IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.5672/Mum./2016
(Assessment Year : 2011–12)

Sanghi Jewel Pvt. Ltd.
GJ–01, Seepz++
Andheri (E), Mumbai 400 096
PAN – AAICS7624R ……. Appellant

v/s

Dy. Commissioner of Income Tax
Circle–5(3)(1), Mumbai ……. Respondent

ITA no.5673/Mum./2016
(Assessment Year : 2012–13)

Sanghi Jewel Pvt. Ltd.
GJ–01, Seepz++
Andheri (E), Mumbai 400 096
PAN – AAICS7624R ……. Appellant

v/s

Dy. Commissioner of Income Tax
Circle–5(3)(1), Mumbai ……. Respondent

Assessee by : Ms. Aarti Vissanji
Revenue by : Shri V. Vidhyadhar

Date of Hearing – 17.04.2018	Date of Order – 11.07.2018

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeals at the instance of the assessee are against separate orders, both dated 29th July 2016, passed by the learned Commissioner (Appeals)–10, Mumbai, pertaining to the assessment years 2011–12 and 2012–13.

ITA no.5672/Mum./2016
Assessment year – 2011–12

2. In ground no.1, the assessee has challenged the disallowance of deduction claimed under section 10AA of the Income Tax Act, 1961 (for short *"the Act"*) in respect of interest income of ₹ 80,16,276.

3. Brief facts are, the assessee company is engaged in the business of manufacture and export of diamond studded gold, silver and platinum jewellery. For the aforesaid purpose, the assessee has set–up a unit in Special Economic Zone (SEZ), hence, is eligible for deduction under section 10AA of the Act. For the assessment year under dispute, the assessee filed its return of income on 17th November 2011, declaring total income of ₹ 1,98,14,801 under the normal provision and book profit of ₹ 2,16,34,283 under section 115JB of the Act. During the assessment proceedings, while verifying assessee's claim of deduction under section 10AA of the Act the Assessing Officer found

that such deduction has also been claim in respect of interest income of ₹ 80,16,276. Therefore, he called upon the assessee to explain why the said interest income should not be excluded for computing deduction under section 10AA of the Act. In reply, it was submitted by the assessee that the interest income was earned on fixed deposits placed with Banks against the credit facilities granted and used for the purpose of business of manufacture and export of studded jewellery from the SEZ unit. It was submitted, as per the sanction letter of credit facilities, there is a specific condition that a certain percentage has to be kept as term deposit with the Bank as collateral security. It was submitted, since, the term deposits were placed with the Bank under business compulsion and have a direct nexus with the activity of manufacture and export of studded jewellery from the SEZ unit, it is eligible for deduction under section 10AA of the Act. In support of the aforesaid submissions, assessee relied upon the following decisions:–

i) CIT v/s Motorola India Electronics Pvt. Ltd., [2014] 98 DTR 081;
ii) Medusind Solutions India Pvt. Ltd. v/s CIT, 56 SOT 177;

4. Without prejudice to the aforesaid submissions, it was submitted that in case deduction under section 10AA of the Act is not allowed in respect of interest income, the related interest cost should be netted–off against the interest income and the net interest income should be reduced from the profits of business for computing deduction under

section 10AA of the Act. In support of such contention, the assessee relied upon the decision of the Hon'ble Supreme Court in ACG Associated Capsules Pvt. Ltd. v/s CIT, 67 DTR 205 (SC). Assessing Officer, however, did not find merit in the submissions of the assessee and held that interest income earned on fixed deposit having not been been derived from the export made by the assessee from its SEZ unit, cannot be included in the profit of business for computing deduction under section 10AA of the Act. The Assessing Officer also rejected assessee's claim that the interest income should be netted–off against the interest income and only the net interest income should be reduced from the profits of business for computing deduction under section 10AA of the Act. Thus, the Assessing Officer computed deduction under section 10AA of the Act after reducing the interest income of ₹ 80,16,276, from the profits of business. Being aggrieved with the aforesaid decision of the Assessing Officer, assessee preferred appeal before the first appellate authority.

5. The learned Commissioner (Appeals) after considering the submissions of the assessee and taking note of the decisions of the Tribunal in assessee's own case for the assessment year 2007–08 and 2010–11, directed the Assessing Officer to reduce the net interest income from the profit of business for computing deduction under section 10AA of the Act.

6. The learned Authorised Representative reiterating the stand taken before the Departmental Authorities submitted, while sanctioning the credit facility the Banks have put a condition that the assessee has to pledge certain percentage in fixed deposits with the Banks towards collateral. In this context, she drew our attention to the sanction letter issued by the Bank. The learned Authorised Representative submitted, since, the fixed deposits were kept for the purpose of availing the credit facilities, the interest income earned from such fixed deposits has a direct nexus with the manufacturing and export activities of the assessee which is eligible for deduction under section 10AA of the Act. Drawing an analogy between section 10AA(7) and section 10A(4) of the Act, she submitted that both these sections refer to the profits of business of the undertaking and not to the profits of exports. Thus, she submitted, the aforesaid expression would take within its ambit the entire income of the business of the undertaking including the income which is incidental to the manufacturing and export activity. Therefore, such income will also be eligible for deduction under section 10AA of the Act. In support of such contentions, the learned Authorised Representative relied upon a number of decisions including the Full Bench decision of the Hon'ble Karnataka High Court in CIT v/s Hewlett Packard Global Soft Ltd.,

[2017] 299 CTR 118 (Kar.) and CIT v/s Motorola India Electronic Pvt. Ltd. (supra), [2014] 46 taxmann.com 167 (Kar.).

