

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

BEFORE SHRI B. R. BASKARAN, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.6349/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2012-13)

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| Dy. Commissioner of Income Tax, Central Circle-5(2), Room No. 1908, 19 th Floor, Air India Building Nariman Point, Mumbai-21. | बनाम/ Vs. | M/s. Auro Gold Jewellery Pvt. Ltd. 70/70A, Laxmi Premises, 1 st Floor, Shaikh Memon Street, Zaveri Bazar, Mumbai-400002. |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCA3860H | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |
| Assessee by: | Shri Reepal G. Tralshawala (AR) | |
| Revenue by: | Mrs. Sunita Billa (DR) | |

सुनवाई की तारीख / Date of Hearing: 01.05.2018
घोषणा की तारीख /Date of Pronouncement: 27.06.2018

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 18.07.2016 passed by the Commissioner of Income Tax (Appeals)-53, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2012-13.

2. The revenue has raised the following grounds: -

1. "Whether on the facts and in the circumstances of the case and in law, Ld CIT(A) was justified in allowing appeal of the assesses without appreciating that the decision of the 1TAT, Jaipur Bench in the

case of DOT Vs Goenka Diamonds and Jewellers Ltd in ITA No, 509/JP/2011 dtd 31.01.2011, has not been accepted by the Department at Jaipur and appeal to the Hon'ble Rajasthan high Court has been preferred and also in the case of M/s Gitanjali Export Corp Ltd in ITA No 6948/Mum/2011 is not accepted and an appeal to the Hon'ble High Court of Mumbai has been preferred?"

2. "Whether on the facts and in the circumstances of the case and in law, I CIT(A) failed to appreciate that the three words "manufacturing produce" "provide any services" used in section 10AA should be interpreted in continuity or coherently to put into effect the spirit and intention of the legislature in provide for a deduction under section 10AA of the Income-tax Act, 1961?"
3. "Whether on the facts and in the circumstances of the case and in law, CIT(A) failed to appreciate that the intention of the legislature was not to accord benefit of deduction u/s 10AA to the trading activity of the type practiced by the assessee, by specifically choosing, not to include a clause, facilitating the borrow of the meaning of the word "trading or "service" from the SEZ Act?"
4. "Whether on the facts and in the circumstances of the case and in law, CIT(A) was justified in allowing the appeal of the assessee without appreciating fact that the Hon'ble Rajasthan High Court decision in the case of Kota Co-opera Marketing Society Vs CIT 207 ITR 608(Raj), has held that the exemption clause in tax statute, should be construed strictly and cannot be extended beyond the clear language used in the section."

3. The brief facts of the case are that the assessee filed its return of income on 29.09.2012 declaring total income to the tune of Rs.14,65,23,986/-. The case was selected for scrutiny. Thereafter, notice u/s 143(2) of the Act dated 07.08.2013 was issued and served upon the assessee. Notices u/s 142(1) of the Act dated 19.08.2014 &

29.09.2014 were also issued and served upon the assessee. The assessee company was manufacturer and trader of Gold Jewellery and Bullion. The assessee was having two manufacturing units in Mumbai and export oriented units in Sachin SEZ Surat. In the F.Y. 2011-12, the assessee has undertaken trading the goods to the tune of Rs.4,11,08,86,812/-. In unit no. 365, the trading of good was to the tune of Rs.2,36,64,03,460/-. In unit no. 001, the trading of goods was to the tune of Rs.1,74,44,83,352/-. The Assessing Officer observed that the trading activity of the assessee nowhere falls in the category of claim u/s 10AA of the Act. Therefore, the trading activity of Rs.11,06,23,894/- was not found eligible u/s 10AA of the Act for deduction. The income of the assessee was assessed to the tune of Rs.25,71,47,880/- and book profit u/s 115JB of the Act was assessed to the tune of Rs.49,69,70,140/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who allowed the claim of the assessee, therefore, the revenue has filed the present appeal before us.

