IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**C**" KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.2666/Kol/2013 Assessment Year :2009-10

M/s Midas DFS (P) Ltd. 103/24/1, Binani Metal Compound, Foreshore Road, Howrah-711 102 [**PAN No.AAFCM 0353 G**]	**V/s.**	ITO Ward-1(3), P-7, Chowringhee Square, Aayakar Bhawan, Kolkata-700 069
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Subash Agarwal, Advocate
प्रत्यर्थी की ओर से/By Respondent	None
सुनवाई की तारीख/Date of Hearing	15-11-2016
घोषणा की तारीख/Date of Pronouncement	18-01-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is against the order of Commissioner of Income Tax (Appeals)-XXIV, Kolkata dated 28.12.2011. Assessment was framed by ITO Ward-1(3), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 02.12.2011 for assessment year 2009-10.

2. At the outset it was noticed that none appeared on behalf of Revenue nor any adjournment application filed. Hence, we have taken up the appeal for hearing in the absence of Revenue. Shri Subash Agarwal, Ld. advocate appeared on behalf of assessee.

3. Solitary issue raised in this appeal of assessee is that Ld. CIT(A) erred in confirming the order of Assessing Officer by disallowing the deduction claimed u/s 10AA of the Act in respect of trading, warehousing and consultancy income.

4. Briefly, the facts are that assessee in the present case is a Private Limited Company and engaged in the business of import and export of tobacco products, CNF agent, trading of all types of FMCG products alcoholic and non-alcoholic beverages. The assessee, for the year under consideration has filed its return of income dated 11.06.2010 declaring total income of Rs.58,769/- after claiming deduction u/s. 10AA of the Act for ₹60,04,827/-. Thereafter case was selected for scrutiny and notice u/s. 143(2)/142(1) of the Act was issued upon assessee. Subsequently assessment was framed u/s 143(3) of the Act at a total income of ₹60,90,498/- after disallowing the deduction u/s. 10AA of the Act.

4.1 The assessee, for the year under consideration has shown *inter alia* the income from (i) trading activities (ii) warehousing activities and (iii) consultancy activities. The assessee derived all the aforesaid income from its units located at Falta Special Economic Zone. During the course of assessment proceedings AO observed that the income from trading activity is not eligible. It is because as per the provision of Section 10AA of the Act the assessee should be engaged in the manufacturing / producing articles or things or providing services.

Similarly, for warehousing service income the AO observed that assessee has imported goods which were recorded as purchase in its books of account along with quantitative details. But on later date the same goods were returned to the parties from which the goods were imported but the assessee raised invoice for providing warehousing facilities to such parties. Accordingly, AO was of the view that the bill raised to the party is not related warehousing services as claimed by assessee. The AO further observed for the

warehousing income that the goods should be stored by assessee in its go-down on behalf of some party and the same should be released at the instruction of the party. In the instant case, the assessee company has shown purchase of goods and thereafter purchased return in the books of accounts. The assessee on such transactions of purchase and purchase return has shown warehousing charges income in its books. So it was clear that assessee did not provide warehousing services.

4.2 Besides the above, assessee did not furnish any documentary evidence that assessee was engaged in clearing and forwarding agency business or storing the goods as agent of the party. Similarly, the bank releasing certificate was also not furnished in order to ascertain the nature of the payment received by assessee.

Similarly, assessee failed to furnish any documentary evidence in support of consultancy income shown by assessee in the year under consideration. In view of the above, the deduction claimed by assessee u/s. 10AA of the Act was disallowed and added back to the income of assessee.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that AO has raised no dispute with regard to applicability of the provision of Sec. 10AA of the Act in relation to service income. As per the Special Economic Zone Act and its rules, 2002 service included trading activity by virtue of its Rule 76 under Chapter VIII of Special Economic Zones Rules 2006. The view of AO that the definition of the term 'service' as specified in SEZ Act cannot be imported in the income tax proceedings is wrong. The assessee further submitted that the trading activity of the assessee has already been held eligible u/s 10AA of the Act in its own case for AY 2008-09 by the order of Ld. CIT(A).

The assessee with regard to warehousing income has submitted that same was received from M/s Gallaher Ltd., of United Kingdom as warehousing and handling charges for storing its goods which were eventually returned to the

party. It was also submitted that the FIRC certificates was not submitted before AO as same were not available with the assessee at that relevant time. Similarly, the assessee with regard to consultancy income submitted that it received such income for the purpose of marketing activities on behalf of overseas customers. The consultancy charges are intrinsically linked with normal import-export activity carried out by assessee from its SEZ units. However, Ld. CIT(A) disregarded the claim of assessee after observing that definition provided under the SEZ Rules, 2006 which is included trading activities within the meaning of 'service' cannot applied in the income tax proceedings.

Similarly, assessee has shown warehousing income from storing its own goods which cannot be regarded as service eligible for deduction u/s. 10AA of the Act.

Similarly, the consultancy charges claimed by assessee were not treated as service and accordingly the deduction u/s. 10AA of the Act was denied.

Being aggrieved by this, assessee has come up in appeal before us.

6. Before us Ld AR for the assessee filed paper book which is running pages from 1 to 158 and reiterated same submissions as made before Ld. CIT(A). He also produced ledger copy of the parties along with FIRC which are placed on pages 28 to 43 of the paper book and demonstrated that the aforesaid income received by assessee is eligible for deduction u/s 10AA of the Act.

7. We have gone through the submissions made by ld. AR and order of the lower authorities as well as judgments relied upon before us. From the foregoing discussion we find that the assessee has shown income from the trading activity, warehouse and consultancy services. The assessee in respect to the aforesaid incomes claimed exemption under section 10AA of the Act. The AO denied the exemption under section 10AA of the Act for all the

aforesaid incomes. The AO observed that trading activity is not entitled for exemption under section 10AA of the Act. Similarly necessary documents were not furnished in support of warehousing and consultancy income. Similarly the ld. CIT(A) confirmed the order of the AO on the reasons already adverted in the Para above and the same is not being repeated for the sake of brevity. The ld. CIT(A) also observed that the provisions of SEZ, 2005 cannot override the specific provisions of Income Tax Act ,1961. The crux of the controversy before us is whether assessee in the present case is entitled for exemption under section 10AA of the Act with regard to trading and warehousing & consultancy income.

7.1 First we take up the issue of trading income of the assessee. Admittedly the assessee is engaged in the import and export of the goods which is in the nature of trading activities. As per the Income Tax Act the trading activity is not entitled for the exemption under section 10AA of the Act. However the SEZ Rules 2006 elaborate the service in its rule 76 which says that the service includes trading activities if it relates to the import of the goods for the purposes of export in terms of its explanation to rule 76 of 2006. At this juncture it is so important to reproduce the relevant provisions of SEZ rules 2006 which read as under:-

> *"76. The "**services**" for the purposes of **[1]** [clause] (z) of section 2 shall be the following, namely:- Trading, warehousing, research and development services, computer software services, including information enabled services such as back-office operations, call centres, content development or animation, data processing, engineering and design, graphic information system services, human resources services, insurance claim processing, legal data bases, medical transcription, payroll, remote maintenance, revenue accounting, support centres and web-site services, off-shore banking services, professional services (excluding legal services and accounting) rental/leasing services without operators, other business services, courier services, audio-visual services, construction and related services, distribution services (excluding retail services), educational services, environmental services, financial services, hospital services, other human health services, tourism and travel related services, recreational, cultural and sporting services, entertainment services,*

transport services, services auxiliary to all modes of transport, pipelines transport.
*[1] [Explanation: The expression "**trading**", for the purposes of the Second Schedule of the Act, shall mean import for the purposes of re-export.]*

From the above, it is amply clear that service includes trading activity if it related to the import of the goods for the purpose of the export.

Now the next question arises whether the provisions of Income Tax Act 1961 will prevail over the provisions of The Special Economic Zones Act, 2005. At this point it is relevant to refer the relevant provisions of section 51 of SEZ Act 2005 which is given below:-

"51.(1) The provisions of this Act shall have Act to have effect notwithstanding anything inconsistent overriding effect, therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

7.2 From the reading of the provisions it is clear that the provisions as specified under The Special Economic Zones Act, 2005 would have overriding effect on the Income Tax Act. The same view has also been held in the own case of the assessee by the Hon'ble ITAT in **ITA No.30/Kol/2012** for the AY 2008-09 vide order dated 13/11/2013. The relevant extract of the order is reproduced below:-

*"3. We have heard the rival submissions and perused the relevant material on record. The first objection of the Assessing Officer was that the benefit of Section 10AA of the Act is lost when the assessee is engaged solely in '**trading**' activities. It has been noticed above that Section 10AA(1) allows benefits, inter alia, for the provisions of any 'services' by an eligible enterprise. Obviously, the erstwhile partnership firm i.e., M/s Midas International was permitted to do '**trading**' by the Competent authority. The firm got converted into assessee company and continued the same business with the prior permission from the Competent authority under the SEZ Act. the definition of "service" in the SEZ Act includes 'trading' activity. In that view of the matter, it becomes manifest that the trading activity has been permitted by the Competent authority under the SEZ Act. As such, there can be no question of denial of exception us/s 10AA of the Act. The Ld. Counsel for the assessee has placed on record a copy of an order passed by the Jaipur Bench in* DCIT Vs. Goenka Diamond & Jewellers Ltd. *It appeal No.*

509(JP) of 2011 2012(050)-SOT-0307-TJAI in which it has been held that trading of the eligible goods entitles the se to the benefit of section 10AA of the Act. Similarly, the copy of another order passed by Mumbai Bench in M/s Gitanjali Exports Corporation Limited Vs. ADCIT in **ITA No. 6947 & 6948/Mum/2011** *dated 08-05-2013 has also been placed on record in which the view expressed by the Jaipur Bench has been reiterated. No contrary precedent has been brought to our notice by the Ld. DR. In view of the two Tribunals orders available on the point allowing exemption u/s. 10AA of the Act in respect to '***trading***' activities, we are of the considered opinion that no exception can be taken to the view expressed by the Ld. CIT(A) in granting the exemption."*

Now coming to the issue of denial of exemption in respect of warehousing and consultancy services we find that the assessee has produced FIRC, ledgers, invoices for consultancy and warehousing charges which are placed on pages 28-43 of the paper book. On perusal of the records we find that the AO disallowed the exemption on warehousing charges by observing that the assessee initially shown the import of the goods as purchases and thereafter shows as purchase return. On such transaction of purchase and purchase return the assessee has shown warehouse income for Rs.23,06,539/-. As per the AO, the assessee cannot earn warehousing charges on such transaction and therefore such income is not entitled for exemption u/s 10AA of the Act. However we find that the assessee has raised the bill for the warehousing charges and the payment was also received for the same. The FIRC is also placed in support of the payment. Indeed the assessee has recorded the transaction as purchase and purchase return along with quantitative details of the goods in the books of accounts. Now the question arises whether the accounting entries can change the substance of the transaction. Indeed the assessee has raised the invoice for the warehousing and handling charges as evident from the invoice placed on page 29 of the paper book. The lower authorities have not brought any defect in the bill, payment of the bill and the FIRC in support of the payment. Hence in our considered view the accounting entries cannot form the basis for denying the exemptions on account of warehousing charges to the assessee under section 10AA of the Act.

7.3 Similarly the exemption was denied on the consultancy charges due to non-production of the necessary details. However the assessee has produced the bills along with FIRC before the ld. CIT(A) on which remand report was also called for which are placed on the record and no defect has been reported by the learned DR regarding this. In view of above we're inclined to reverse the order of lower authorities. Hence this ground of appeal of the assessee is allowed.

8. **In the result, assessee's appeal stands allowed.**

Order pronounced in the open court 18/01/2017

Sd/-	Sd/-
(न्यायिक सदस्य)	(लेखा सदस्य)
(N.V.Vasudevan)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,

*Dkp, Sr.P.S
दिनांकः- 18/01/2017 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s Midas DFS (P) Ltd. 103/24/1, Binani Metal Compound, Foreshore Road, Howrah-711 102
2. प्रत्यर्थी/Respondent-ITO Ward-1(3),P-7, Chowringhee Square, Aayakar Bhawan, Kol-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।