IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " A "

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

I.T.A. Nos.379 to 381/Bang/2015 (Assessment Year : 2009-10 to 2011-12)		
M/s. Lakshminarayana Mining Company, No.100 (Old No.33), Sannidhi Road, Basavanagudi, Bangalore-560 085 PAN AAAFL 6249G	Vs.	Dy. Commissioner of Income Tax, Central Circle 1(1), Bangalore.
Appellant		Respondent.

Appellant By : Shri D. Devaraj, C.A.
Respondent By : Smt. Prescilla Singsit, D.R.

Date of Hearing : 9.1.2017.
Date of Pronouncement : 03.03.2017.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

These three appeals by the assessee are directed against the composite order of Commissioner of Income Tax (Appeals) dt.14.11.2014 for the Assessment Years 2009-10 to 2011-12.

2. The brief facts leading to the controversy are that the assessee is a partnership firm and engaged in the business of mining of iron ore for export.

Mining is carried out in leased area under mining license No.2487 in N-E range, Siddapur, Sandur Taluk, Bellary, Karnataka. There are two separate undertakings and one of them is 100% Export Oriented Unit ('EOU') which was set up in the Assessment Year 2007-08. The assessee was subjected to search under Section 132 on 10.12.2010 which continued till 7.2.2011 when the final Panchanama was drawn. Subsequently, a Notice under Section 153A of the Income Tax Act, 1961 (in short 'the Act') was issued by the Assessing Officer. In response to which the assessee filed returns of income for the assessment years 2009-10 and 2010-11 declaring income of Rs.28,16,70,090 and Rs.110,88,62,620. For the Assessment Year 2011-12, the return was filed under Section 139 of the Act and the assessment was completed under Section 143(3) of the Act. The Assessing Officer completed assessment for the three assessment years after making addition on account of deduction claimed under Section 10B of the Act apart from an addition for the Assessment Year 2010-11 in respect of under-valuation of closing stock. The assessee challenged the addition made by the Assessing Officer before the CIT (Appeals) but could not succeed.

3. Common grounds have been raised by the assessee in these appeals. The grounds raised for the Assessment Year 2009-10 are reproduced as under :

1.The assessment order of the Learned A.O and the order of the Learned CIT(A) are opposed to the facts of the case and law, and therefore liable to be cancelled.

2.The Learned A.O and the Learned CIT(A) have failed to appreciate that the assessment for this assessment year has not abated under the Second Proviso to section 153A(1) and therefore, no addition to total income could be made in the absence of any seized material indicating undisclosed income.

3.The Learned A.O and the Learned CIT(A) have failed to appreciate that the exemption u/s.10B cannot be restricted / reduced on the ground that SESA PLANT is located outside the bonded area since the appellant is an eligible 100% EOU and custom bonding is required only where imports are contemplated, and the appellant is an exporter and is not importer of any goods.

4.The Learned A.O and the Learned CIT(A) have failed to appreciate that the addition of Rs.27,83,31,924/- is unsustainable on facts and in law.

5.The Learned A.O and the Learned CIT(A) have failed to appreciate that there is no liability for the charge of interests u/s.234B and 234C or under sections 115WJ3 and 115WJ5 of the Act.

6.The appellant craves leave to add any ground or modify or revise any of the grounds during the hearing before the Hon'ble ITAT.

For these and other grounds as may be urged at the time of hearing, the Hon'ble ITAT may be pleased to allow the appeal in the interest of equity and justice.

4. First we take up the issue of denial of deduction under Section 10B of the Act raised in Ground Nos.3 & 4.

5. The learned Authorised Representative of the assessee has submitted that the dispute revolves around the deduction under Section 10B in respect of 100% EOU unit. The assessee set up a 100% EOU in F.Y. 2006-07 after obtaining the necessary permission as accepted by the Assessing Officer in paras 4 and 4.2 of the impugned assessment order. The 100% EOU has commenced

production from 29.9.2006 relevant to the Assessment Year 2007-08. The assessee claimed a deduction under Section 10B in respect of the profits of the EOU for the Assessment Year 2007-08 and 2008-09 which was accepted by the Assessing Officer in the scrutiny assessment under Section 143(3) of the Act. While granting the approval as an EOU, entire area of 105.22 Hectares in the mining license No.2487 was approved by the concerned authorities. Thus the learned Authorised Representative has submitted that any export from this area which was approved as an EOU is classifed as an export from EOU and consequently eligible for deduction under Section 10B of the Act. The 100% EOU purchased plant and machinery known as the 'Sesa Plant' on 31.3.2008 and it was put to use in the following month i.e. April, 2008 relevant to the Assessment Year 2009-10. The 100% EOU is bounded by 5.20 Hectares area however Sesa Plant could not be located within the bounded area due to techno-economical reason. Initially the assessee wanted the bounded area of 5.2 Hectares to be redefined to include the Sesa Plant also with a view to avoid any controversy in the matter. However subsequently the assessee was advised that no specific approval was required for redefining or redesignating the bounded area specifically in view of the total area of 5.2 Hectares remaining the same even after redefining. Since the assessee has not or was

not importing any material and claiming any exemption from duties, no bounding was required. The learned Authorised Representative has pointed out that the entire production 100% EOU was certified by custom authorized which included ore process in Sesa Plant which is integral part of the 100% EOU. The learned Authorised Representative has contended that the relief under Section 10B cannot be disallowed or restricted merely on the ground that certain plant and machinery is situated outside the bounded area when the assessee is an exporter and not an importer at all in view of the Notification No.53/1997 dt.3.6.1997 issued under Section 25(1) of the Customs Act as per which the custom bonding is required only where imports are contemplated for use in manufacturing/production of goods for export. In support of his contention, he has relied upon the decision of Hon'ble jurisdictional High Court in the case of **CIT Vs. Caritor India Pvt. Ltd.** 369 ITR 463 as well as decision of Hon'ble Delhi High Court in the case of CIT Vs. Arts Beauty Exports 357 ITR 276 (Del). The learned Authorised Representative also relied upon the decision of the Delhi Tribunal reported in **46 SOT 220**. Thus he has contended that when all exports of assessee were approved by the Excise and Custom authorities and there is no violation of any of the conditions under Section 10B then the assessee is eligible for deduction in respect of iron ore

mined and excavated and would process through Sesa Plant which is part of the EOU unit. The export of the iron ore was mined and excavated but processed through a non-EOU unit would not contradict any of the conditions under Section 10B of the Act and therefore the status of the assessee as EOU is not in dispute then deduction under Section 10B cannot be denied merely because of outsourcing of processing of iron ore. He has referred to the profit and loss account as well as ledger account to show that the assessee has shown the job work charges regarding the process of iron ore. The learned Authorised Representative has further contended that when the deduction under Section 10B was allowed during the assessment under Section 143(3) for A.Ys 2007-08 and 2008-09 then it cannot be disallowed by the Assessing Officer on the ground that Sesa Plant is situated beyond the bonded area.

6. On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that the production in respect of the export was not carried out in the EOU unit as it was admitted by the assessee that the production was in non-EOU unit. The assessee accepted this fact in the return of income and made a claim under Section 10B in respect of 50% of the production of the earlier year claiming to be treated as having

been outsourced to non-EOU unit. Subsequently, the assessee claimed 100% deduction under Section 10B of the Act.

6.1 Thus the learned Departmental Representative has submitted that when the assessee has failed to establish that the production has been carried out in the EOU unit, the assessee is not eligible for deduction under Section 10B of the Act.

7. We have considered the rival submissions as well as the relevant material on record. The assessee set up a 100% EOU in the F.Y. 2006-07 relevant to the Assessment Year 2007-08. This fact has been accepted by the Assessing Officer in para 4 of the assessment order. The claim of deduction under Section 10B was accepted by Assessing Officer in scrutiny assessment under Section 143(3) of the Act for the Assessment Years 2007-08 and 2008-09. The Assessing Officer has not disputed the fact that the 100% EOU of the assessee was approved for the entire mining area of 105.22 Hectares under mining License 2487 in N-E range, Bellary District, Karnataka. Therefore the mining and excavation of iron ore of the assessee has been carried out form the area belonging to 100% EOU unit. The EOU unit of the assessee purchased plant and machinery known as Sesa Plant and iron ore was processed in this plant apart from outsourcing of some of the processing work to NAPC Ltd. The Assessing Officer denied the claim of the assessee under Section 10B on the ground that the processing of iron ore is done by Sesa Plant which is outside the bounded area therefore, the EOU has not done any manufacturing or production work eligible for claim under Section 10B of the Act. The CIT (Appeals) concurred

with the finding of A.O. while passing the impugned order. The reasoning of the CIT (A) is given in paras 5.15 to 5.19 of impugned order as under :

5.15 Moreover, it is further claimed that 100% exemption should be allowed. Briefly,

(i) Clear evidences as collected during search show that the production in respect of exports were not carried out in the EOU unit in the real sense.

(ii) The partners and the persons incharge of the affairs when questioned during search proceedings have admitted that the production was in the 'non-EOU' unit.

(iii) The appellant has accepted the same in the return of income but made a claim u/s 10B in respect of 50% of production of earlier year claiming it to be treated as having been outsourced to its non EOU unit.

(iv) During the course of assessment, 100% deduction was claimed, i.e. even more than that claimed in return of income.

5.16 Considering the facts on record as brought out by the Assessing Officer, it is to be seen whether in respect of production of non EOU unit :

(i) the appellant is entitled 100% exemption u/s 10B or

(ii) exemption u/s 10B to be restricted to the extent of 50% of earlier year's overall production by treating it to be outsourcing to non-EOU, or

(iii) Nil exemption in respect of production of non EOU unit.

17 As regards 100% exemption u/s 10B, it is on record that the production/manufacture has been made outside the EOU unit in effect, and therefore cannot be allowed. Moreover, this claim is also more than that claimed in return of income. Further, the appellant had agreed to the fact that machineries for production were not installed in the EOU and permission to shift it has not been obtained/sought. Therefore, 100% claim of exemption u/s 10B is totally without any basis.

5.18 As regards the claim that upto 50% of earlier years overall production to be treated as having been outsourced to non EOU and be allowed u/s 10B since this is allowable as per trade policy, it is seen that this is not permitted u/s 10B. Moreover, as brought out by the A.O., there is no evidence of having made any outsourcing in this regard. Therefore, claim of 50% exemption u/s 10B as per return of income is also not justified.

5.19 With the facts on record, I am in agreement with the Assessing Officer that exemption u/s 10B is not allowable to the appellant in respect of production of non EOU unit. Deduction u/s 10B is to be restricted to profits derived by EOU from its production alone as computed and allowed in the assessment order. The appeals on this issue are dismissed.

Thus the Assessing Officer as well as CIT (Appeals) held that exemption under Section 10B is not allowable to the assessee in respect of the production of non-EOU unit. It is pertinent to note that the Assessing Officer has not disputed that the entire iron ore has been excavated by the assessee from the lease area which has been approved as 100% EOU and the same was processed by Sesa Plant which is located outside bonded area of EOU. Therefore the Assessing Officer and CIT (Appeals) considered the production being the process of iron ore from Sesa Plant as production / manufactured from non-EOU unit. It is pertinent to note that in the earlier assessment year i.e. Assessment Years 2007-08 & 2008-09, the assessee was not having this Sesa Plant as it was purchased on 31.3.2008 and was put to use in the month of April, 2008 relevant to the Assessment Year 2009-10. Thus the assessee was getting its

iron ore processed through outsourcing of job work and consequently as per the provisions of foreign trade policy, sub-contract upto 50% of the overall production is allowed and accordingly, the assessee claimed 50% deduction in the earlier years. However, for the year under consideration the assessee claimed deduction under Section 10B of the Act for the entire income of EOU but the Assessing Officer denied the claim. The excavation of iron ore is undisputedly done by the EOU from the mining area belong to EOU and therefore the entire raw-material belongs to the EOU of the assessee. The point of controversy is only regarding the processing of the iron ore as it was done by the Sesa Plant situated outside the bonded area. The Assessing Officer has not disputed the fact that Sesa Plant belongs to the EOU of the assessee. Since the assessee is not an importer of any goods or articles to be used for manufacturing activity for export therefore, there is no question of taking any benefit under Customs Act as per the Notification No.53/1997 dt.3.6.1997 issued under Section 25(1) of the Customs Act, 1962. In the case of **CIT Vs. Caritor India Pvt. Ltd.** (supra) the Hon'ble jurisdictional High Court while dealing with the issue of requirements of a unit within Customs bonded area held as under :

> The assessee commenced production prior to the customs bonding. However, the invoices were raised after the customs bonding. The conditions stipulated in the permission granted by the STPI is the units shall be customs bonded. The benefit of such customs bonding is that the assessee would be entitled to the benefit of customs duty and excise duty. It has nothing to do with the grant of exemption under section 10A of the Income-tax Act. To be eligible for exemption under section 10A, the conditions stipulated in sub-section (2)(i) of section 10A has to be fulfilled, i.e., the assessee has to begin manufacturing the products on or after the first day of April, 1994, in any electronic hardware technology park. In order to start the unit in software technology park, the permission is required. Once permission is obtained and the unit is started in software technology park, after the aforesaid date, the assessee is entitled to the benefit under section 10A of the Act. Customs bonding is not a requirement or a condition precedent for granting exemption under section 10A. As is clear from the facts set out above, both the appellate authorities were justified in granting relief to the assessee. Therefore, we do not see any merit in this appeal. The substantial question of law is answered in favour of the assessee and against the Revenue.

It is clear that the custom bonding is not a requirement or a condition precedent for granting exemption under Section 10A/10B as held by the Hon'ble jurisdictional High Court. A similar view has been taken by the Hon'ble Delhi High Court in the case of **CIT Vs. Arts Beauty Exports** (supra), in para 21 as under :

> **21.** The other objection of the Assessing Officer that the assessee did not fulfill the conditions prescribed by Development Commissioner in his letter dated 5th May, 2005 also does not appear to us to be of any substance. One of the main objections of the Assessing Officer was that the EOU was directed to be custom-bonded which was not complied with by the assessee. The CIT(Appeals) held that custom-bonding was required only where imports are contemplated and since the assessee-firm did not plan to import any materials to be used in the manufacture of ingredients, the EOU was not custom-bonded. It appears to us from the copy of the notification No.53/97 - customs dated 3rd June, 1997, that custom-bonding is required only where imports are contemplated for the purposes of manufacture, production, packaging etc. for the purposes of export of goods or services out of India. The notification was issued in exercise of the powers conferred by Section 25(1) of the Customs Act, 1962. It has not been shown by the Revenue that the assessee imported any materials either of unfinished or semi-finished or in raw form, which it used in the manufacture or export of handicrafts. In this view of the matter, we do not see any purpose being served by insisting on the custom-bonding of the EOU. A reasonable way of construing the condition imposed by the Development Commissioner would be to understand the same as necessary only when imports are contemplated. We, therefore, do not see much merit in the objection.

8. In view of the above facts and circumstances of the case as discussed above as well as the decisions of Hon'ble jurisdictional High Court as well as Hon'ble

Delhi High Court, we are of the view that the claim of deduction under Section 10B of the Act cannot be denied merely on the ground that the iron ore excavated from the mining area belonging to EOU got processed through its plant and machinery located outside the bonded area. Further the raw material as well as the finished product both belong to assessee and exported by the assessee therefore, there is no violation of any condition as provided under Section 10B of the Act for claim of benefit of deduction under Section 10B of the Act. Accordingly, we set aside the orders of the authorities below on this issue and allow the claim of the assessee.

9. Since the issue on merits has been decided in favour of the assessee therefore the issue regarding validity of assessment under Section 153A becomes academic in nature. Therefore we do not propose to decide this issue.

10. The Ground No.5 is regarding charging of interest under Section 234B & 234C of the Act which is consequential in nature.

11. In the result, the appeals of the assessee are allowed.
Order pronounced in the open court on 3rd March, 2017.

Sd/-	Sd/-
(A.K. GARODIA)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Bangalore,
Dt. 03.03.2017.