

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Ram Lal Negi, Judicial Member**

ITA No. 1650/Mum/2015
(Assessment Year: 2011-12)

M/s. Ossian Exports 902, Jewel World Kalbadevi Road Mumbai 400002	Vs.	Income Tax Officer-14(2)(4) Earnest House Nariman Point Mumbai PAN – AAACFO0992K
Appellant		Respondent

ITA No. 2024/Mum/2015
(Assessment Year: 2011-12)

DCIT, Central Circle-8(3) <i>(Erstwhile DCIT, CC-46)</i> Room No. 659, 6 th Floor Aayakar Bhavan, M.K. Road Mumbai 400020	Vs.	M/s. Ossian Exports 902, Jewel World Kalbadevi Road Mumbai 400002 PAN – AAACFO0992K
Appellant		Respondent

Appellant by: Shri Reepal Tralshawala
Respondent by: Ms. Anju Garodia

Date of Hearing: 25.01.2017
Date of Pronouncement: 31.01.2017

ORDER

Per Jason P. Boaz, A.M.

These are cross appeals, by the assessee and Revenue, directed against the order of the CIT(A)-29, Mumbai dated 12.01.2015 for A.Y. 2011-12.

2. The facts of the case, briefly stated, are as under: -

2.1 The assessee, a firm, inter alia, engaged in trading and import/ export of polished diamonds, gold and gold jewellery, filed its return of income for A.Y. 2011-12 on 29.09.2011 declaring Nil income after claiming deduction of ₹3,61,19,032/- under section 10AA of the Income Tax Act, 1961 (in short

'the Act'). The return was processed under section 143(1) of the Act and the case was subsequently taken up for scrutiny. The assessment was completed under section 143(3) of the Act vide order dated 27.11.2013; wherein the assessee's income was determined at ₹4,83,19,020/- in view of the following disallowances/treatment of an item of income: -

- (i) Disallowance of deduction under section 10AA ₹3,61,19,032/-
- (ii) Treatment of interest on FDs as 'income from other sources' ₹1,23,10,695/-

2.2 Aggrieved by the order of assessment dated 27.11.2013 for A.Y. 2011-12, the assessee preferred an appeal before the CIT(A)-29, Mumbai. The learned CIT(A) disposed off the appeal vide the impugned order dated 12.01.2015 allowing the assessee partial relief by (i) allowing the assessee's claim for deduction under section 10AA of the Act, and (ii) by upholding the AO's action in treating interest on FDs as being exigible to tax as 'income from other sources'.

3. Both Revenue and the assessee, being aggrieved by the impugned order of the CIT(A)-29, Mumbai for A.Y. 2011-12 dated 12.01.2015, have preferred cross appeals in respect of the issues held against them in the aforesaid impugned order. Their appeals will be disposed off in seriatum hereunder: -

4. **Revenue's appeal in ITA No. 2024/Mum/2015 for A.Y. 2011-12**

4.1 In this appeal Revenue has raised the following ground on the issue of deduction under section 10AA of the Act: -

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in holding that the assessee is eligible for deduction u/s. 10AA.

The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.

The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary."

The learned D.R. for Revenue placed strong reliance on the order of the AO in disallowing the assessee's claim for deduction under section 10AA of the Act.

4.2.1 Per contra, the learned A.R. of the assessee contended that there was no error in the learned CIT(A)'s order in allowing the assessee's claim for deduction under section 10AA of the Act. According to the learned A.R., the assessee was engaged in the business of trading in diamond and gold jewellery and had claimed deduction under section 10AA of the Act in respect of income earned from trading activity in import/export of cut and polished diamonds in its SEZ unit at Surat. It is submitted that in the course of assessment proceedings, the Assessing Officer (AO) came to the view that in the year under consideration the assessee had neither manufactured or produced any goods or articles nor provided any services, as the imported diamonds were merely immediately re-exported, therefore its claim for deduction under section 10AA was not allowable and is to be disallowed. In coming to this finding, the AO rejected the assessee's contention that the term 'services' as used in section 10AA(9) of the Act should be read as defined in the SEZ Act, 2005 which would override the provisions of section 10AA of the Act.

4.2.2 It is contended that this interpretation of the AO is erroneous as section 51(1) of the SEZ Act is a non-obstante clause and will override anything inconsistent therewith contained in any other law or instrument that may be in force. It is further contended that 'services' as defined in Rule 76 of the SEZ Rules, 2006 and the Explanation thereto state that the expression 'trading' shall mean import for the purpose of re-export and therefore the assessee was entitled to be allowed deduction under section 10AA as claimed. It is submitted that in identical factual circumstances as in the case on hand, the Coordinate Bench of the Tribunal in the case of; (i) Geetanjali Exports Corporation Ltd. & Others in ITA No. 6947/Mum/2011 dated 08.05.2013, following the decision of the ITAT, Jaipur Bench in the case of Goenka Diamonds and Jewellers Ltd. in ITA No. 509/JA/2011 dated 31.01.2012; have allowed the assessee's claim in those cases for deduction under section 10AA of the Act. It is prayed that in view of the above factual position of the case on hand and the judicial pronouncements cited (supra) which are on identical facts, the learned CIT(A)'s order allowing the assessee's claim for deduction under section

10AA of the Act following the aforesaid decisions of the ITAT (supra) be upheld and Revenue's grounds/appeal be rejected.

4.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited (supra). On an appreciation of the material on record, it is seen that in the course of assessment proceedings, while examining the assessee's trading activities in connection with its claim for deduction under section 10AA of the Act, the AO observed that assessee had merely imported diamonds from Dubai and the same without any value addition was immediately re-exported to Dubai. The AO was of the view that, since the assessee had neither manufactured or produced any goods or articles nor provided any services during the year while trading in exports, deduction under section 10AA is not allowable. In coming to this finding the AO rejected the assessee's claim that the term 'services' under section 10AA(9) of the Act should be read as defined in Section 2(z) and Section 51(1) of the SEZ Act, 2005 and Rule 76 of SEZ Rules, 2006 thereunder, which overrides the Act.

4.3.2 In the case on hand, we are inclined to concur with the finding of the learned CIT(A) that the facts brought on record clearly establish that the assessee is engaged in trading and re-export of imported diamonds and therefore would be entitled to deduction under section 10AA of the Act in view of the overriding provisions of section 51(1) of SEZ Act, 2005. The provisions of SEZ Act will be applicable since there is no doubt that export trading for re-export is covered by and included as 'services' as defined thereunder. We have carefully perused the judicial pronouncements cited and referred to by the learned CIT(A) in the impugned order and find that an identical fact situation has been considered and adjudicated in favour of the assessee by the Coordinate Bench of the Tribunal in the case of Geetanjali Exports Corporation Ltd. & Others in ITA No. 6947/Mum/2011 dated 08.05.2013, wherein following the decision of the ITAT Jaipur Bench in the case of Goenka Diamonds and Jewellers Ltd. (ITA No. 509/JA/2011 dated 31.01.2012) it was held as under at para 22 thereof: -

"22. We have heard rival submissions and considered them carefully. After considering the submission and perusing the material on record, ITA Nos.6947, 6948,6781,6783, 6785,6787,6949&6950/2011 15 we found no infirmity in the finding of the learned CIT(A). The finding of the learned CIT(A) have been recorded in para 2.2 & 2.3 at page 9 and 10, which are as under :-