ISSUE NOs.1 to 4:-

4. All the issues are in connection with the allowance of the claim of the assessee u/s 10AA of the Act in respect of trading activity. The contention of the Ld. Representative of the Department is that the assessee's claim of trading is not eligible for exemption u/s 10AA of the Act being the concerned section only speaks about to provide any service activities, therefore, the claim of the assessee has wrongly

been allowed by the CIT(A) hence the finding of the CIT(A) is liable to be set aside and trading is not liable to be treated for exemption u/s 10AA of the Act. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -

“4.3.1 I have considered the submissions of the appellant and perused the materials available on record including copies of judicial decisions relied upon by it. The issue for adjudication is whether the AO was justified in disallowing the appellant's claim for deduction of Rs.11,06,23,894/- u/s 10AA of the Act on the ground that diamond trading activity undertaken by the appellant was not eligible for such deduction. As per section 10AA of the Act, an assessee being an entrepreneur as referred to in section 2(j) of the SEZ, 2005 who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any A.Y. commencing on or after 01.04.2006 is entitled to deduction at prescribed rates of profits and gains derived from the exports of such articles or things or from provision of services for specified periods. Under section 2(j) of SEZ Act, 2005 an entrepreneur means a person who has been granted a letter of approval by the Development Commissioner u/s 15(9) of the Act. Section 15(9) of SEZ Act provides that the Development Commissioner may, after approval of the proposal referred to in sub-section (3), grant a letter of approval to the person concerned to set up a unit and undertake such operations which the Development Commissioner may authorize and every such operation so authorized shall be mentioned in the letter of approval, it is noticed from the record that the appellant was initially granted letter of approval dated 20.01.2005 by the Development Commissioner, Surat SEZ, Surat to carry out authorized operations in respect of manufacturing of plain and studded gold jewellery.

4.3.2 It is pertinent to note that Instruction No 1 issued vide R5/J/2006-EPZ by the EPZ Section, Department of Commerce, Ministry of Commerce and Industry, Government of India, New

Delhi on 24.03.2006 had clarified that "trading for the purposes of Rule 76 of the SEZ Rules would be confined to import of goods for exports". Thereafter, it is observed that the Ministry of Commerce & Industry, Government of India issued another Instruction No.4 dated 24.05.2006 which is reproduced as under: -

"This Department has **been** receiving representations **a difficulties** faced by (he existing SEZ units holding approval to do trading, that their exports are adversely affected and **also** that several of 'heir orders are held up due TO the **restriction on** trading on account of the above instruction. Taking cognizance of the **representations, in partial modification** of the above referred Instruction dated 24th March, 2006, it has been **decided** (half **while units in the Special Economic Zone** -who hold approval to do trading activates with be allowed to carry out all **forms** of trading activity, the benefits **under Section 10AA** 'will exclude **trading other than Trading in the nature** of export of imported goods. **Appropriate amendment; in** this regard are being issued. **In the meantime, sourcing from domestic area may be permitted by units in** (the SPZs which are allowed (o do trading, subject tit **this circular** being cited and on production of an undertaking by the concerned unit that **no income** tax benefits will be available **by the unit for trading** t **except in the nature of re-export of imported goods.**"

It is noticed from the record that the appellant obtained revised approval from the Development Commissioner, Surat SEZ vide letter No. SSEZ/A-26/2 68/2004-05/9 77 dated 23 03.2009 to carry on authorized operations in respect of trading of rough or polished diamonds at its unit Nos.362 & 365 in (he SEZ at Sachin, Surat In other words, trading and export of rough or polished diamonds was approved as "authorized operations" of the appellant by the competent authority under the SEZ Act. One of the conditions stipulated in the aforesaid letter of approval was that "the benefit u/s 10AA of the income-tax Act, 1961 shall exclude trading other than trading in the nature of re-export of imported goods on\y. Accordingly, the appellant is said to have started importing rough or polished diamonds and re-exporting ihe same on "as is where is" basis.

4.3.3 Thus, it is found that the appellant is an entrepreneur as defined in section 2(j) of the SEZ Act who began to carry out trading and export of rough or polished diamonds as per revised letter of approval dated 23.03.2009 issued by the Development

Commissioner Surat SEZ. The only question to be considered now is whether the activity of re-export of imported rough or polished diamonds earned on by the appellant during the relevant period is eligible for deduction u/s,10AA of the Act or not. In this connection, it is evident that the appellant is not engaged in manufacture or production of any articles or things. What remains TO be seen is whether the appellant can be said to be providing any 'services' so as to be eligible for deduction u/s.10AA of the Act. It is pertinent to mention that the word 'services' has not been defined either in section 10AA or in section 2 of the Act dealing with definitions of various words and expressions. However, it is noticed that Rule 76 of SEZ Rules as amended in 2008 defines the word "services" inter alia to include "trading". It is also noticed that Explanation to Rule 76 lays down that "the expression 'trading' for the purpose of the Second Schedule of the Act, shall mean import for The. purposes of re-export". In this regard, I find merit in the appellant's plea that by virtue of section 51 of the SEZ Act, the provisions of that Act have been given overriding effect over the provisions of any other law for the time being in force including those of (he Act. Section 27 of the SEZ Act also provides that the provisions of Income-tax Act, 1961, as in force for the time being, shall apply to or in relation to the developer or entrepreneur for carrying on the authorized operations in a Special Economic Zone or unit subject [o the modifications specified in the Second Schedule. As the word 'services' is found to have been specifically defined in Rule 76 of the SEZ Rules, it has to be understood in that sense only. Therefore, the AO view that the word 'services' has to be construed by its general or natural meaning will not hold good.

4.3.4 It is also seen from the record that this issue is covered in favour of the appellant by various decisions of Hon'ble Tribunal cited in para 4.2.2 above. The earliest decision on the point is available in the case of M/s.Goenka Diamond and Jewellwers Ltd. (supra) wherein it has been held that the word 'services' as mentioned in section 10AA cannot be construed inconsistently with the definition of 'services' given in the SEZ Act and that "under the SEZ Act, the trading is included in services provided the trading is export of imported goods". In view of this, it has been held (hat the assessee in that case engaged in trading of diamonds was entitled to deduction u/s 10AA of the Act. It is observed that similar view has been taken by the Mumbai, Ahmedabad and Kolkata Benches

of Hon'ble Tribunal in the cases cited above. Respectfully following the aforesaid decisions of various Benches of Hon'ble Tribunal, it is held that since the appellant was engaged in the activity of re-export of imported rough or polished diamonds during the relevant period, the AO was not justified in disallowing its claim for deduction u/s 10AA amounting to Rs.11,06,23,894/- in respect of profits and gains derived by the appellant firm from such activity. Therefore, the AO is directed to allow deduction of Rs.11,06,23,894/- to the appellant us/ 10AA while giving effect to this order Ground bearing nos. 1, 2 and 3 of the present appeal are accordingly allowed."

5. On appraisal of the above mentioned order, we noticed that the CIT(A) has decided the matter of controversy on the basis of the decision of Hon'ble ITAT in the case of **DCIT Vs. M/s. Goenka Diamond & Jewellers Ltd. 146 TTJ (Jpr) 68** and on the basis of the decision of the Hon'ble ITAT Mumbai Bench in the case of **Addl. CIT Vs. Gitanjali Exports Corporation Ltd. in ITA. No. 6781/M/2011 & 6783/M/2011 for the A.Y.2006-07 & 2007-08 dated 08.05.2013** and on the basis of the decision of Mumbai Bench in the case of **DCIT Vs. Diamonds 'R' US dated 30.10.2015 in CO No. 276/M/2014 for the A.Y.2007-08**. The only contention is that the revenue has not accepted the decisions in the above mentioned cases. Merely the decisions have been challenged in the superior court no where itself makes the ground to the challenge the decision again and again. Moreover this contention has no force in the eyes of law till any development came into existence in favour of Revenue .Since the case of the assessee has duly been covered by above mentioned cases therefore we are of view of the view that CIT(A) has decided the

matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage.

6. In the result, the appeal of the revenue is hereby ordered to be dismissed.

Order pronounced in the open court on 27.06.2018.

Sd/-

(B. R. BASKARAN)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 27.06.2018.

VIJAY

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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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