7. The learned Departmental Representative relying upon the finding of the learned Commissioner (Appeals) submitted, there is a basic difference between the provisions contained under section 10AA and section 10A of the Act. He submitted, while sub–section (1) of section 10A of the Act speaks of deduction of profits and gains derived by an undertaking from the export of articles or things or computer software, etc., sub–section (1) of section 10AA of the Act, which applies to newly established units in SEZ, speaks of deduction in respect of profits and gains derived from the export of articles or things or services, etc. The learned Departmental Representative submitted, provision of section 10AA of the Act is more restrictive and specific as it refers to profits derived from export and not of the undertaking. He submitted, the decisions relied upon by the assessee are in respect of provisions contained under section 10A / 10B of the Act, hence, will not apply to a case involving claim of deduction under section 10AA of the Act.

8. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. From the facts and materials on record, prima–facie, it appears that the fixed deposits from which the assessee earned the interest income,

which is the subject matter of dispute in this ground, were placed with the bank for obtaining credit facilities. Thus, it can be said that the interest income earned from such deposits have some nexus with the business activities of the assessee. However, the issue which arises for consideration is, whether such interest income can be considered to be a part of the profit and gain from export of article or thing or services to make it eligible for deduction under section 10AA of the Act. In this context, it is the contention of the assessee from the assessment stage itself that the interest earned on fixed deposit is incidental to its manufacturing and export business activity and, therefore, has to be treated as profits and gains of the business of the undertaking. While the Assessing Officer has dealt with the aforesaid contention of the assessee in a mechanical manner without proper reasoning and analysis of the case law cited before him, the learned Commissioner (Appeals), unfortunately, has totally skirted the issue by restricting his finding to the without prejudice claim of netting–off of interest expenditure against interest income. In our considered opinion, assessee's claim of deduction u/s 10AA of the Act in respect of interest income has to be considered keeping in view not only the provisions contained under section 10AA of the Act read with SEZ Act, 2005 but also in the light of the ratio laid down in the decisions relied upon by the assessee. None of the Departmental Authorities have done that exercise. That being the case, we are inclined to restore the issue to

the Assessing Officer for de novo adjudication after due opportunity of being heard to the assessee. It is made clear, while deciding the issue, the Assessing Officer must deal with all the submissions to be made by the assessee with proper reasoning and must also examine the applicability of the ratio laid down in the decisions relied upon or to be relied upon by the assessee. With the aforesaid observations, ground is allowed for statistical purposes.

9. In ground no.2, the assessee has challenged disallowance of deduction under section 10AA of the Act in respect of unrealized export turnover of ₹ 1,09,35,183.

10. Brief facts are, during the assessment proceedings, the Assessing Officer on verifying the details of realization of export sale proceeds found that out of the total export turnover of ₹ 172,35,58,101, an amount of ₹ 1,09,35,183, has not been brought into India. As observed by the Assessing Officer, the assessee itself submitted that while computing deduction under section 10AA of the Act the said amount has to be reduced from the export turnover. However, it was also submitted by the assessee that as and when the unrealized amount is realized, deduction under section 10AA of the Act should be amended and total income should be determined accordingly. The Assessing Officer referring to the Explanation–1 to section 10AA of the Act observed that export turnover means the consideration in respect

of export received in or brought into India. Therefore, the unrealized export turnover cannot be considered for computing deduction under section 10AA of the Act. Further, he held that the deduction under section 10AA of the Act cannot be revised on realization of the export turnover. The assessee challenged the aforesaid decision of the Assessing Officer before the first appellate authority.

11. The learned Commissioner (Appeals) while concurring with the view of the Assessing Officer observed that the provisions of section 155(11A) of the Act provides for amendment only in respect of claim of deduction under section 10A or section 10B or section 10BA of the Act and not in the case of section 10AA of the Act.

12. The learned Authorised Representative drawing our attention to Regulation–9 of the Foreign Exchange Management (Export Of Goods and Services) Regulations 2000 submitted that in respect of exports by SEZ unit, there is no time limit for realization of export sales proceeds. Therefore, the decision of the Departmental Authorities in not allowing deduction under section 10AA of the Act on realization of export proceeds is contrary to law. In support of such contention, she relied upon the following decisions:–

i) Tara Jewels Exports Pvt. Ltd., ITA no.662/Mum./2012, dated 21.01.2014;

ii) M/s. Niru Jewels Pvt. Ltd., ITA no.1468/Mum./2014, dated 27.04.2016; and

iii) M/s. Dania Oro Jewellery Pvt. Ltd. v/s ITO, ITA no. 7635/Mum./2014, dated 03.01.2018.

13. The learned Authorised Representative submitted, let a direction be given to the Assessing Officer to carry out necessary amendment to the deduction claimed under section 10AA of the Act on realization of the export sale proceeds and accordingly determine the total income.

14. The learned Departmental Representative submitted, the issue may be restored to the Assessing Officer for examining assessee's claim in accordance with law.

15. We have considered rival submissions and perused materials on record. Undisputedly, the amount of ₹ 1,09,35,183, cannot form part of export turnover in terms of Explanation–1(i) of section 10AA of the Act, since, such amount representing export sale proceeds was neither received in nor brought into India during the relevant previous year. However, it has been contended by the assessee that in respect of SEZ unit, there is no time limit prescribed for realization of export value. Thus, the assessee has contended that when such export sale proceeds is realized and brought into India, assessee should be given the benefit of deduction under section 10AA of the Act by carrying out necessary amendment. In this context, it is necessary to observe,

unlike sub–section (3) of Section 10A and section 10B of the Act fixing certain time limit for bringing the export sale proceeds to India, there is no such restriction imposed under section 10AA of the Act. At the same time, section 155(11A) of the Act permits amendment of deduction claimed under section 10A, section 10B and section 10BA of the Act on realization of export sale proceeds. The said provision is totally silent insofar as it relates to realization of export sale proceeds under section 10AA of the Act. However, in case of M/s. Dania Oro Jewellery Pvt. Ltd. (supra), the Co–ordinate Bench following another decision of the Tribunal in M/s. Niru Jewels Pvt. Ltd. (supra) and the decision of the Hon'ble Jurisdictional High Court in Jemplus Jewellery India Ltd., 330 ITR 175 (Bom.) restored the issue to the Assessing Officer for fresh adjudication. Since, the aforesaid decision of the Co–ordinate Bench is on identical issue of deduction claimed under section 10AA of the Act, respectfully following the same, we restore the issue to the file of the Assessing Officer for fresh adjudication keeping in view the ratio laid down in the decisions referred to above. This ground is allowed for statistical purposes.

16. In ground no.3, the assessee has challenged the disallowance of ₹ 16,18,327 under section 40(a)(ia) of the Act.

17. Brief facts are, during the assessment proceedings, the Assessing Officer noticing that the assessee has claimed deduction towards

expenditure incurred of ₹ 16,18,327, called upon the assessee to explain why such deduction should not be disallowed under section 40(a)(ia) of the Act, since, the assessee failed to deduct tax at source while making such payment. As observed by the Assessing Officer, in reply to the query raised the assessee itself submitted that the amount may be disallowed under section 40(a)(ia) of the Act for non–deduction of tax at source. Without prejudice, it was submitted by the assessee that since the payments were made during the relevant previous year and nothing remained payable, no disallowance under section 40(a)(ia) of the Act can be made. The Assessing Officer rejecting the without prejudice claim of the assessee disallowed the amount of ₹ 16,18,327, under section 40(a)(ia) of the Act. Though, the assessee challenged the aforesaid disallowance before the first appellate authority, however, the learned Commissioner (Appeals) also sustained the disallowance.

18. The learned Authorised Representative fairly submitted that at this point of time the issue stands decided against the assessee by the decision of the Hon'ble Supreme Court in Palam Gas Service v/s CIT, [2017] 394 ITR 300 (SC).

19. The learned Departmental Representative agreed with the aforesaid submissions of the assessee.

20. We have considered rival submissions and perused materials on record. The ground on which the assessee seeks deletion of the disallowance under section 40(a)(ia) of the Act is, the amount in dispute was paid during the relevant previous year. However, as held by the Hon'ble Supreme Court in Palam Gas Service (supra), the provisions of section 40(a)(ia) of the Act covers not only the amounts which remained payable at the end of the year but also the amount which were paid during the relevant previous year without deduction of tax at source. In view of the aforesaid, we do not find merit in the ground raised, hence, it is dismissed.

21. In the result, assessee's appeal is partly allowed for statistical purposes.

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Assessment year – 2012–13

22. The only effective ground raised in this appeal is against disallowance of ₹ 13,85,839, under section 40(a)(ia) of the Act.

23. The issue raised in this ground is identical to the issue raised in ground no.3, raised by the assessee in its appeal being ITA no.5672/Mum./2016, for assessment year 2011–12, herein above. Following our decision therein, we dismiss the ground raised.

24. In the result, assessee's appeal is dismissed.

25. To sum up, assessee's appeal in ITA no.5672/Mum./2016 for A.Y. 2011–12 is partly allowed for statistical purposes and assessee's appeal in ITA no.5673/Mum./2016 for A.Y. 2012–13 is dismissed.

Order pronounced in the open Court on 11.07.2018

Sd/-	**Sd/-**
RAJESH KUMAR	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 11.07.2018

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai