

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE 'B' BENCH, BANGALORE**

**BEFORE SMT ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER
AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

**ITA No.1061(BNG)/2015
(Assessment year : 2011-12)**

The Deputy Commissioner of Income-tax,
Circle-3(1(2), 5th Floor, Nrupathunga Road,
Bangalore

Appellant

Vs

M/s Gumbi Software Pvt.Ltd.
No.45/13, Indl. Suburb, Yeshwanthpur,
Bangalore -560 022
PAN No.AACCG7830R

Respondent

**Revenue by : Shri Neera Malhotra, CIT
Assessee by : Shri H. Shambhu Sharma, CA**

**Date of hearing : 19-11-2015
Date of pronouncement : 30-11-2015**

ORDER

PER SHRI INTURI RAMA RAO, AM :

This appeal by the revenue is directed against the order of the CIT(A), Hubli dated 31-03-2015 for the assessment year 2011-12.

2. The revenue raised the following grounds of appeal;

“1. The order of ld. CIT(A) is opposed to law and facts of the case.

2. On the facts and circumstances of the case, learned CIT(A) erred in allowing relief to the assessee when the assessee company has not furnished evidence to show that neither

competent authority or RBI has allowed the netting off export against import as a compliance to the provisions of Sec.10A.

3. On the facts and in the circumstances of the case ld. CIT(A) erred in allowing relief to the assessee when it has failed to substantiate its claim with regard to allocation of expenses.

4. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the AO may be restored'.

3. Briefly, the facts of the case are that the respondent-assessee is a company incorporated under the provisions of Companies Act, 1956. It is engaged in the business of manufacturing and development of software services. The return of income for the assessment year 2011-12 was filed on 13-10-2010 declaring a loss of Rs.63,45,920/- under normal provisions of IT Act and taxable income of Rs.3,58,61,278/- u/s 115JB of the IT Act, 1961. The case was selected for scrutiny and finally the assessment was completed u/s 143(3) of the Act vide order dated 11-02-2014 at a total income of Rs.2,42,33,253/- under normal provisions of the IT Act. While doing so the AO disallowed the claim of deduction of Rs.2,98,01,342/- under the provisions of Sec.10A of the IT Act on the ground that the foreign exchange in respect of export sales was not

received within the stipulated period of time and also disallowed a sum of Rs.76,429/- by allocating common expenditure to the STPI unit.

4. Being aggrieved, the assessee filed appeal before the CIT(A), who vide impugned order allowed the appeal of the assessee by observing as under;

“I have gone through the facts of the case, contents of the assessment order and written submissions of the assessee. The assessee is a manufacturer and exporter of software and the assessee has maintained two units one is in Bangalore and second is in Hubli. In Bangalore unit the assessee is manufacturing software and rendering services within India and this unit is known as "Domestic Unit", The second unit which is located in Hubli is "STP Unit (Software Technology Park Unit)" with 100% export oriented. The Hubli STP Unit has exported software to Evergo Technology, Hongkong on 21.03.2011 for US \$7,50,000 which amounts to Rs. 3,35,32,500/- and the export proceeds of the STP Unit has received by way of import from Evergo Technology, Hongkong on 18.03.2011 for US \$ 3,94,500 and on 15.06.2011 (Invoice dated 15.12.2011) for US \$ 3,55,500. The AO has disallowed the claim of the assessee u/s 10A to the extent of Rs. 2,97,92,959/- on the plea that the same was not received within the stipulated time as provided u/s 10A(3) of the IT Act and AO has further contended that the assessee has relied

on the RBI Circular No. 57 dated 29.06.2010 which is not applicable to the assessee's case for net off.

Assessee in the written submission it is mentioned that assessee has relied on both Circular No. 47 dated 17.11.2011 and Circular No. 57 dated 29.06.2010.

Circular No.47 is

related to set off of the export receivables against import payable, liberalization of procedure as reproduced below

RBI/2011-12/264

A.P. (DIR Series) Circular No, 47

November 17, 2011

To

All Category - I Authorized Dealer Banks

Madam/Sir,

**"Set-off" of export receivables against
import payables-**

Liberalization of Procedure

Attention of Authorized Dealer Category - I (AD Category - I) banks is invited to the fact that the requests received from the exporters through their AD branches for set-off of export receivables against import payables are considered by the Reserve Bank of India. As a measure of further liberalization, it has been decided to delegate power to AD Category - I banks to deal with the cases of "set-off" of export receivables against import payables, subject to following terms and conditions:

- a) The import is as per the Foreign Trade Policy in force.
- b) Invoices/Bills of Lading/Airway Bills and Exchange Control copies of Bills of Entry for home consumption have been submitted by the importer to the Authorized Dealer bank.
- c) Payment for the import is still outstanding in the books of the importer.
- d) Both the transactions of sale and purchase may be reported separately in 'R' Returns.
- e) The relative GR forms will be released by the AD bank only after the entire export proceeds are adjusted / received.
- f)The "set-off" of export receivables against import payments should be in respect of the same overseas buyer and supplier and that consent for "set-off" has been obtained from him.
- g) The export / import transactions with ACU countries should be kept outside the arrangement.
- h) All the relevant documents are submitted to the concerned AD bank who should

comply with all the regulatory requirements relating to the transactions.

i) Both the transactions of sale and purchase may be reported separately in 'R' Returns.

j) The relative GR forms will be released by the AD bank only after the entire export proceeds are adjusted / received.

k) The "set-off" of export receivables against import payments should be in respect of the same overseas buyer and supplier and that consent for "set-off" has been obtained from him.

l) The export / import transactions with ACU countries should be kept outside the arrangement.

All the relevant documents are submitted to the concerned AD bank who should comply with all the regulatory requirements relating to the transactions.

2. AD Category - I banks may bring the contents of this circular to the notice of their constituents and customers concerned.

3. The directions contained in this circular have been issued under Sections

10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions approvals, if any, required under any other law.
Yours faithfully, (Dr. (Sujatha Elizabeth Prasad)
Chief General Manager **Related Press Release**
Nov 17, 2011 Liberalization of Export/Import procedures "Set-off" of export receivables against import payables

Regarding Circular No. 57 is related to extension of the time for realization of export proceedings. The contents of the circular No. 57 dated 29.06.20 10 as mentioned below

RBI/2009-10/513

A.P. (DIR Series) Circular No.57

June 29, 2010

To

All Category - I Authorized Dealer Banks

Madam / Sir,

**Export of Goods and Software - Realization
and Repatriation of
export proceeds - Liberalization**

Attention of Authorised Dealer Category-I (AD Category-I) banks is invited to A.P.(DIR Series) Circular No.70 dated June 30, 2009 increasing the period of realisation and repatriation to India of the amount representing the full export value of goods or software **exported, from six months to twelve months** from the date of export, subject to review after one

year.

2. The issue has since been reviewed and it has been decided, in consultation with the Government of India, to extend the above relaxation up to March 31, 2011.

3. The provisions in regard to period of realization and repatriation to India of the full export value of goods or software exported by a unit situated in a Special Economic Zone (SEZ) as well as exports made to warehouse established outside India remains unchanged.

4. AD Category - I banks may bring the contents of this circular to the notice of their constituents and customers concerned.

5. The Directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any other law." The AO's contention is that the Circular No. 57 relied by the assessee is not appropriate is not correct for the reason that the Circular No. 47 related to set off of export receivable against import payables and Circular No. 57 related to extended period for realization of the export proceeds and the RBI has issued further circulars extending period also. Circular No. 40 dated November, 1st, 2011 and moreover the contention of the assessee that the circular is related to Foreign Exchange

Management Act (FEMA) but not related to section 10A of the IT Act is not correct for the reason that the whole FEMA is aimed at to encourage more exports against the imports. Section 10A of the IT Act is related to in respect of newly establish undertaking in a free trade zone.

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AO in the assessment order it is mentioned that the CIT (Appeals) has relied on the Hon'ble Supreme Court of India in the case of J.B. Boda & Co. Vs. CBDT reported in 223 ITR 271 which is related to section 800 of the IT Act. The inference has drawn from the Supreme Court judgment where it is clearly mentioned that "two way traffic of receiving foreign exchange here and sending it back is a ritual which is unnecessary; and accordingly held that set off commission payable against commission receivable is " income received in foreign exchange". In this regard it is pertinent to mention here that all the court judgement cannot squarely applicable to the facts of the each case. In such a situation the inference has to be drawn based on the spirit of the judgement but not on the words. Based on the Hon'ble Supreme Court judgment in the case of JB Boda & Co. Vs. CBDT reported in 233 ITR 271 the Hon'ble Allahabad High Court has delivered the judgment

in the case of **CIT, Bareilly Vs. Heena Zabreet reported in 21 taxman 314** it is held that "section 10 of the IT Act-free trade zone-assessee imported gold bars from some foreign parties on credit without incurring any expenditure in foreign currency-it converted these gold bars into gold ornaments and then exported same-amount due and payable to foreign parties in respect of gold bars was deducted from gross export of sale proceeds, to arrive at balance amount receivable by assessee from foreign parties- thus, assessee received back net amount and credited same in bank account-assessee claimed exemption under section 10A on net income-However, Assessing Officer denied exemption on ground that provisions of section 10A were not complied with as entire sale proceeds were not brought into India In *J.B. Boda & Co. (P.) Ltd. v. CBDT* [1997] 223 ITR 271/[1996] 89 Taxman 311, Supreme Court held that if net proceeds are received in foreign exchange and credited, then assessee would not be disentitled from exemption Whether in view of said decision, exemption under section 10A should not be denied to assessee Held, yes [In favour of assessee."

Hazel Mercantile Ltd v ACIT- Mumbai
ITAT dated 30-04-2013 "Section bA- "A two-way

traffic" is unnecessary - i.e. first receive the amount and thereafter pay the amount. ITAT bench observed that the assessee adjusted export proceeds against import payment with RBI's permission. The bench held that, the export proceeds must be treated as "received" by the assessee. Further the bench placed reliance on SC ruling in J B Boda, in which it was held that, in the context of erstwhile Sec 80-0 deduction on foreign earnings, a 'two-way traffic" is unnecessary i.e. first to receive the amount and thereafter to pay the amount. Accordingly, ITAT allowed deduction u/s 10A on amount adjusted against import payables."

Zylog Systems Ltd vs. ITO (2011) 49 0Th 1 (Chennai) (Trib.) (SB) 7 STR (Trib) 348 / 128 ITD 105 (SB) (Yr/b) (Chennai): "The assessee was engaged in the business of development of software by way of onsite and off shore development and had a branch in USA for which separate accounts were maintained. The assessee claimed deduction under section 10B in respect of the exports of software made He also held that the turnover of the USA branch to the extent of Rs. 15.14 crores had to be reduced from the export profits as it had not been received in convertible foreign exchange in India within the period specified in section 10B(3). On appeal CIT(A) upheld the claim of assessee with regard to Rs. 15.14 crores while rejected the claim with regard to Rs. 3.33 crores. The cross appeals of

the parties were referred to Special Bench.

As regards the turnover of Rs 15.14 crore retained abroad, one limb of the Government cannot be allowed to defeat the operation of other limb. While section 10B requires the foreign exchange to be brought to India within the prescribed period, the RBI permits the assessee to retain the said foreign exchange abroad for specific purpose. RBI is the competent authority for section 10B as well. The result is that reinvestment of export earning is deemed to have been received in India and thereafter to have been repatriated abroad. (Principle in 3. B. Boda & Co. (1998) 233 ITR 271 (SC) followed)."

The other tribunal judgements mentioned in appeal order passed by the CIT (Appeals), Hubli for AY 2010-11 dated 30.08.2013 are also on the same line.

In view of the detailed discussion of the facts and court judgements, the contention of the AO that the Hon'ble Supreme Court judgment in the case of JB Boda & Co. Vs. CBDT is not applicable to the facts of the case is not correct for the reasons that based on the Supreme Court Judgment the Hon'ble Allahabad High Court had delivered the judgment by not accepting the two way traffic in the case of CIT, **Barely Vs., Heena Zabreet.** The AO's contention that the RBI Circular No. 57 is not applicable is not correct. The circular says set off of export

receivable against the import payables-liberalization of procedures where it is permitted to set off export proceeds against import payables and the AO also contended that export proceeds not received within six months is also not correct for the reason that Circular No. 40 issued by the RBI dated on November 01, 2011 extended the time period for realization of exports for 12 months from the date of export. Hence, the set off of export proceeds against the import payables beyond six months is as per the circulars issued by the RBI. Hence, the addition made by the Assessing Officer is dismissed and assesses **ground of appeal is allowed.**

4. As regards the allocation of common expenditure to the STPI Unit, the CIT(A) has held as follows;

“ I have gone through the facts of the case, contents of the assessment order and written submissions of the assessee. The AO has disallowed an expenditure of Rs.76,429/- related to STPI Unit on the plea that the assessee has not furnished any evidence to show that said expenditure exclusively related to domestic business. Assessee in the written submission has furnish the details of the expenditure related to domestic unit located in Bangalore and STPI Unit located in Hubli and also filed the details of the two separate balance sheet and P&L account for both units.

When the assessee has maintained the tow separate balance sheet and P& L account maintained for domestic and

STPI Unit separately, it is not appropriate for the AO to club some expenditure such as depreciation and insurance on car, interest on overdraft/cash credit and rates & taxes comprising of service tax on domestic income, Karnataka entry tax on machinery used for domestic unit, Karnataka VAT on sales of domestic unit on presumption without any cogent evidence. For example to STP there is no service tax and Karnataka VAT, hence the addition made by the AO is dismissed and assessee ground of appeal is allowed”.

5. Being aggrieved by the above order, the revenue is in appeal before us in the present appeal.

6. The learned Sr. DR vehemently argued that the facts of the case are distinguishable from the facts in the case of JB Boda Co.Pvt.Ltd. case. He further argued that the assessee never sought the permission for setting off the sale proceedings against import bill and therefore, the CIT(A) was misdirected himself in allowing the appeal.

7. On the other hand, the learned AR relied o the orders of the lower authority.

8. We have heard the rival submissions and perused the material on record. The contention of the Sr. DR cannot be accepted. The CIT(A), after going through the correspondence between the respondent assessee company and the bankers had come to a conclusion that the

set off of the sale proceeds against the import bills was permitted only after necessary approvals from the RBI. The order of the CIT(A) is a speaking order and refers to material based on which he had come to conclusion that set off of sale proceeds was done and he had followed the parity of reasoning in the case of J.B Boda & Co.Pvt.Ltd (Supra) and therefore, this ground of appeal of the revenue is dismissed.

9. As regards the allocation of Expenditure, we find from the details before us that the expenses are not directly or indirectly relatable to the STPI Unit and therefore, in our considered opinion, we do not find any reason to interfere with the reasoning adopted by the CIT(A). Hence, the ground of appeal filed by the revenue is dismissed as such.

10. In the result, the appeal filed by the revenue is dismissed

Order pronounced in the open court on the 30-11-2015.

Sd/-

ASHA VIJAYARAGHAVAN
JUDICIAL MEMBER

Place: Bangalore

D a t e d : 30-11-2015

am*

Copy to :

Appellant
Respondent
CIT(A)-II Bangalore
CIT
DR, ITAT, Bangalore.
Guard file

Sd/-

INTURI RAMARAO
ACCOUNTANT MEMBER

By order, AR,ITAT, Bangalore

