आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ ।

IN THE INCOME TAX APPELLATE TRIBUNAL, RAJKOT
[Conducted through "E" Court at Ahmedabad]

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 1062/RJT/2010

निर्धारण वर्ष/Assessment Years: 2002-03

Siyaram Metals P.Ltd. Plot No.12 & 14, Naghedi Ind. Jamnagar.	Vs	ACIT, Cir.2 Jamnagar.

आयकर अपील सं./ ITA No. 1072/RJT/2010

निर्धारण वर्ष/Assessment Years: 2002-03

ACIT, Cir.2 Jamnagar.	Vs	Siyaram Metals P.Ltd. Plot No.12 & 14, Naghedi Ind. Jamnagar.

आयकर अपील सं./ ITA No. 1064 and 1065/RJT/2010

निर्धारण वर्ष/Assessment Years: 2006-07 and 2007-08

Siyaram Metals P.Ltd. Plot No.12 & 14, Naghedi Ind. Jamnagar.	Vs	ACIT, Cir.2 Jamnagar.

आयकर अपील सं./ ITA No. 738 and 1078/RJT/2010

निर्धारण वर्ष/Assessment Years: 2006-07 and 2007-08

ACIT, Cir.2 Jamnagar.	Vs	Siyaram Metals P.Ltd. Plot No.12 & 14, Naghedi Ind. Jamnagar.

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

Revenue by :	Shri Jitender Kumar, CIT-DR
Assessee by :	Shri M.J. Ranpura, AR

सुनवाई की तारीख/Date of Hearing : 30/07/2018
घोषणा की तारीख /Date of Pronouncement : 26/09/2018

O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER : Assessee and Revenue are in cross appeals against order of the ld.CIT(A), Jamnagar dated 25.1.2010, 21.5.2010 and 24.5.2010 passed for the assessment years 2002-03, 2006-07 and 2007-08 respectively.

2. The issues agitated in all these appeals are common, therefore we heard them together and deem it appropriate to dispose of by this common order. Facts on all vital points are common, therefore for the facility of reference, we take facts from assessment order mainly from A.Y.2002-03. Sole grievance of the assessee in all these three years relates to denial of deduction under section 10B in respect of following deemed export sales:

Asstt.Year 2002-03 : Rs.1,90,77,294/-
Asstt.Year 2006-07 : Rs.15,10,11,158/-
Asstt.Year 2007-08 : Rs.14,80,20,329/-

3. Brief facts of the case are that the assessee-company at the relevant time was engaged in trading of recycled non-ferrous metals, scrap etc. It used to import various types of scrap such as mixed metal scraps, cable scrap, transformer scrap etc. from international market and employs

various processes both manual and mechanical on the imported goods. Thereafter, it re-exported these goods. In the assessment year 2002-03, it has filed its return of income on 31.10.2002 declaring total income at Rs.51,83,600/-. It has claimed deduction under section 10B amounting to Rs.1,57,70,098/- and deduction of Rs.22,21,542/- under section 80IB of the Act. The assessment order was passed under section 143(3) r.w.s. 147 on 31.3.2006 in which deduction under section 10B and 80IB were partially allowed. The AO was of the view that export of scrap by the assessee did not amount to 'manufacture' or 'production'. Ultimately, the dispute travelled upto the Tribunal, and the issue was remitted back to the AO for re-adjudication. During the pendency of proceedings before the AO, investigation was carried by Central Economic Intelligence Bureau and Central Excise Department. The DRI authorities had found case of under valuation of import and payment of balance money to the foreign exports through non-banking channels. Thus, the AO has recorded reason again and issued notice under section 148 of the Act on 25.3.2009. The ld.AO thereafter passed assessment order on 31.12.2009 under section 143(3) r.w.s. 147 and 254 of the Act.

4. As far the issue agitated by the assessee in these three years is concerned, it relates to denial of deduction on sale made by the assessee to other export oriented units. The assessee had made sales to certain export oriented units situated in the domestic area, though these were also hundred percent export oriented units. The sales made to these units were not considered by the AO as export of goods. On the other hand, the case of the assessee is that these sales be construed as deemed export and deduction under section 10IB ought to be granted. The

ld.CIT(A) has relied upon order of the ITAT passed in the case of Tata Elexi Ltd. Vs. ACIT, 115 TTJ 0423. Similarly, it relied upon the order of ITAT in the case of Naval Overseas P.Ltd. Vs. ITO, ITA No.3023/Ahd/2004.

5. The ld.counsel for the assessee at the very outset submitted that order of Tata Elexi Ltd. has been reversed by the Hon'ble Karnataka High Court. He placed on record judgment of Hon'ble Karnataka High Court in the case of Pr.CIT Vs. International Stones India P.Ltd., ITA No.564/2016. According to the ld.counsel for the assessee, Hon'ble Court has construed the meaning of expression "deemed export of goods" employed in EXIM policy and thereafter decided the issue in favour of the assessee. The ld.DR was unable to controvert this contention of the ld.counsel for the assessee.

6. We have duly considered rival contentions. We find that identical issue has been considered by the Hon'ble Karnataka High Court in the case of Pr.CIT Vs. M.S.International Stone India P.Ltd. rendered in Income Tax Appeal No.564 of 2016. This decision has been pronounced on 12.6.2018. The relevant discussion in the judgment reads as under:

> *"6. The other question with regard to the deduction allowable to the Respondent-assessee, M/s. International Stones India Pvt. Ltd., in the present case, the question as framed by the Revenue in the Memorandum of Appeal deserves to be reframed in the following manner:—*
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> > *"Whether in the facts and circumstances of the case, the Respondent-assessee is entitled to deduction u/S.10B of the Act in respect of the 'Deemed Export' of goods made by it during the period in question through a third party or not?".*

7. At the outset, we may note that a similar controversy came to be decided by the co-ordinate Bench of this Court in the case of Tata Elxsi Ltd. v. Asstt. CIT [2015] 127 DTR 327 (Kar), the Division Bench of this Court for the purpose of S.10A of the Act held the assessee entitled to the benefit of such deduction in respect of "Deemed Exports" made by it, while the goods in question were sold by the assessee M/s. Tata Elxsi Ltd., to another STP unit within India M/s. Texas Instruments India Pvt. Ltd., (TIIPL) for the purpose of export outside India.

8. The Division Bench of this Court discussed in detail the definition of 'Export Turnover', the Exim Policy and held that the purpose of giving the deduction to the assessee u/s.10A of the Act in respect of the export of goods made by it in terms of Exim Policy was to fetch foreign currency against such exports and in view of the fact that export was so made by another STP Unit (TIIPL), to whom the goods in question were sold by the assessee-M/s. Tata Elxsi Ltd., the foreign currency was received and shared by both the STP Units, therefore, the conditions of S.10A were satisfied and the assessee - M/s. Tata Elxsi Ltd., was entitled to deduction u/s.10A of the Act.

7. After taking note of the judgment in the case of Tata Elexi (supra), Hon'ble Court has appreciated other issues also, and ultimately held that sales made to other EOU would be considered to be in the ambit of "deemed export". Conclusion made by the Hon'ble Court reads as under:

"21. As held by the Division Bench of this Court in M/s. Tata Elxsi's Ltd. case, the purpose of giving these deductions in these special provisions is to encourage exports and fetch foreign currency in terms of Exim Policy propounded and announced by the Union of India. The 'Deemed Export' by the assessee Undertaking even through a third party who has exported such goods to a Foreign country and has fetched Foreign Currency for India, still remains a 'Deemed Export' in the hands of the assessee undertaking also. If the Parliament intended to put any restrictive meaning for curtailing the said deduction, such words could be employed in sub-section(1) itself, which could have excluded 'Deemed Export' from the ambit and scope of word 'export' employed in sub-section(1) of S.10B of the Act. The Explanation defining 'Export

Turnover' in both these provisions does not make any such distinction between the 'Direct Export' and 'Deemed Export'.

22. For a harmonious reading of these provisions of the Act which are undoubtedly beneficial provisions, the word 'export' read with the background of Exim Policy of Union of India would certainly include 'Deemed Export' also within the ambit and scope of the 'Export Turnover' as explained in Explanation-2 of sub-section (9A) of the said S.10B of the Act.

23. Therefore, both the contentions raised by the learned counsel for the appellant-Revenue to restrict the deduction in the hands of the respondent-assessee by excluding the 'Deemed Exports', does not have any merit and the said contention deserves to be rejected and the same is accordingly rejected."

8. Respectfully following judgments of Hon'ble Karnataka High Court, we allow this common ground raised by the assessee in all three years. The ld.AO shall grant deduction to the assessee on sales made to other EOUs by treating them as "deemed export".

9. No other issues were argued by the ld.counsel for the assessee, hence, appeals of the assessee are partly allowed.

10. We now take the appeals of the Revenue i.e. ITA No.ITA No.1072/Ahd/2010 (Asstt.Year 2002-03).

11. In this year, Revenue has taken seven grounds of appeal. Grievance relates to only two issues viz. (a) the ld.CIT(A) has erred in deleting the addition made on account of suppression of sales amounting to Rs.15,82,45,177/-, and (b) the ld.CIT(A) has erred in deleting the addition of Rs.1,14,36,789/- added on account of under valuation of closing stock. As observed earlier, during the pendency of assessment proceedings, after remand from the ITAT, Central Excise

authorities have made an investigation and intimated the AO with a copy of show cause notice showing that the assessee was indulged in under-invoicing of import to a very large extent. The ld.AO, based on the copy of show cause notice made addition on account of suppression of sales as well as under valuation of closing stock.

12. On appeal, the ld.CIT(A) has deleted this addition by recording the following finding:

> *"11. I have carefully considered the issue and find that all these additions and adjustments have been made by the AO, which are based on the enquiries by the Directorate of Revenue Intelligence and the order of Customs & Central Excise, under which these findings were given. Perusal of the order of Central Excise shows that the appellant had raised various objections during the course of proceedings, which not taken care of. Even before the AO, the appellant wanted to verify the documents, on which the additions were being based. The appellant also wanted an opportunity of cross examination, but the same was not allowed by the AO, because as per him this was a time barring case and the order was to be framed within time. It is noticed that the assessment was reopened on 25/03/2009 and order of Commissioner of Central Excise was passed on 31/03/09. In such a situation, the AO had ample time to get the documents verified and also allow proper opportunity to the appellant so that principle of natural justice are properly observed. After going through the entire assessment order it is noticed that the AO has devoted the entire discussion towards findings in the order of Commissioner of Central Excise, which itself suffers from denial of natural justice. Income tax proceedings are separate from proceedings under Central Excise Act and before arriving at a conclusion it is necessary that sufficient opportunity is allowed to the appellant. It is noticed that the assessment in proper way was taken up only by issue of notice dtd. 13/11/09 which left barely a month's time to complete an assessment in which so many papers required proper scrutiny. Appellant in his letter dtd. 5-12-09 stated that a personal hearing was requested for verification of alleged document and cross examination of witness if any addition was to be made. However, the AO did not allow any such opportunity and made*

the additions and adjustments based on the order of the Central Excise authority. Thus the appellant was condemned unheard and the order suffers from denial of principle of natural justice. Apart from that, it is seen that the order passed by the Commissioner of Central Excise was challenged before the Customs &Central Excise Tribunal, Ahmedabad and vide order dtd. 12/08/09 the order of Commissioner of Central Excise was set aside because no opportunity of cross examination etc. was allowed to the appellant even by the Commissioner of Central Excise. This order was also produced before the Assessing Officer, but still the additions and adjustments were made. Since the entire order of the AO is based on the order of Commissioner of Central Excise, Ahmedabad, which no longer subsists, the entire additions and adjustments have no base at all because the entire thing is based on the finding of Central Excise Authorities. In view of the order of Customs & Central Excise Appellate Tribunal, the amounts considered as under invoicing or under valuation of stock etc. does not survive and, therefore, additions made by the AO amounting to Rs.15,82,45,177 on account of suppressed sales, Rs.l,14,36,789 on account of under valuation of stock and adjustment on account of under invoicing amounting to Rs.5,34,99,909 has no basis and all these additions and adjustments are directed to be deleted."

13. The ld.counsel for the assessee, at the very outset submitted that the addition is being made on basis of a show cause notice issued by the Central Excise to the assessee as well as on the basis of material transmitted by the Central Excise. A large number of assessees viz. Meridian Impex, Ramgopal Maheshwari and assessee had challenged the issue of show cuase notice by central excise authorities before the Customs & Service Tax Appellate Tribunal (CESAT). The Tribunal has decided this issue in favour of the assessee vide order dated 12.8.2009. According to the Tribunal no opportunities were given to the assessee for refuting the allegations made against them. Therefore, the Tribunal has remanded the issue to the Central Excise authorities. He placed on record copy of the Tribunal's order and submitted that there is no material with the Revenue authorities to say that the assessee was

indulged in under invoicing of imports. On the other hand, the ld.DR contended that CIT-DR had filed written submission vide order dated 17.1.2016. In this submission, the ld.CIT-DR has contended that since the CESAT has set aside the issue to the file of Central Excise authorities, thus, the same may be set aside in the present proceedings. In rebuttal, the ld.counsel for the assessee submitted that on the basis of show cause notice issued by the Excise authority, additions were made. In the case of Vrundavan Ceramics P.Ltd. the Tribunal has deleted this addition and the issue went before the Hon'ble Gujarat High Court, and the Hon'ble High Court in Tax Appeal No.82 of 2016 has upheld order of ITAT. He submitted that there is no material with the Revenue authorities to make any addition.

14. We have considered rival submissions and gone through the record. A perusal of the assessment order would indicate that ld.AO has made reference to large number of information transmitted to him by the Custom & Excise authorities. Basically, it was a show cause notice issued by the Central Excise authority containing various information. In the case of avoidance of excise this show cause has not attained finality. The Tribunal has set aside the proceedings and remitted back to the file of authorities. According to the information given to us by the ld.counsel for the assessee at Bar that no further steps have been taken. It is also pertinent to observe that CESAT has remitted the issue on 12.8.2009 i.e, more than nine years have expired. We have confronted the ld.DR whether any steps have been taken during this period of nine years by the AO for collecting any other conclusive material. The DR was unable to supply any other information. Therefore, we are of the

view that a roving inquiry cannot be allowed in the affairs of the assessee endlessly. It was for the Revenue to bring concrete material on the record on which any liability can be fastened upon the assessee. The Revenue failed to bring any evidence. We could appreciate the request of the ld.CIT-DR for remitting the file to the AO if after the order of the ld.CIT(A) in the year 2010 the Revenue was able to lay its hand on any material which could be produced before the Tribunal by way of additional evidence. It appears that proceedings remained dormant even after the order of the ld.CIT(A) when additions have been deleted. No efforts have been made to collect any further information for justifying the challenge to the order of the ld.CIT(A). In such situation, we cannot remit the issue to the file of the AO for re-investigation. We do not find any merit in these grounds of appeal. They are rejected.

15. Now we deal with Revenue's appeals in the Asstt.Year 2006-07 and 2007-08 i.e. ground no.1 and 2 in the Asstt.Year 2006-07 and ground nos.1, 2 and 3 in the Asstt.Year 2007-08.

16. Common issue according to the Revenue is that the process employed by the assessee for segregation of scrap from mixed metal scrap did not amount to production or manufacturing of any article within the meaning of section 10B and/or section 80IB of the Income Tax Act, 1961, and therefore, does not entitle for deduction under these sections. Thus the issue is, whether deduction under sections 10B/ 80IB is admissible or not to the assessee, because according to the understanding of the Revenue, the assessee was not "manufacturing"

article or things which is one of the mandatory conditions for claiming deduction under these sections.

17. The ld.counsel for the assessee at the very outset submitted that the ld.CIT(A) has allowed the deduction to the assessee by following the order of the ITAT passed in ITA No.305, 376, 306, 377, 523 & 528 in assessee's own case for the Asstt.Years 2002-03 to 2004-05. He further pointed out that the issue travelled to the Hon'ble Gujarat High Court at the instance of the Revenue, and Hon'ble Court has upheld the stand of the assessee in Tax Appeal No.2602 of 2009. He placed on record copy of Hon'ble High Court's judgment dated 2.4.2014. The Hon'ble Court has formulated the following questions in the appeal:

> *"(1). Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal erred in treating the processes employed by the assessee in segregating the metal scrap from cable scrap as 'Manufacture or produce' within the meaning of section 10B of the Income-tax Act?*
>
> *(2). Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal erred grievously in setting aside he issue relating to DEEMED EXPORT (DTA sales) to the file of the Assessing Officer and thereby not confirming the concurrent findings of the Assessing Officer and the CIT(A)?*
>
> *(3). Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal is right in allowing deduction u/s.80IB of the Income tax Act, 1961?*
>
> *(4) Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal is right in confirming the order of the CIT (A) in allowing deduction u/s.80HHC without adjudicating on the ground of appeal taken by the revenue?"*

18. On detailed analysis, Hon'ble High Court has answered question nos.1, 3 and 4 in favour of the assessee. With regard to question no.2 the Hon'ble Court has observed that the Tribunal has just remitted the issue to the file of the AO, and therefore, order of the Tribunal does not call for any interference. While dealing with question no.1, Hon'ble Court has examined scope of expression "manufacture" in detail. Hon'ble Court has held that activities undertaken by the assessee in segregating the scrap and carrying out process activities all that would amount to manufacture of article or thing whose export would entitle it for grant of deduction under section 10B as well as whose sales would entitle the assessee to claim deduction under section 80IB.

19. Similarly, with regard to the issue whether a new plea could be taken up before the Appellate Authority, Hon'ble Court has answered the question nos.3 and 4 against the Revenue and in favour of the assessee. Respectfully following the judgment of Hon'ble High Court in assessee's own case for the assessment years 2002-03, 2003-04 and 2004-05, we do not find any merit in the grounds raised by the assessee in these appeals. They are accordingly rejected.

20. In the result, appeals of the assessee are allowed and that of the Revenue are dismissed.

Pronounced in the Open Court on 26th September, 2018.

Sd/-	**Sd/-**
(WASEEM AHMED)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated, 26/09/2018