal before the CIT (A), who confirmed the order of the AO and the assessee is in second appeal before us.

4. The learned Counsel for the assessee submitted that the assessee has received consideration on export of software in the form of foreign exchange which has been deposited in the EEFC A/c and the valuation of the forex at the end of the relevant A.Y has resulted in the forex gain. Therefore, according to him, the gain is inextricably linked to the export consideration and therefore, such income is eligible for deduction u/s 10A of the Act. In support of his contention, he placed reliance upon the following decisions:

a) Income Tax Appellate Tribunal Bangalore in the case of M/s. Wipro Ltd vs. Dy.CIT in ITA No.972/Bang/2011 dated 15.06.2012.

b) Hon'ble Karnataka High Court in the case of CIT vs. M/s. Kshema Technologies Ltd in ITA No.703/2009, dated 8.1.2016.

5. The learned DR, however, supported the orders of the authorities below and submitted that the export consideration has been deposited in the EEFC A/c in foreign exchange and there was no prohibition from withdrawing the said amount for its business purposes. It is submitted that the "export" comes to an end when the sale consideration is deposited into the EEFC A/c and the forex gain or loss on the date of deposit alone is part of export turnover and thereafter if there is any gain on fluctuation of such foreign exchange on the date of conversion, it cannot be considered as business income but has to be treated as income from other sources.

6. Having regard to the rival contentions and the material on record, we find the export turnover is always brought into India by way of foreign exchange deposited into the EEFC A/c. The assessee has kept the foreign exchange in the EEFC A/c as it did not require the same immediately for its business purposes. By virtue of the deposits remaining in the EEFC A/c, the assessee has gained on the foreign exchange fluctuation. Merely because the sale consideration is retained in the bank a/c, it will not lose the character of being export consideration. The gain is on a/c of conversion of foreign exchange. We find that similar issue had arisen in the case of Banyan Chemicals Ltd. before a third Member Bench reported in (2009) 117 ITD 376 (Ahd.) wherein it was held as under:

> *"13. In the case of Smt. Sujata Grover (supra), the Tribunal held that the basically exchange rate fluctuation difference is nothing but part of sales. When the goods are exported to a country outside India, the invoice has to be raised in terms of the foreign currency prevalent in that country and at the time of making the export. The exporter converts that currency*

into Indian rupees at the exchange rate prevalent at that time and accordingly takes the cognizance of that amount as its export figure in its books of account. However, when the invoice is actually realised from the foreign country and the amounts remitted to India, the exchange rate prevalent on that day may be equal to or more or less than the one recorded in the books of account at the time of making the sales. If the exchange rate is more it results into income from the exchange rate fluctuations and in the reverse case, it becomes loss on that account. Under all circumstances, the basic character of the receipt of the foreign currency remains the same, i.e., it remains attributable to the export effected by the assessee. It also held that the expression "any other receipt of a similar nature" as used in Expln. (baa) to s. 80HHC(4B) should mean only such items which do not directly add to the export turnover. The foreign exchange fluctuation income is related to the exports effected earlier and there cannot be any doubt that amount representing foreign exchange rate fluctuations income in relation to exports effected cannot be considered for exclusion to the extent of 90 per cent for computing "profits of the business". The items which are excluded under Expln. (baa) below s. 80HHC are independent receipts and are in the nature of income and not turnover or its part. Be that as it may, there is even no exception in s. 10B like that in Expln. (baa) to s. 80HHC.

In the case of Renaissance Jewellery (P) Ltd. (supra), the Tribunal, following the aforesaid decision in the case of Smt. Sujata Grover (supra) and the Tribunal decision in the case of Priyanka Gems vs. Asstt. CIT (2005) 94 TTJ (Ahd) 557, held that profit on account of foreign exchange gain is directly referable to the articles and things exported by the assessee and such profits are therefore in the same nature as the sale proceeds and there is no reason while deduction under s. 10A should not be allowed in respect of such exchange gain. It had also observed that there is no difference in the language of ss. 10A and 80HHC in regard to the treatment of foreign exchange gain.

In the case of Shah Originals (supra), the Tribunal held that gain on foreign exchange rate fluctuation under EEFC account is to be included in the profits of export business for the purposes of deduction under s. 80HHC.

In the present case, the receipt of the sale consideration is in US dollar. It was credited/deposited in EEFC account of the assessee to be retained in US dollar as per guidelines for operating this account. In this account, the receipts may be kept in foreign currency instead of converting it to Indian rupee. The gain accounted for by the assessee is the excess rupee value of US dollar on the date of realization of sales proceeds credited. Therefore, the exchange gain on the date of deposit in the EEFC account has to be used on account of sales realized in US dollar on that date. The exchange gain is thus sales realization of the billed amount in US dollar and would be an income derived from the export of goods and articles.

The assessee has also recorded gain being the difference in rates on the date of withdrawals from the EEFC account and the date of deposit in that account. Such gain would not be part of sales as once the sale consideration is deposited in EEFC account, the exchange gain accrued thereafter would not be a part of the turnover and consequently not a profit arising from the export of goods and the amount to that extent would be an income earned by the assessee derived from export and that amount is Rs. 22,960 on which assessee had also not claimed/ surrendered its claim under s. 10B. The assessee has given the break-up of the exchange gain of Rs. 15,51,239 as under :

> 1 "9. On a perusal of this chart, we find that the receipt of Rs. 15,51,239 includes Rs. 15,31,518 as the gain on the sales realization in US dollar on the date of its receipt and deposit in EEFC account and balance Rs. 19,721 is with regard to exchange gain on import payment. Therefore, the assessee would be entitled to the deduction under s. 10B with regard to exchange gain of Rs. 15,31,518 only which is the gain on the day of deposit of US dollars in the EEFC account. In my opinion, therefore, the assessee should be granted deduction under s. 10B of the Act with regard to exchange gain of Rs. 15,31,518. I hold accordingly".

Therefore, respectfully following the above decision, we hold that the forex gain as on the date of deposit into EEFC A/c only is part of the export turnover as held by the Hon'ble Third Member in the above case.

7. In the result, assessee's appeal is dismissed.

ITA No.3221/Hyd/2016 A.Y 2010-11

8. In this appeal, the assessee has raised the following grounds of appeal:

> "*1. The order of the learned Commissioner of Income-Tax (Appeals) is erroneous to the extent it is prejudicial to the appellant.*
>
> *2. The learned Commissioner of Income-Tax (Appeals) erred in holding that the foreign exchange gain derived of Rs.92,l4,74l/- is not eligible for exemption u/s 10A of the I.T.Act.*
>
> *3. The learned Commissioner of Income-Tax (Appeals) erred in confirming the action of the Assessing Officer in excluding Rs.92,l4,74l/- from the eligible profits for exemption u/s l0A of the I.T.Act on the ground that the said amount was derived out of forward contracts and that such income represents income "from other sources".*
>
> *4. The learned Commissioner of Income-Tax (Appeals) erred in holding that an amount of Rs.3l,83,463/- is not eligible for exemption u/s l0A of the I.T.Act without considering the explanation that the said amount represents reimbursement of expenses.*
>
> *5. The learned Commissioner of Income-Tax (Appeals) ought to have considered the fact that there was no delay in filing the return of income*

and, therefore, the interest u/s 234A is not chargeable.

6. The learned CIT (A) ought to have seen that interest u/s 234B and u/s 234C is not chargeable and ought to have directed the AO to delete interest charges u/s 234B and 234C of the I.T. Act".

9. As regards Ground No.2, for the detailed reasons given by us in this order of even dated in the assessee's own case for the A.Y 2009-10 above, this ground is dismissed.

10. As regards Ground No.3, brief facts are that the assessee admitted a foreign exchange gain of Rs.92,14,741 which is claimed as deduction u/s 10A of the Act. The assessee explained that the same was derived out of forward contracts. Observing that these gains are not derived from the business of export of software, the AO treated this income as income from other sources and disallowed the claim of deduction u/s 10A. Aggrieved, the assessee preferred an appeal before the CIT (A) who confirmed the order of the AO and the assessee is in second appeal before us.

11. The learned Counsel for the assessee, while reiterating the submissions made before the authorities below, has drawn our attention to the decision of the Coordinate Bench of this Tribunal at Chennai in the case of Majestic Exports vs. JCIT in ITA Nos. 1336 & 3072/Mds/2014 for the A.Ys 2009-10 and 2010-11, dated 8.6.2015 wherein the gain on account of the forward contracts has been held to be in the nature of the business

income eligible for deduction u/s 10A of the Act. Copy of the said order is filed before us.

