IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI

BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 3487/DEL/2011 (A.Y 2008-09)

Replika Press Pvt. Ltd. B-214, Ashok Vihar, Phase-1 New Delhi AAACR1084L **(APPELLANT)**	Vs	ACIT Circle-15(1) New Delhi **(RESPONDENT)**

ITA No. 3921/DEL/2011 (A.Y 2008-09)

DCIT Circle-15(1) C. R. Building, I.P. Estate New Delhi **(APPELLANT)**	Vs	Replika Press Pvt. Ltd. B-214, Ashok Vihar, Phase-1 New Delhi AAACR1084L **(RESPONDENT)**

Appellant by	**Sh. K. Sampath & Sh. V. Raja Kumar, Advs**
Respondent by	**Sh. Surender Pal, Sr. DR**

Date of Hearing	**12.02.2019**
Date of Pronouncement	**26.03.2019**

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the assessee and the Revenue against the order dated 4/5/2011 passed by CIT(A)-XVIII, New Delhi for Assessment Year 2008-09.

2. The grounds of appeal are as under:-

ITA No. 3487/DEL/2011 (Assessee's appeal)

"That on the facts and in the circumstances of the case and in law the authorities below erred in law on the following:-

1. In bringing to tax a sum of Rs. 23,45,668/- pertaining to duty draw back and otherwise not allowing rebate u/s 10B of the Act thereon.

2. In not reducing the sale scrap in a sum of Rs. 53,34,092/- from the cost of sale and setting it off merely from the turnover."

ITA No. 3921/DEL/2011 (Revenue's appeal)

"1. That on the facts and in the circumstances of the case and in law the Ld.CIT(A) has erred in directing the A.O to compute deduction u/s 10B by including the constructive export of Rs. 4,36,65,896/- to arrive at the total turnover of the assessee.

2. The Ld.CIT(A) failed to appreciate that no goods were sent (exported) out of the country by the assessee and therefore exemption u/s 10B was not allowable to the assessee in respect of constructive exports."

3. The assessee Company is a manufacturer and exporter of books. Return declaring total income of Rs. 1,37,30,410/-was filed on 29/09/2008. The assessee claimed exemption u/s 10B amounting to Rs. 6,48,99,250/-. The return was processed u/s 143(1) of the Income Tax Act, 1961. The case was selected for scrutiny in CASS. Statutory notice were issued and duly complied with. In response to the notices CA/AR of the assessee Company attended the assessment proceedings and furnished details in support of return filed by the assessee as well as in response to queries that were raised during the course of assessment proceedings. During the course of proceedings, the Assessing Officer observed that the assessee claimed exemption u/s 10B amounting to Rs. 6,48,99,250/- on a total export turnover of Rs. 35,65,42,912/-. Domestic turnover was shown at Rs. 7,25,95,328/-. However, from the details filed, the

Assessing Officer observed that exports included an amount of Rs. 4,36,65,896/- being "Constructive Export (DTA Supply)". Following details were filed:

Summary of Sales is as follows:-	Amount (Rs.)	
a) Physical Export	312480000	] as per chart 'C' enclosed
b) Constructive Export	43665896	] as per chart 'C' enclosed
c) Exchange Fluctuation	-3044122	
d) Type Setting & Scanning	3441138	] STP Forms & Payment advice received are enclosed Annexure 'D'
(A) Export Sales	356542912	
e) Domestic Sale	67261236	
f) Scrap Sale (wastage)	5334092	
(B) Domestic sale	72595328	
(A+B) Total Turnover	429138240	

However the Assessee company is availing Exemption u/s 10B of the Income Tax Act, 1961 on the following sales:-

Export Sale

a) Physical Export	Rs. 312480000	] as per chart 'C' enclosed
b) Constructive Export	Rs. 43665896	] as per chart 'C' enclosed
c) Exchange Fluctuation	Rs. (3044122)	
d) Type Setting & Scanning	Rs. 3441138	] STP Forms & Payment advice received are enclosed

The Assessing Officer made addition in respect of disallowance u/s 10B on account of duty draw back claim and not including income from typesetting and scan and exchange rate fluctuation as well as not reducing the sale of scrap in sum of Rs.53,34,092/- from the cost of sale and setting it off from the turnover.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. The Ld. AR submitted as regards assessee's appeal that Ground No. 1 has to be remanded back to the file of the CIT(A) for considering Duty Drawback u/s 10B in light of the decision of the Hon'ble Supreme Court in case of Topman Exports 342 ITR 49. The Ld. DR does not object for the same.

6. We, therefore, remand back this issue to the file of the CIT(A) for fresh adjudication in light of the decision of the Apex Court in case of Topman Export (Supra). Ground No. 1 of the assessee's appeal is partly allowed for statistical purpose.

7. As regards Ground No.2 of assessee's appeal, the Ld. AR relied upon the decision of the Hon'ble Delhi High Court in case of CIT vs. Sadhu Forging Ltd. 336 ITR 444 wherein it is held that the receipts of sale of scrap being part and parcel of the activity and being proximate thereto would also be within the ambit of gains derived from industrial undertaking for the purpose of computing deduction under Section 80-IB of the Act. Thus, the Assessing Officer as well as the CIT(A) are not correct in not reducing the sale of scrap in sum of Rs.53,34,092/- from the cost of sale and setting it off from the turnover. The Ld. DR on the other hand relied upon the order of the CIT(A).

8. We have heard both the parties and perused the material available on record. The issue contested herein is very much identical to the issue decided by the Hon'ble Delhi High Court in case of Sadhu Forging Ltd. (supra). The Hon'ble High Court held as under:

"Keeping in view of the activities of the assessee in giving heat treatment for which it had earned labour charges and job-work charges, it can thus be said that the appellant had done a process on the raw material which was nothing but a part and parcel of the manufacturing process of the industrial undertaking. These receipts cannot be said to be independent income of the manufacturing activities of the undertakings of the assessee and thus could

not be excluded from the profits and gains derived from the industrial undertaking for the purpose of computing deduction under section 80-IB. These were gains derived from industrial undertakings and so entitled for the purposes of computing deduction under section 80-IB. There cannot be any two opinions that manufacturing activity of the type of material being undertaken by the assessee would also generate scrap in the process of manufacturing. The receipts of sale of scrap being part and parcel of the activity and being proximate thereto would also be within the ambit of gains derived from industrial undertaking for the purpose of computing deducting under section 80-IB."

Therefore, respectfully following the decision of the Hon'ble Delhi High Court in case of Sadhu Forging Ltd. (supra), the ground of appeal No. 2 raised by the assessee on this issue is allowed.

9. As regards Revenue's appeal, the DR submitted that there is sale in India and Indian Agents were present, which is a Permanent Establishment of the assessee in India and parties are Indian Entities. The Ld. DR further submitted that there was no remand report called by the CIT(A) from the Assessing Officer and Excise Duty was not paid by the Assessee. Therefore, the CIT(A) was not correct in directing the A.O to compute deduction u/s 10B by including the constructive export of Rs. 4,36,65,896/- to arrive at the total turnover of the assessee. In fact, the Ld. DR submitted that no goods were sent (exported) out of the country by the assessee and therefore exemption u/s 10B was not allowable to the assessee in respect of constructive exports.

10. The Ld. AR submitted that the orders for the constructive export were received from foreign publishers. Books were delivered as per direction of the foreign parties after approval and clearance of Custom (NEPZ), RBI etc. The payments for the constructive export were also received from foreign publishers in convertible foreign exchange. The Ld. AR submitted these are identical features between constructive export and physical export. The only difference

between these two export was that the delivery of goods was made to the agents (importers) of foreign buyers in India. It is an admitted fact that the goods under the constructive export did not cross boundaries of India as they were delivered to the agents(importers) of the foreign buyers in India. These agents (importers) of the foreign buyers were the importer of the same goods from the assessee's foreign buyers. The Ld. AR further submitted that all the formalities of export of the assessee's goods to the foreign buyers and the import of the same goods by the Indian buyers from the foreign parties had been duly observed and due permissions and approvals had been obtained from the RBI, Custom Authorities, etc. For the delivery of the goods in local market, prior permission of the Development Commissioner of NEPZ was obtained in each case. The Ld. AR submitted that on the basis of the permission of the Development Commissioner of NEPZ, the persons to whom delivery of the goods was made as per the instructions of the foreign buyers, remitted the payment in foreign currency to the overseas publishers with the prior approval of the RBI (to release foreign exchange). Thus, all the formalities of export and import had been duly observed by the assessee and approvals and permissions granted by the RBI, Customs, (NEPZ) etc. to the assessee. The Ld. AR further submitted that the Excise Duty has been paid and it's a domestic transaction. Thus, the Ld. AR submitted that the CIT(A) was rightly allowed the claim of the assessee with regards to constructive export as is allowed in the earlier A.Ys. 2005-06 to 2007-08. The Ld. AR relied upon the decision of the Hon'ble Supreme Court in case of J B Bora 197 ITR 271. The Ld. AR further submitted that in fact in assessee's own case for Assessment Year 2005-06, the Hon'ble High Court decided this issue in favour of the assessee.

11. We have heard both the parties and perused the material available on record. The CIT(A) held as under:

"7.4 On careful examination of the mater, I find that the claim of the appellant with regard to the constructive export has been allowed by the

department in scrutiny assessments made in earlier years, i.e. A.Y. 2005-06 to A.Y. 2007-08. Further, as per the facts relating to constructive export, it is found that in this kind of export, the appellant supplies the published material to local shopkeepers who are importers of books, from the foreign publishers as per instruction of the foreign clients (publishers) of the appellant. Thus, there is no independent counter sale by the appellant. The sale is in effect made by the appellant to the foreign buyer and only the delivery is made to the Indian importer instead of sending the published material abroad and again bringing it back, to avoid two-way movements of goods. The export proceeds are received by the appellant in convertible foreign exchange directly from the overseas buyers. Considering the above and argument of the ld. AR with regard to such export being part of the Exim Policy and also being authorized by NPEZ and the totaling of facts and case laws as discussed above as well as the principle of consistency. I find that the disallowance made by the AO in this regard cannot be sustained on facts or in law. The AO is, therefore, directed to compute deduction u/s 10B in respect of the said constructive export as claimed by the appellant."

Thus, the CIT(A) has rightly held that there is no independent counter sale by the assessee as the assessee supplied the published material to local shopkeepers who are importers of books, from the foreign publishers as per the instruction of the foreign clients (publishers) of the assessee and the sale was actually made by the assessee to the foreign buyer and only the delivery is made to the Indian importer instead of sending the published material aboard and again bringing it back to avoid two way movements of goods. This claim was also allowed by the Revenue in A.Ys. 2005-06 to 2007-08, therefore, rule of consistency also has to be applied. Besides this, the Hon'ble High Court in assessee's own case WP (c) No. 13838 of 2009 order dated 22.01.2013 held as under:

"10. We have heard the counsel for the parties and we may straightaway state that his is a clear case of change of opinion as also a case

which was beyond the jurisdiction of the revenue audit which had pointed to the so-called discrepancies on paints of law, particularly, on an interpretation of Section 10B of the said Act.

11. In so far as the change of opinion is concerned, it is writ large from the records of the case. The Assessing Officer had specifically raised a query with regard to the supplies made in the domestic tariff area and the petitioner/assessee had given a detailed reply to the same. The Assessing Officer, after considering the reply furnished by the assessee, framed the assessment order in which, as we have pointed out above, he made specific references to exports in the domestic tariff area and/or constructive exports. While computing the claim for exemption under Section 10B, the Assessing Officer has included the supply made in the domestic tariff area, both in the main body of the assessment order as also in Annexure-A thereto, which was the calculation of the deductions. Therefore, it is absolutely clear that the Assessing Officer had applied his mind to the very issue which is now sought to be raised under Section 147 of the said Act. That would mean that the present venture of invoking Section 147 is nothing but a mere change of opinion, which is impermissible in law, as is well settled by a long line of decisions. The second point of the petitioner is also well taken that an audit party could not have commented on a point of law and, particularly, on an interpretation of Section 10B of the said Act.

12. Therefore, on both points, the petitioner is liable to succeed. The impugned notice dated 24.02.2009 and all proceedings pursuant thereto, including the order dated 07.12.2009, are quashed and/or set aside. The writ petition is allowed, as above. There shall be no order as to costs."

Since, the CIT(A) has given a proper reasoning and the issue is decided in favour of the assessee by the Hon'ble High Court in assessee's own case, we are dismissing the ground of appeal of the Revenue on this issue.

12. In result, appeal of the Assessee is partly allowed for statistical purpose and appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 26th March, 2019.

Sd/-	**Sd/-**
(R. K. PANDA)	**(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 26/03/2019
R. Naheed

Copy forwarded to:

1.	Appellant
2.	Respondent
3.	CIT
4.	CIT(Appeals)
5.	DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	12.02.2019
Date on which the typed draft is placed before the dictating Member	12.02.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	26.03.2019
Date on which the final order is uploaded on the website of ITAT	26.03.2019
Date on which the file goes to the Bench Clerk	26.03.2019
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	