"I have carefully considered the findings of the Assessing Officer and submissions of the appellant. I have also gone through the relevant sections as well as provisions of SEZ Act and Circular NoAI2006 issued by the Government of India (Ministry of Commerce & Industry). The Assessing office has disallowed deduction u/s.10AA on the trading activity by the appellant from plot No.241, Unit No.374, situated in Surat SEZ areas because he was not agreeable with the arguments of the appellant that trading activity carried out by the appellant are red by service. The Assessing Officer was of the view that such exemption ct is available only on manufacturing activity and not on trading of goods. He has relied upon the decision of Delhi High Court and Supreme Court to understand the meaning of the word 'service' because the service has not been denied in the Income-tax Act. After considering the entire facts and case laws as well as circular relied by the appellant I find merit in the claim of the appellant because it is very clear from Circular 17 of 29.05.2006 issued by the. Export Promotion Council For EOUs & SEZ Unit (Ministry of Commerce & Industry, Government of India) para 2 of which reads as under :-

"In the meantime, sourcing from domestic area may be permitted by units in the SEZs which are allowed to do trading subject to this circular being cited on prescription of an undertaking by the concerned unit that no Income-tax benefit will be availed by the Unit for trading except in the nature of re-export of imported goods".

2.3 The appellant has filed a schedule to SEZ which clears the case with modifications to the income-tax Act, 1961 for inserting Sec.10AA of the Act.

10 Instruction No.4/2004 also clears the claim of deduction u/s.10AA of the Act to the units carried out for trading in the nature of re-export form the SEZ Act. So it is very clear from the SEZ Act that service includes trading also and appellant has done trading from SEZ Act of the imported goods which have been re- exported after processing. It is further very clear from Section 51 of the SEZ Act which provides as under:

"Section 51 of the SEZ Act provides as follows:- "51(1) The provisions of this Act shall have effect notwithstanding anything inconsistent 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". Hence, by virtue of Section 51 of the

SEZ Act, the provisions of the SEZ Act and the Rule will have overriding effect over the provisions contained in any other Act. it can be seen from the wordings of Section 51 (1) of SEZ Act the provisions of the SEZ Act and Rules has overriding effect in case of contradiction between the SEZ Act and other Act. Thus the provisions of SEZ Act will be applicable and since there is no doubt that trading is covered by services and services include trading as per SEZ Act. Therefore the appellant is fully entitled for deduction u/s.10M of the Act on goods imported and reexported from SEZ Act. However, no such deduction will be available on the local purchase and sales made by the Appellant and that is why Government has made it clear that local purchase and sale will not be entitled for benefit. Therefore, the Assessing Officer is directed to allow benefit and deduction u/s.10M of the Act on the import-export trading activity of the appellant. However, no such benefits should e given in the local purchase and sale made by the appellant. He should ensure this fact again while giving effect to this order. Hence, this ground of appeal is allowed.”

We noted that learned CIT(A) has taken into considering the aspect and observation of the AO that deduction under Section 10AA is not allowable for the reason that the assessee has not carried out any manufacturing activity but has done trading of goods only. For this purpose, learned AO has placed reliance on the order of Hon'ble Delhi High Court. Learned CIT(A) has taken into consideration these observation of the AO and thereafter he found that the Government of India has issues a circular No.17 of 29.5-2006, which was issued by Export Promotion Council For EOUs & SEZ Unit (Ministry of Commerce & Industry, Government of India). The contents of the Circular have also been incorporated in the finding of the learned CIT(A), which have also been reproduced somewhere above in this order. Therefore, we are not repeating the contents of that circular issued by the Ministry of Commerce & Industry, Government of India). Under Section 51(1) of the SEZ Act, it has been clearly provided that the provision of this Act has overriding effect in case of contradiction between the SEZ Act and other Act. Hence, by virtue of Section 51 of the SEZ Act, the provision of SEZ Act and rules will have overriding effect over the provision contained in any other Act. Learned CIT(A) has taken into consideration this circular issued by Government of India and the provision of Section 51 of the SEZ Act and found that trading done by the assessee is a service and, therefore, deduction under Section 10AA is allowable. We further noted that on similar facts in case of Goenka Diamonds and Jewellery Limited (supra), the Jaipur Bench of the Tribunal has discussed the issue in detail. The provisions of Section 51 of SEZ Act were also considered. The decision of the Hon'ble Supreme Court in the case of Tax Recovery Officer Vs. Custodian Appointed Under The Special Court, reported in the case of 211 CTR 369 (SC) and the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Vasisth Chay Vyapar Ltd., reported in 238 CTR

142 (Delhi), were also taken into consideration and thereafter it was concluded that in view of the Instruction No.1 of 2006, dated 24-3-2006 as modified by Instruction No.4 of 2006, dated 24-5-2006 issued by the Ministry of Commerce & Industry, Government of India and the definition of service given in the SEZ Act, 2005, which overrides the word 'service' accruing in Section 10AA by virtue of Section 51 of the SEZ Act. The assessee engaged in trading in nature of re-export of imported goods and for the same the assessee was entitled deduction under Section 10AA of the Act. Facts are similar before us, as the assessee is engaged in trading of re-export of imported goods and, therefore, the assessee is entitled for deduction under Section 10AA of the Act. All the arguments advanced by the learned DR before us have also been taken care of by the Tribunal while discussing the appeal in the case of Goenka Diamonds and Jewellery Limited (supra). It is further noted that the main plank of argument of learned DR is that rules provided under the SEZ Act cannot partake the character of the Section of the Income Tax Act. We find that in the SEZ Act under Section 51, it has been clearly provided that the provision of SEZ Act will override the provision of any other Act, meaning thereby the provision provided under the SEZ Act has to override on the provision of Section 10AA of the Income Tax Act. Under the rules, it is not provided but under Section 51 of the SEZ Act, it is provided, therefore, in our view, the contention raised by the learned DR is not tenable. Moreover, the issue is squarely covered by the decision of the coordinate Bench in the case of Goenka Diamonds and Jewellery Limited (supra). Therefore, respectfully following the decision of the Tribunal in the case of Goenka Diamonds and Jewellery Limited (supra) and in view of the reasoning given by the learned CIT(A), we confirm his order.”

4.3.3 In view of the factual and legal matrix of the case as discussed above and following the decision of the Coordinate Bench of the Tribunal in the case of Geetanjali Exports Corporation Ltd. (supra), we are of the considered opinion and hold that the assessee in the case on hand is eligible for deduction of its income earned from trading exports of diamonds under section 10AA of the Act and therefore uphold the finding of the learned CIT(A) on this issue in the impugned order. Before us, the learned D.R. was not able to contravene the decision of the learned CIT(A) in the impugned order on this issue. Consequently the grounds raised by Revenue are dismissed.

5. In the result, Revenue's appeal for A.Y. 2011-12 is dismissed.

6. **Assessee's appeal in ITA No. 1650/Mum/2015 for A.Y. 2011-12**

6.1 In this appeal, the assessee has raised the following grounds: -

- “1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in law treating the income from Fixed Deposit as income from other source where in the nexus of business transaction was already proved.
2. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in law in holding that the expenses are not pertaining to the income earned in the nexus of business transaction was already proved.
3. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred not allowing the expenditure from the income which was incurred solely for the purpose of earning the same.
4. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in not deciding the fact that the addition of the income by the leaned AO in respect of FD interest was double addition.
5. Appellant reserves the right to add, amend, modify or alter the above grounds of appeal at any stage of appellate proceedings.”

7. Grounds 1 to 3 – Income from Fixed Deposits (FD)

7.1 In these grounds, the assessee assails the impugned order of the learned CIT(A) in treating the income from fixed deposits (FD) as ‘income from other sources’; instead of as part of ‘business income’ as claimed, since the nexus of the same been clearly established by documentary evidence and the same is therefore allowable as deduction under section 10AA of the Act. The learned A.R. of the assessee submitted that the FD in question was not made out of assessee’s excess funds or with an intention to earn interest, but was for its export business. The assessee in the course of its business of import/export trading in diamonds opened a Letter of Credit (L/C) with Corporation Bank, Surat Branch and as per the terms and conditions specified by the Bank in this regard vide letter dated 29.12.2010, the assessee made an FD (as margin money) equivalent to 95% of the transaction value to assure that the maturity amount of FD would cover 100% value of L/C on the date of payment (copy placed at page 75 of the paper book). According to the learned A.R., this clearly establishes that the income earned from the aforesaid FD has a clear nexus with the assessee’s business and being a part of business receipts would constitute business income. This income would, therefore, be eligible for deduction under

section 10AA of the Act. In support of this proposition, the learned A.R. of the assessee, inter alia, placed reliance and submitted that in similar factual situation, the Coordinate Bench of the Tribunal in the case of Jewel Art in ITA No. 642/Mum/2013 dated 30.09.2015 has held this issue in favour of that assessee and against the Revenue.

7.2 Per contra, the learned D.R. supported the finding of the authorities below that the income earned on the aforesaid FD constitutes income from other sources and since it was not part of the assessee's business income, would not be entitled for deduction under section 10AA of the Act.

7.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncement cited. The facts on record indicate that the assessee in the course of its business of import/export trading in diamonds earned interest income from FDs kept in Bank as per instructions of Bank by way of margin money for the purpose of assessee's business and the assessee considering the same as business receipts/income, claimed deduction thereon under section 10AA of the Act. Revenue, however, treated the same as 'income from other sources' and thereby disallowed the assessee's claim thereon for deduction under section 10AA of the Act.

7.3.2 Before us, the learned A.R. has submitted that the said FDs with Banks were not made out of it excess funds or with the intention of earning interest income, but out of business funds. As per the details filed before us (placed at page 75 of the paper book) it is evident that the FD in question was made by the assessee with Corporation Bank as per the requirements/directions laid down by the Bank, as margin money, when opening an L/C for its business of import/export trading in diamonds. We find from a perusal of the cited judicial pronouncement that an identical issue was considered and adjudicated by the Coordinate Bench of the Tribunal in the case of M/s. Jewel Arts (ITA No. 642/Mum/2013 dated 30.09.2015) in favour of the assessee and against Revenue, following, inter alia, the decision of the Coordinate Bench in the case of Prestress Wire Industries (ITA No. 8418/Mum/2010 and 6312/Mum/2011 dated

31.01.2014). At para 3 to 6 thereof the Coordinate Bench in the aforesaid order has held as under: -

“3. Briefly stated relevant facts of the case are that the assessee is an exporter of diamond jewellery and reported the earning of interest income out the fixed deposits kept with the banks by way of margin money for the purpose of assessee’s business. The dispute arose on the treatment of the said interest income. Assessee considered the same as a ‘business receipt’. Assessee claimed exemption u/s 10A of the Act in respect of the said interest receipts. Per contra, Revenue Authorities treated the same as “income from other sources” and denied the benefit of deduction u/s 10A of the Act. Aggrieved with the same, assessee is in appeal before us.

4. During the proceedings before us, Ld Counsel for the assessee submitted that the assessee has not made FDs with the bank out his excess funds or for a longer period with an intention to earn interest income. Further, elaborating the same, Ld Counsel for the assessee submitted that the FDs made were out of the working capital and out of the business funds. It is the business requirement of the assessee that the FDs are to be made with the directions of the bank. Referring to various documents placed in the paper book, Ld Counsel for the assessee brought our attention to the correspondence placed at page 28 onward and read out the relevant instances of the bank insisting the assessee to prepare term deposits in the bank. Further, bringing our attention to various decisions of the Tribunal, wherein one of us (AM) to the order in the case of ACIT vs. M/s. Prestress Wire Industries in ITA No. 8418/M/2010 (AY 2007-2008) and ITA No. 6312/M/2011 (AY 2008-2009) and others dated 31.1.2014, Ld Counsel for the assessee mentioned that the said decision is relevant for the proposition that, under the identical factual matrix, the receipts were treated as “business receipts” and declared as eligible for deduction u/s 80IA of the Act. In this regard, he brought our attention to the relevant paras 14 to 16 of the said Tribunal’s order (supra). Further, bringing our attention to other decisions of the Tribunal, Ld Counsel for the assessee mentioned that they relate to prior to the amendment to section 10A(4) of the Act. He also relied on the Judgment of the Apex Court in the case of CIT vs. Karnal Cooperative Sugar Mills Ltd 243 ITR 2 (SC) and the judgment of the Bombay High court in the case of CIT vs. Indo Swiss Jewells Ltd 284 ITR 389 (Bom) and also on various precedents of the Hon’ble Supreme Court as well as various High Courts, copies of which are placed in voluminous paper book, and submitted that the said judgments were relied upon by the Tribunal in adjudicating the issue in favour of the assessee in the said case dated 31.1.2014 (supra).

5. After hearing both the parties and on perusal of the said order of the Tribunal, we find the issue is covered in favour of the assessee on the facts of this case. For the sake of completeness of this case, we

extract the said paras 14 to 16 of the said Tribunal's order in the case of M/s. Prestress Wire Industries and the same read as under:

14. Regarding the issue of interest received from fixed deposits kept as margin money for bank guarantees, Ld Counsel for the assessee mentioned that the temporary deployment of funds should be assessed as 'business income' and not as 'income from other sources' as treated by the Assessing Officer. In this regard, Ld Counsel relied on the following decisions.

- i) CIT vs. Vidyut Steel Ltd. 219 ITR 30 (AP)*
- ii) CIT vs. Koshika Telecom Ltd 287 ITR 479 (Del)*
- iii) CIT vs. Karnal Cooperative Sugar Mills Ltd 243 ITR 2 (SC)*
- iv) CIT vs. Indo Swiss Jewells Ltd 284 ITR 389 (Bom)*

15. On the other hand, Ld DR dutifully relied on the order of the AO.

16. We have heard both the parties and perused the orders of the Revenue Authorities as well as citations quoted by the Ld Counsel along with the relevant material placed before us. On perusal of the cited judgments of the higher judiciary, we find that they are relevant for the proposition that there is no question of isolating the interest received on margin money paid for obtaining bank guarantee and assessing it as separate income under section 56. Therefore, agree with the view of the Tribunal that the income derived on the margin money for obtaining bank guarantee cannot be separately assessed under section 56. Considering the binding judgments given by the Hon'ble High Courts as well as the Hon'ble Supreme Court, we are of the opinion that the interest derived on margin money for the purpose of obtaining bank guarantee should be assessed as 'business income' instead of 'income from other sources'. Accordingly, we decide this part of the ground in favour of the assessee."

6. Considering the above settled nature of the issue, we are of the opinion that the said interest receipts constitute business receipts and are eligible for deduction u/s 10A of the Act. Accordingly, the grounds raised by the assessee are allowed."

7.3.3 Following the aforesaid decision of the Coordinate Bench of the Tribunal in the case of Jewel Arts (supra), which is on similar factual/legal matrix as the case on hand, we are of the considered opinion that the said interest receipts earned by the assessee out of FDs kept with Banks by way of margin money made for the purposes of the assessee's business of import/ export trading in diamonds, constitutes business receipts/income and is therefore eligible for deduction under section 10AA of the Act. We

hold and direct accordingly. Consequently, assessee's appeal on grounds 1 to 3 is allowed.

8. **Ground No. 4**

8.1. In view of our finding rendered allowing grounds 1 to 3 of the assessee's appeal, that income earned from out of FDs made with Banks for business purposes constitutes business receipts/income and is therefore eligible for deduction under section 10AA of the Act (supra), ground No. 4 is rendered infructuous and is accordingly dismissed.

9. **Ground No. 5** being general in nature, no adjudication is called for thereon and the same is dismissed as infructuous.

10. In the result, the assessee's appeal for A.Y. 2011-12 is partly allowed

11. To sum up, Revenue's appeal for A.Y. 2011-12 is dismissed and the assessee's cross appeal is partly allowed.

Order pronounced in the open court on 31st January, 2017.

Sd/-
(Ram Lal Negi)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 31st January, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -29, Mumbai*
4. *The CIT - 18, Mumbai*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.