12. The learned DR, however, supported the orders of the authorities below.

13. Having regard to the rival contentions and the material on record, we find that the nature of the forward contract and the character of the gain on account of such contract has been considered at length by the Coordinate Bench of this Tribunal at Chennai in the case of Majestic Exports (cited Supra) at Para No. 7 to 9 which is reproduced hereunder for ready reference:

> *"7. We have heard both the parties and perused the material on record. In this case, the assessee was engaged in the business of manufacturing and export of hosiery garments. During the course of export, the assessee entered into derivative contract. The assessee incurred loss in this transaction. The assessee claimed it as business loss. According to the Assessing Officer this loss was not business loss and it is a speculative loss and this transaction is speculative in nature as such the loss incurred on this transaction cannot be set off against business income of the assessee. According to the ld. Authorised Representative for assessee, the derivative transaction cannot fall under sec.73. Explanation to sec.73 creates a deeming fiction by which among the assessee, who is a company, as indicated in the said Explanation dealing with the transaction of share and suffer loss, such loss should be treated to be speculative transaction within the meaning of sec.73 of the Act, notwithstanding the fact that the definition of speculative transaction mentioned in sec.43(5) of the Act, the transaction is not of that nature as there has been actual delivery of the scrips of share. As per the definition of sec.43(5), trading of shares which is done by taking delivery does not come under the purview of the said section. Similarly, as per clause (d) of sec.43(5), derivative transaction in shares is also not speculation transaction as defined in the said section. Therefore, both profit/loss from all the share delivery transactions and derivative transactions are having the same meaning, so far as sec.43(5) of the Act is concerned. Again, in view of the fact that both delivery transactions and derivative transactions are non-speculative as far as sec.43(5) is concerned, it follows that both will have the same treatment as far as application of Explanation to sec.73 is concerned. Therefore, aggregation of the share trading profit and loss from derivative transactions should be done before the Explanation*

to sec.73 is applied. The above view has been taken by Special Bench of this Tribunal, Mumbai Bench, in the case of CIT v. Concord Commercial Pvt. Ltd. (2005) 95 ITD 117 (Mum)(SB). In this case, the Special Bench held that :

> *"Before considering whether the assessee's case is hit by the deeming provision of Explanation to Sec. 73 of the Act, the aggregate of the business profit / loss has to be worked out based on the non-speculative profits; either it is from share delivery or from share derivative."*

8. From the above, it is concluded that both trading of shares and derivative transactions are not coming under the purview of Section 43(5) of the Act which provides definition of "speculative transaction" exclusively for purposes of section 28 to 41 of the Act. Again, the fact that both delivery based transaction in shares and derivative transactions are non-speculative as far as section 43(5) is concerned goes to confirm that both will have same treatment as regards application of the Explanation to Section 73 is concerned, which creates a deeming fiction. Now, before application of the said Explanation, aggregation of the business profit/loss is to be worked out in respective of the fact, whether it is from share delivery transaction or derivative transaction.

8.1 Now, this view has been taken by Co-Ordinate, Chennai in the case M/s. Aishwarya & Co P. Ltd in ITA No.860/Mds/2014, dated 29.05.2015, wherein they followed the judgment of the Calcutta High Court in the case of M/s. Baljit Securities Pvt. Ltd. (88 CCH 313) wherein held as under:-

> *"Clause (d) of Section 43(5) became effective with effect from 1st April, 2006. Therefore, prior to 1st April, 2006 any transaction in which a contract for the purchase or sale of any commodity including stocks and shares was periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrip was a speculative transaction. Sub-section 1 of Section 73 provides as follows:*
>
> *'(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.'*
>
> *The resultant effect was that any loss arising out of speculative transaction could only have been set off against profits arising out of speculative transaction. In the present case, the assessee, as already indicated, has been dealing in shares where delivery was in fact*

taken and also in shares where delivery was not ultimately taken. In other words, the assessee has been dealing in actual selling and buying of shares as also dealing in shares only for the purpose of settling the transaction otherwise than by actual delivery. The question arise whether the losses arising out of the dealings and transaction in which the assessee did not ultimately take delivery of the shares or give delivery of the shares could be set off against the income arising out of the dealings and transactions in actual buying and selling of shares. An answer to this question is to be found in the explanation appended to Section 73 which reads as follows:

Explanation: where any part of the business of a company other than a company whose gross total income consists mainly of income which is chargeable under the heads "interest on securities", or a company the principal business of which is the bu9siness of banking or the granting of loans and advances) consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase. In order to resolve the issue before us, the section has to be read in the manner as follows:

"Explanation : Where any part of the business of a company (… … … … … … … … … … … … … … …. … … … … … …. … … … … … … … … …. … … .. .. … .. … … … .. … .. … … … .. … … .. …. … … … .. … .. … … … … …. … … …) consist in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares."

It would, thus, appear that where an assessee, being the company, besides dealing in other things also deals in purchase and sale of shares of other companies, the assessee shall be deemed to be carrying on a speculation business. The assessee, in the present case, principally is a share broker, as already indicated. The assessee is also in the business of buying and selling of shares for self where actual delivery is taken and given and also in buying and selling of shares where actual delivery was not intended to be taken or given. Therefore, the entire transaction carried out by the assessee, indicated above, was within the umbrella of speculative transaction. There was, as such, no bar in setting off the loss arising out of derivatives from the

> *income arising out of buying and selling of shares. This is what the learned Tribunal has done."*
>
> *9. From the above decision of the Calcutta High Court in the case of Baljit Securities Pvt. Ltd. cited supra, the issue stands covered in favour of the assessee. However, we make it clear that total transaction considered for determining this business loss from derivative transactions cannot be more than the total export turnover of the assessee for the assessment year under consideration and if the derivative transaction is in excess of export turnover, then that loss suffered in respect of that portion of excess transactions to be considered as speculative loss only as that excess derivative transaction has no proximity with export turnover and the Assessing Officer is directed to compute accordingly. This ground is allowed as indicated above".*

14. Respectfully following the same, this ground of appeal of the assessee is allowed.

15. As regards Ground No.4, the facts are that the assessee company received an amount of Rs.31,83,463 from its AE towards the reimbursement of the expenditure. The AO observed that the assessee company has not included this amount in the P&L A/c on the ground that the same is only reimbursement of actual expenditure incurred and therefore, has no bearing on the computation of profit/income of the company. The AO was not convinced with the said contention and held that the expenses were incurred for its AE and reimbursed by the AE and therefore, they have to be passed through the P&L A/c and for the correct picture of the transaction, they have to be presented in the financial statements. Therefore, he disallowed the claim of the deduction u/s 10A of the Act on such reimbursed expenditure. The CIT (A) confirmed the disallowance and the assessee is in appeal before us.

16. It is the case of the assessee that since it is only a reimbursement of the expenditure, the same was not carried into the P&L a/c as it would have no effect on the profit/income earned by the assessee. He also submitted that none of the authorities have disputed the genuineness of the transaction but have made the disallowance only on the ground that it has not been routed through the P&L a/c. Since the transaction did not have any impact on the income of the assessee, according to him the disallowance ought not to be made.

17. The learned DR however, supported the orders of the authorities below.

18. Having regard to the rival contentions and the material on record, we find that the reimbursement of the expenditure by the AE to the assessee is also on international transaction. The TPO u/s 92CA of the Act, has not made any ALP adjustment to the reimbursement of expenditure which only shows that the genuineness of the transaction has been accepted. When there is no impact on the profit of the assessee by the said transaction, we agree with the contention of the assessee that it does not have any impact on the computation of income of the assessee. In view of the same, Ground No.4 of the assessee is allowed.

19. As regards Ground No.5 relating to levy of interest u/s 234A of the Act, the learned Counsel for the assessee submitted that in the relevant A.Y, the CBDT has extended the time for filing of the returns till 15.11.2011 and the assessee had filed its return of income on 13.11.2011 itself and therefore, the interests u/s

234A of the Act is not chargeable. Since these facts need verification, we deem it fit and proper to remit the issue to the file of the AO for verification of the details and direct the AO to charge interest u/s 234A of the Act only if there is a delay in filing of the return of income inspite of extension of time by the CBDT. This ground is therefore, allowed for statistical purposes.

20. As regards Ground No.6, against charging of interest u/s 234B & 234C of the Act, we find that they are consequential in nature and we direct the AO to recompute the interest u/s 234B and 234C of the Act in accordance with law. Needless to mention that the assessee shall be given a fair opportunity of hearing.

21. In the result, assessee's appeal for A.Y 2009-10 is dismissed and the appeal for A.Y 2010-11 is partly allowed for statistical purposes.

Order pronounced in the Open Court on 30th November, 2016.

Sd/-	**Sd/-**
(S.Rifaur Rahman)	**(P. Madhavi Devi)**
Accountant Member	**Judicial Member**

Hyderabad, dated 30th November, 2016.

Vinodan/sps

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5 The DR, ITAT Hyderabad
6 Guard File

By Order