आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई मे।

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

BEFORE SRI MAHAVIR SINGH, JM AND SRI G MANJUNATHA, AM

आयकर अपील सं./ ITA No. 768/Mum/2016

(निर्धारण वर्ष / Assessment Year 2004-05)

आयकर अपील सं./ ITA No. 769/Mum/2016

(निर्धारण वर्ष / Assessment Year 2006-07)

The Dy. Commissioner of Income Tax 3(2)(2), Mumbai	Vs.	M/s Parkar Markwel Industries P. Ltd (Formerly known as Markwel Hose Industries Pvt. Ltd.) Plot No. EL-25, MIDC, TTC Industrial Area, Navi Mumbai-400 709
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
PAN No. AACM9967D		

Revenue by	:	Shri Rajat Mittal, DR
Assessee by	:	Shri Dr. SK Shivram & Shri Rahul K Hakani, ARs'

Date of hearing: 23-05-2018 **Date of pronouncement :** 15-06-2018

आदेश / O R D E R

PER MAHAVIR SINGH, JM:

These two appeals by the Revenue are arising out of the orders of Commissioner of Income Tax (Appeals)-8, Mumbai [in short CIT(A)], in appeal No. CIT(A)-8/IT-190 & 191/14-15 of even date 30.11.2015. The Assessments were framed by the Dy. Commissioner of Income Tax, Cir. 3(2), Mumbai (in short 'DCIT') for the A.Y. 2004-05 & 2006-07 vide order

dated 18-02-2014, 31.03.2014 under section 143(3) read with section 254 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only common issue in these appeals of Revenue is against the order of CIT(A) allowing the claim of exemption under section 10B of the Act ignoring the fact that AO while passing order under section 143(3) read with section 263 and 143(3) read with section 254 of the Act rejected the claim of the assessee on the ground that Export Oriented Unit (EOU) was formed out of splitting up and reconstruction of existing business of DTA. For this Revenue has raised identical worded grounds in both the years and lead year being AY 2004-05 in ITA No. 768/Mum/2016, we will take the facts from this year and reproduced the grounds and decide the issue. The relevant grounds raised by the Revenue reads as under: -

> *"1. Whether on the facts of the case and in law the ld. CIT(A) right in holding that the assessee is entitled to exemption u/s. 10B of Rs.2,01,94,869/-, ignoring the fact that in both the assessment orders passed u/s.143(3) r.w.s. 263 and u/s.143(3) r.w.s. 254 the Assessing Officer rejected claim of assessee for exemption u/s. 10B on the ground that EOU was found as Splitting up & Reconstruction of existing business of DTA".*
>
> *2. Whether on the facts of the case and in law, the Id. CIT(A) was right in allowing exemption u/s. 10B to assessee without appreciating facts that the EOU was started on the same plot of land DTA was functioning utilizing P&M and "Building of DTA and producing the same product that the DTA and producing the same product that the DTA was manufacturing and hence the EOU was nothing but*

expansion of DTA and therefore not eligible for exemption as condition(ii) of sub-section(2) of section u/s. 10B is violated, as held by the AO?."

3. Whether on the facts of the case and in law the Id. CIT(A) was right in allowing exemption u/s.10B to assessee holding that New Business u/s.10B means new line of manufacturing and not New business with new line of activity or new line of manufacturing, but in the same line of existing activity.?

4. Whether on the facts of the case and in law the Id.CIT(A) was right in allowing exemption u1s.10B to assessee manufacturing the same goods in EOU that was being manufacturing in DTA, without following the decision of the Hon'ble ITAT, Mumbai in the case of Chenab Information Technologies Vs. ITO, reported in 562 TIOL 2008 decided in favour of Revenue?

5. Whether on the facts of the case and in law the Id. CIT(A) was right in allowing exemption u/s.10B to assessee without appreciating the fact that the EOU was not a hundred percent EOU and goods manufactured in EOU were sold locally also?"

3. Briefly stated facts are that this is second round of assessment and re-assessment framed under section 143(3) read with section 254 of the Act vide order dated 18.02.2014. Originally, the Tribunal has set aside the assessment with direction to reframe the assessment after providing the opportunity of being heard to the assessee. The AO required the assessee to explain as to why the exemption claimed under section 10B of the Act be not denied for the reason that the EOU was formed on

transfer of old undertaking and hence, it is built by splitting up and reconstruction of existing business. The assessee replied vide submission dated 28.12.2013. According to AO, the assessee has not started a new business and 100% EOU was created after splitting up and reconstruction. For this AO recorded the following facts: -

> *"(I) Splitting up reconstruction of business already in existence:*
>
> *43.1. The first DTA unit was situated on Plot No.26.29,104 Phase-IV, Patancheru, Dist Medak, Andhra-502319 admeasuring 6.2 acres equivalent to about 25000 sq.mts. Out of the said area of 25000 sq. mtrs the DTA unit was having a built up area of about 5242 sq. mtrs. Out of the remaining area, an Industries shed was constructed with a total built up area of about 4539 sq mts for EOU-1 unit.*
>
> *4.3.2. A new plot of land bearing no.16A IDA Phase IV patancheru Dist- Medak, Andhra Pradesh 502319 was purchased having the land area of about 2.64 acres equivalent to about 10,500 sq. mtrs An industrial shed was constructed with a total built up area of about 1714 sq. mtrs as EOU-11 unit for catering to the rubber compound requirements for EOU-1 Unit.*
>
> *4.3.3. From the Annual accounts by Note No.4, it is observed that the Auditors that company has set up and commissioned an EOU under Exim Policy by Partial Conversion, the relevant note no.4 is reproduced below:*

The company set up and commissioned an EOU unit under exim policy by partial conversion of its existing unit into 100916 E0U on 1.3.2003. Portion of fixed assets of the company consisting of building valued at gross Rs. 70,51,461/ -with accumulated depreciation of Its.25,59,8271- and plant and machinery valued at Gross Rs,2,15,79,6371- with accumulated depreciation of Rs.97,16,5831- has been transferred to EOU division at cost These transfers an respect of gross block and depreciation block for each relevant asset have been effected and included under original cost block and depreciation block of schedule of fixed assets.

4.3.4. From the above note it is clear that the existing Domestic Tariff Area Unit (OTA) has been split up and reconstructed with the held of new and old machineries housed under an Industrial shed on the same plot where OTA unit is in existence. The amounts to splitting up and reconstruction of the old DTA unit. Therefore, condition laid down in section 10B(2)(ii) are not fulfilled by the assessee. Reliance is placed on recent decision of Mumbai ITAT in the case of Chenab Information Tech P. Ltd vs. ITO (562 TIOL 2008) which is relevant to the issue and facts of the present case, wherein it was held that new unit set up by splitting up of the old units and continuing the same business is not eligible for deduction u/s.10A.

Thus, from the above, it is clear that the new undertaking is nothing but splitting up of the old business with a view to avail the benefit of section

> *10B. Although, the plant & machinery received on transfer from the existing business remain below the threshold of 20% but viewed as a whole, the assessee spitted the existing business to carry out the undertaking claimed to be new."*

4. On the basis of the above, the AO noted that no new business has started and hence, he disallowed the claim of exemption under section 10B of the Act. Aggrieved, assessee preferred the appeal before CIT(A).

5. The CIT(A) allowed the claim of the assessee by following the order of CIT(A) in ITA No. 122/2008-09 dated 20-02-2009 by observing in Para 5.2 to 5.2.7 as under: -

> *"5.2.1 Since grounds nos. 1 to 3 of appeal are essentially related to the claim of deduction u/s 1OB of the Income Tax Act, they are dealt with together. In the latest assessment order dt. 18-02-2015, which is the subject of this appeal, the AO, in para 4.3 has denied the deduction u/s 1OB only on the following 2 grounds:*
>
> *i. There is splitting up and reconstruction of a business already in existence,*
>
> *ii. The new undertaking is not 100% export oriented.*
>
> *5.2.2 He has explicitly stated "There is no dispute regarding" all other conditions for claiming deduction u/s 10B. Therefore, it is unnecessary to de novo examine all other conditions,*
>
> *5.2.3 As regards condition in above, I find that it has been comprehensively discussed by my Ld. Predecessor in his order bearing No. IT 122/08-09 dated 20th Feb, 2009 referred to above. In para 8,*

after extensively discussing the concept of split up and reconstruction, he observed,

> *in view of the decisions in the cases of Hindustan General Industries Ltd. and in the case of Textile Machinery Corporation Ltd. where meanings of split up and reconstruction have been explained appellants case is not covered as either split up or reconstruction Therefore, the denial of deduction on this ground is not justified."*

5.2.4 I find no reason to controvert or differ from the cogent reasoning of my Ld. Predecessor in this matter.

5.2.5 Coming to the only remaining objection of the AO that the new undertaking is not 100% export oriented I find that his reasoning is erroneous. Export oriented does not mean exclusively for export. The fact is in the instant case, the manufactured goods exported amount to ₹ 17 crores and the rejected or the defective goods unfit for exports only have been sold for Rs. 11 lacs in the local market. As evident, domestic sales constitute only a miniscule portion (0.65%) of the total turnover of the EOU.

