आयकर अपीलीय अधिकरण "एच" न्यायपीठ मुंबई में।

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

श्री संजय अरोड़ा, लेखा सदस्य **एवं** श्री विवेक वर्मा, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI SANJAY ARORA, AM AND SHRI VIVEK VARMA, JM

आयकर अपील सं./I.T.A. No. 628/Mum/2011

(**निर्धारण वर्ष /** Assessment Year: 2007-08)

Asst. CIT, Circle 18(1), 1st Floor, Piramal Chambers, Lalbaug, Mumbai-400 012	**बनाम**/ Vs.	S. K. International (Export) Co., A-2, Unit No. 79, Shah & Nahar Indl. Estate, S. J. Road, Mumbai-400 013
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAAFS 5529 G		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri R. K. Sahu
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri K. Gopal

सुनवाई की तारीख / **Date of Hearing**	:	14.10.2014
घोषणा की तारीख / **Date of Pronouncement**	:	13.01.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-29, Mumbai ('CIT(A)' for short) dated 04.10.2010, allowing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2007-08 vide order dated 15.12.2009.

2. The appeal raises two issues, which we shall take up in seriatim, as follows:

3. *Issue No. 1 - Reimbursement of freight charges (Rs.74,14,903/-)*:

The assessee, a manufacturer and exporter of readymade garments, was during the course of assessment proceedings observed to have disclosed a receipt by way of freight charges at Rs.74.15 lacs. In explanation of the genesis of the said receipt, it was explained by the assessee that the sale invoice in respect of goods exported (outside India) are on CIF (i.e., cost plus freight and insurance) basis. The assessee exporter pays the freight and insurance, which for the year amounts to Rs.81.30 lacs, and which is then recovered from the customers. There is thus no question of it being regarded as a source of income and, in fact, there is a negative impact on the profit of the assessee on this account. Reliance toward same was also placed on the decisions in the case of *Gala International* (in ITA No. 6519/Mum/1998) and *C. A. Galikotwala & Co. Ltd.* (in ITA No. 1512/Mum/1996), wherein it had been held that the freight collected is to be reduced from both the export and total turnover, i.e., in computing the income derived from export. The Assessing Officer (A.O.), however, assessing the same as income from other source, the ld. CIT(A) in appeal found that there was a clear nexus between the income and the freight expenses. Even assuming freight to be in an independent source of income, the expenditure incurred by the assessee would have to be allowed u/s.57(iii), resulting in a loss under the head 'income from other source'. The A.O.'s view therefore could not be sustained. Aggrieved, the Revenue is in appeal.

4. We find ourselves to be in complete agreement with the findings by the ld. CIT(A), whose order has not been impugned by the assessee in any meaningful manner. The receipt on account of freight is not in vacuum, and its basis lies in the incurring of the freight and insurance expenses by the assessee. Both the incurring of the expenditure on these counts, as well as the raising of the bills on cum freight and insurance basis on the overseas customers, has not been disputed by the Revenue. How then, we wonder, could it adopt a view as that followed by the A.O. Further, the source of the said receipt does not clearly lie in any separate or independent source of income, i.e., distinct and apart from the assessee's business of manufacture and export of goods outside India. We,

accordingly, find no merit in the Revenue's stand, and the said receipt would stand to form as a part of the assessee's export business. We decide accordingly. This decides the Revenue's Ground # 1.

5. *Issue No. 2 – DEPB receipt (Rs.92,42,507/-)*:

This issue is with regard to the eligibility or otherwise in law of the Duty Entitlement Pass Book Scheme (DEPB) receipt (Rs.92.43 lacs) for being included in computing the deduction u/s.10B of the Act. Both the assessee and the Revenue have relied on a series of case law, both by the tribunal and the higher courts of law, which we may enlist as under:

i. By the Revenue:

Liberty India vs. CIT [2009] 317 ITR 218 (SC); *India Comnet International vs. ITO* [2008] 304 ITR 322 (Mad) (approving its earlier decision in ***CIT vs. Menon Impex (P.) Ltd.*** [2003] 259 ITR 403 (Mad)); *Tessitura Monti India (P.) Ltd. vs. ITO* [2013] 22 ITR (Trib) 329 (Mum) [141 ITD 531]; *Tricom India Ltd. vs. Asst. CIT* [2010] 36 SOT 302 (Mum); *ITO vs. V. J. Home (P.) Ltd.* [2009] 125 TTJ 215 (Jodh)/[2010] 38 SOT 4 (Jodh) (URO).

ii. By the assessee:

Topman Exports vs. CIT [2012] 342 ITR 49 (SC); *CIT vs. Arts & Crafts Exports* [2012] 246 CTR 463 (Bom) (22 taxmann.com 53 (Bom)); *CIT vs. Motorala India Electronics (P.) Ltd. (Kar)* (in ITA Nos. 428 & 427 of 2007 dated 11.12.2013); *Arts & Crafts Exports vs. ITO* [2012] 66 DTR 69 (Mum-Trib); *Rajesh Exports Ltd. vs. Asst. CIT* (in ITA No. 51/Bang/2008 dated 14.08.2008).

The decisions relied upon by the Revenue-appellant are on the premise that deduction u/s.10B, though on the income derived from export, is yet only *qua* the profits of the eligible undertaking, i.e., as derived by it. The computational formula of section 10B(4) only takes care of the latter part, i.e., the income of the undertaking that can be said to be derived from export, on which export of eligible articles and things, enabling securing convertible foreign exchange for the country, the deduction is granted. The words 'profits of the business of the undertaking' in section 10B(4), are to be read as 'profits derived from eligible undertaking'. The receipts by way of DEPB, which are step

removed from the undertaking, in-as-much as they own their origin to the scheme/policy framed by the Government under the provisions of the relevant statutes (viz. Central Excise Act, 1944; Customs Act, 1942), would therefore stand excluded in reckoning the profits of the eligible undertaking. That is, the decisions by the apex court, as in the case of *Liberty India* (supra), or even prior thereto, viz. *Pandian Chemicals Ltd. vs. CIT* [2003] 262 ITR 278 (SC); *CIT vs. Sterling Foods* [1999] 237 ITR 579 (SC); *India Leather Corpn. (P.) Ltd. vs. CIT* [1997] 227 ITR 552 (SC), etc. shall apply. The second set of decisions, i.e., as relied upon by the assessee, canvass the view that once the provision lays down the formula for the computation of the qualifying profits, i.e., as eligible for deduction, there is no question of applying the decision or ratio of any decision. The same, as explained by the hon'ble high court in *Motorola India Electronics (P.) Ltd.* (supra), cannot be construed as the profit derived from the business of the undertaking. Accordingly, the profits of the undertaking are to be computed following the regular provisions of the Act, i.e., u/s.28, in the manner provided and giving effect to the provisions of sections 28 to 43D. DEPB, or duty drawback (DDB) for that matter, is only a business income u/s.28. The foregoing sums up the controversy arising in the instant case.

6. We have heard the parties, and perused the material on record.

6.1 The first thing for us to consider is if the issue is covered by any binding decision. Toward this, we find the decision by the hon'ble jurisdictional high court in the case of *Arts & Crafts Exports* (supra), rendered under the cognate provision of section 10BA. So, however, as its reading would show, the same is based on a concession by the Revenue that the decision by the apex court in *Liberty India* (supra), vigorously relied upon by it before us as well as in the other decisions relied upon by it, has no relevance in the facts of that case. In view thereof, the hon'ble court declined to entertain the third question of law raised by the Revenue before it, and did not thus answer the same, which is the only pertinent question as far as the issue/s arising in this appeal is concerned.

6.2 The second question before us is if the matter, in view of the conflicting and differing views by the different courts and tribunal, ought to be referred by us to a larger bench, so as to conform to the principle of judicial proprietary. Toward this, we observe that both the parties have relied upon a decision/s each by the hon'ble high court. The same, being an appellate forum higher in judicial hierarchy than the appellate tribunal, no useful purpose would be served by referring the matter to a larger bench of the tribunal, even as the decision by the non-jurisdictional high court is persuasive and not binding on this tribunal (refer: *CIT v. Thane Electricity Supply Ltd*. [1994] 206 ITR 727 (Bom.)). In fact, this specific proposition, i.e., of reference to the larger bench of the tribunal, was specifically also put to the parties during hearing, only to be declined by them.

6.3 We therefore proceed to discuss the matter, beginning by reproducing the provision in its relevant part:

> '**SECTION 10B**
> **Special provisions in respect of newly established hundred per cent export-oriented undertakings.**
>
> (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export-oriented undertaking from the export for articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee:
>
> **Provided** that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to the deduction referred to in this sub-section only for the unexpired period of aforesaid ten consecutive assessment years:
>
> **Provided further** that for the assessment year beginning on the 1st day of April, 2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software;

> **Provided also** that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, 2012 and subsequent years:
>
> **Provided also** that no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sub-section (1) of section 139.
>
> (4) For the purposes of sub-section (1), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.'

As its reading would show, the crucial expression calling for interpretation are the words 'profits and gains as are derived by a hundred per cent export-oriented undertaking from the export for articles or things or computer software ….', occurring in section 10B(1), which confers as well as delineates the scope of the deduction. Implicit therein is the condition of the profits of the eligible undertaking derived from its business as being the qualifying profits. Vide sub section (4) of section 10B, the profit derived by a hundred per cent export-oriented undertaking (EOU) from export of eligible goods is deemed to be an appropriate fraction, i.e., the ratio of the export turnover of such goods to the total turnover of the undertaking. Clearly, therefore, the profits derived from the export (of the eligible goods) are a part of that derived from the business of the eligible undertaking, determined by allocating the same in the ratio of the export turnover of the relevant goods to the total turnover of the undertaking. It is only the profits derived from more than one source that could be appropriated or allocated thus, i.e., amongst the different sources from which it arises, and which is what is contemplated by or the provision of s. 10B(4) is toward. The business of the export of eligible goods is a part of the business of the 100% EOU, and which may further be a part of its total business, include as it may domestic turnover/business as well. This explains our observation that implicit in the words 'derived from the export', defining the primary condition, is that the profit under consideration is derived from the business of the eligible undertaking. The limiting ratio of section 10B(4) only seeks to restrict the base or the qualifying profits,

derived from total business of the eligible undertaking, to that from the export of the eligible goods only, i.e., are statutorily estimated. It cannot but by otherwise if the words 'derived from', employed by the Legislature in section 10B(1), which controls the scope of the deduction, as well as in s.10B(4), is to be given its proper meaning, as explained by the apex court in several decisions, some of which are cited supra. We are, thus, in agreement with the interpretation as accorded by the tribunal in *Tessitura Monti India (P.) Ltd.* (supra) that the words 'profits of the business of the undertaking' would signify the profits as derived from the business of the undertaking. That is, connote a relationship of first degree between the profits and the business of the eligible undertaking. The tribunal, appreciative and acknowledging that the words 'business of the undertaking' are wider in scope than the words 'of the undertaking', yet clarified that the said relationship of first degree between the profits would stand to be with the business of the undertaking, i.e., the economic activity that comprises the business of the eligible undertaking, rather than being restricted strictly to the eligible undertaking. As such, as long as a receipt is intimately or inextricably connected with the business of the undertaking, it cannot be excluded in reckoning the eligible profits u/s. 10B(1). The impugned receipt by way of DEPB, part of which would in fact represent a pure trading profit, i.e., the realization of the DEPB license/s through its transfer to a third party, assessable u/s.28(1)(iiid), arises to the assessee not from the said economic activity, but a fiscal incentive, so that the same is only its immediate source and not the economic activity itself. The benefit of deduction u/s.10B was accordingly denied. The discussion in the said order at paras 4.3 and 4.4(c) is relevant in this regard, which also makes reference to the decision by the apex court in *Liberty India* (supra), which has application in-as-much as the words used in section 80IB are 'derived from the business of the undertaking' or 'derived from the eligible business'.

6.4 For the reason afore-mentioned, we are unable to subscribe to the view expressed per the decisions relied upon by the assessee, i.e., that in view of computational formula of section 10B(4), the entire profits of the business of the undertaking, irrespective of their immediate source, shall comprise the qualifying profits. The words "profits of the

business of the undertaking", occurring in section 10B(4), have to be accorded a contextual meaning and, therefore, are circumscribed by the qualifying condition of section 10B(1). As explained earlier, implicit in the proportionate formula (of section 10B(4)) is the condition that the profits being allocated thus are derived from such business of the eligible undertaking. It is only where they are so that the further restriction, i.e., to that derived from the relevant exports, could be derived or arrived at. All that was therefore required, i.e., if the entire profits of the eligible undertaking or its business, are to be considered, as held in the said decisions, was to define the same as the 'profits of the eligible undertaking as computed under Chapter IV-D' or 'under the head of income profits and gains of business or profession', as in fact done at several places in the statute. As explained by the apex court in, among others, *CIT vs. Tara Agencies* [2007] 292 ITR 444 (SC), the intention of the Legislature has to be gathered from the language used in the statute, and which means that attention should be paid to what has been said as also to what has not been said. Further, that it is the bounden duty and obligation of the court to interpret the statute as it is. It is contrary to all rules of construction to read words into a statute which the Legislature in its wisdom has deliberately not incorporated. Continuing further, the decision in the case of *Motorola India Electronics (P.) Ltd.* (supra) is based on the finding of a direct nexus between the income under reference and the business of the eligible undertaking. The same, thus, does not contradict what stands stated by us in this order, and a different decision in the said case, i.e., vis-à-vis that in the instant case, is due to the difference in the facts, so that the said decision is in fact supportive and distinguishable on the facts at the same time.

6.5 In view of the foregoing, in our clear view, the receipt by way of DEPB shall not form part of the eligible profit of the assessee's EOU u/s.10B(1) r/w s. 10B(4). We decide accordingly.

7. In the result, the Revenue's appeal is partly allowed.
परिणामतः राजस्व की अपील आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on January 13, 2015

Sd/-	Sd/-
(Vivek Varma)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 13.01.2015
व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**