5.2.6 The Act itself defines what is 100% export oriented unit in Explanation 2 of Section 10B. There is no dispute that the competent authority has designated the undertaking as EOU. It is not for the AO to step into the shoes of the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries

> *(Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act unless he finds something adverse. Zero domestic sale of rejects or defective goods are not envisaged anywhere in s. 10B. Therefore, this reasoning of the AO is unjustifiable.*
>
> *5.2.7 In view of the above, the order or the AO under appeal has no legs to stand upon. Accordingly, grounds of appeal 1 to 3 are allowed and the claim under section 10B of appellant at Rs.2,01,94,869 is upheld.'"*

Aggrieved, Revenue is in appeal before Tribunal.

6. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the assessee is engaged in the business of manufacturer of high pressure Hydraulic Hoses. The assessee before us claimed that during the relevant year under consideration the assessee started a new unit being a EOU unit from 01.08.2003. It was explained that EOU Unit-1 has manufacturing unit which is on plot and No 26/29 and on plot No 16/29 is the EOU unit 2 mixing and RM concern unit which is exclusively used for captive consumption of EOU unit. It was further explained that DTA mixing and RM stores which is on different and separate plot. It was explained that on plot No 26/29 the total area admeasuring about 25,000 sq. meters. Out of this 25,000 sq. meters split up area, about 5,242 sq. meter used for DTA unit and the balance remaining area was used for EOU after constructing industrial shed admeasuring about 4,500 sq. meters. Further, another plot No. 16, an industrial shed was constructed with built up area on 1,714 sq. meters categorically to the component requirement for EOU 1 unit. From the above, undisputed facts are that the percentage of new machinery is 91% and only 9% is out of old machinery. The sales

effect by EOU unit is ₹ 1,702.45 lakhs and for DTA unit it is ₹ 4,321.33 lakhs and for both the units separate books of accounts are maintained. Accordingly, the total investment in setting up a new unit is more than 6 crores. Separate godown, separate manufacturing unit, labour stores etc. and separate power and wages. It is also a fact that factory sheet is clearly earmarked in respect of EOU unit. The assessee obtained letter of permission from Dev commissioner and an agreement is clearly entered into between the unit and DTA unit, which is monitored by Dev commissioner. Even the central excise registration certificate for EOU unit and permission from Asst. Commissioner of custom and excise to commence production is obtained. In similar facts, the Tribunal for AY 2005-06, 2007-09 and 2008-09 vide its order dated 03-07-2013 remanded the matter back to the file of the AO to decide afresh in term of what is to be decided for AY 2004-05 and 2006-07. In regard to these three AYrs i.e. AY 2005-06, 2007-08 and 2008-09 noticed under section 143(2) of the Act were issued dated (of even date) 24.01.2014, which were replied by the assessee. But no assessment order has been passed on remand order by the ITAT and these 3 AYrs have become time barred as per section 153(3) of the Act and the claim of deduction under section 10B of the Act stands allowed for these three AYrs.

7. We find that in the similar circumstances the Hon'ble Supreme Court in the case of Textile Machinery Corporation Ltd vs. CIT (1977) 107 ITR 195 (SC) has considered the issue of new manufacturing, whether the new business can be said to be reconstituted and the business already in expense. Hon'ble Supreme Court answer this issue by observing as under:-

> *"Reconstruction of business involves the idea of substantially the same persons carrying on substantially the same business. It is stated on behalf of the revenue that the same company in the*

instant case continues to do the same business of heavy engineering—no matter certain spare parts necessary as components to completion of the end-product are now manufactured in the business itself. The fact that the assessee is carrying on the general business of heavy engineering will not prevent him from setting up new industrial undertakings and from claiming benefit under section 15C if that section is otherwise applicable. However, in order to be entitled to the benefit under section 15C, the following facts have to be established by the assessee, subject always to time-schedule in the section:

(1) investment of substantial fresh capital in the industrial undertaking set up,

(2) employment of requisite labour therein,

(3) manufacture or production of articles in the said undertaking,

(4) earning of profits clearly attributable to the said new undertaking, and

(5) above all, a separate and distinct identity of the industrial unit set up.

We may add that there is no bar to an assessee carrying on a particular business to set up a new industrial undertaking on account of which exemption of tax under section 15C may be claimed.

The legislature has advisedly refrained from inserting a definition of the word "reconstruction" in the Act. Indeed, in the infinite variety of instances of restructuring of industry in the course of strides in technology and of other developments, the question has to be left for decision on the peculiar facts of each case.

If any undertaking is not formed by reconstruction of the old business that undertaking will not be denied the benefit of section 15C simply because it goes to expand the general business of the assessee in some directions. As in the instant case, once the new industrial undertakings are separate and independent production units in the sense that the commodities produced or the results achieved are commercially tangible products and the undertakings can be carried on separately without complete absorption and losing their identity in the old business, they are not to be treated as being formed by reconstruction of the old business.

The business of the assessee is of heavy engineering. The two new undertakings are independently producing articles which may be of aid to the principal business but yet the undertakings are distinct and not reconstruction out of the existing business of the assessee. Use by the assessee of the articles produced in its existing business or the concept of expansion are not decisive tests in construing section 15C. The High Court is not right in holding the two undertakings as formed by reconstruction of the existing business of the assessee.

Several decisions have been cited at the bar before us. We approve of the conclusions in Commissioner of Income-tax v. Ganga Sugar Corporation Ltd. [1973] 92 ITR 173 (Delhi), Rajeswari Mills Ltd. v. Commissioner of Income-tax [1963] 50 ITR 29 (Mad), Nagardas Bechardas & Brothers P. Ltd. v. Commissioner of Income-tax [1976]

104 ITR 255 (Guj), Commissioner of Income-tax v. Electric Construction and Equipment Co. Ltd. [1976] 104 ITR101 (Cal) and Commissioner of Income-tax v. Hindustan Motors Ltd. [1977] 107 ITR 164 (Cal). The decision in Commissioner of Income-tax v. Naya Sahitya [1972] 84 ITR 567 (Delhi) does not represent the correct legal position and, hence, cannot be approved.

We may observe that we are not required to consider in these appeals how profit will be actually calculated in order to determine the quantum of exemption of six per cent. of the profits on the capital employed. If difficulties are insurmountable and, therefore, profit, cannot be ascertained, that will be a different question in the course of practical application of the section. That kind of a possible difficulty should not weigh in the true construction of section 15C. In the present case the assessee claimed profit and there was no difficulty about ascertainment of the exempted profit as separate books of accounts were kept and the undertakings were at separate places.

In view of the foregoing discussion, we are clearly of opinion that the High Court is not right in answering the two questions in the negative and against the assessee. On the other hand, the Tribunal was right in answering the two questions in the affirmative and against the department. The two questions referred stand answered in the affirmative. The judgment of the High Court is, therefore, set aside and the appeals are allowed with costs."

8. Even the Hon'ble Delhi High Court in the case of CIT vs. Hindustan General Industries Ltd 1982 137 ITR 851 (Del) has considered the issue where assets transferred from old unit to new unit was less than 20%, the Hon'ble Delhi High Court held that the real test of finding out whether there is a reconstruction or not is not whether as a result of the setting up of a new industrial undertaking, the assessee has expanded its business in the same or similar articles. The real test is to find out whether the unit which has been set up separately is new in the sense that new plant and machinery are erected and a new independent and viable unit has come into existence for producing either the same commodities or some distinct commodities. In view of these facts and the ratio laid down by Hon'ble Supreme Court in Textile Machinery Corporation Ltd. (supra) and of Hon'ble Delhi High Court in the case of Hindustan General Industries Ltd. (supra), we confirm the order of CIT(A) allowing the claim of exemption under section 10B of the Act. This issue of Revenue's appeal is dismissed.

9. As regards to the exemption denied to the assessee as it has made local sales, the learned Counsel for the assessee explained that assessee being 100 % EOU as per explanation 2 (Vi) of section 10B of the Act and local sales are permissible by the legal agreements with the development commissioner and does not affect the status of 100% EOU. The learned Counsel for the assessee explained that as per section 10B(4) of the Act which provides a formula for computing profit derived from export and he further explained in section 10B(4) of the Act itself provides that profits derived from export will 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. In view of the above, we set aside this particular issue of local sales for computing the long term of the formula to the AO who will

determine quantum. The appeal of Revenue is dismissed as indicated above.

10. Similar are the facts in AY 2006-07, taking a consistent view and respectfully following the same we dismiss this appeal of Revenue also.

11. **In the result, both the appeals of Revenue are dismissed.**

Order pronounced in the open court on 15-06-2018.

आदेश की घोषणा खुले मे दिनंक 15-06-2018को की गई ।

Sd/-	Sd/-
(G MANJUNATHA)	(MAHAVIR SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 15-06-2018
Sudip Sarkar /Sr.PS

<u>Copy of the Order forwarded to</u>:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI