

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.2936/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2011-12)

| | | |
|--|--|---|
| ITO, Ward 1(1)(3), 531A/579, Aayakar Bhavan, M.K Road, Mumbai-400020 | बनाम/ v. | M/s. Everyday Health India Pvt. Ltd., A-35, 5 th Floor, Okay Industries , Street No.2, MIDC, Andheri(E) Mumbai 400093 |
| स्थायी लेखा सं./ PAN : AABCE9887F | | |
| (अपीलार्थी / Appellant) | .. | (प्रत्यर्थी / Respondent) |
| Revenue by: | Shri V.Justin, DR | |
| Assessee by: | Shri. Vipul Joshi Ms. Dinkle Hariya | |

सुनवाई की तारीख /**Date of Hearing** : **12.07.2018**

घोषणा की तारीख /**Date of Pronouncement** : **10.08.2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by Revenue, being ITA No. 2936/Mum/2016, is directed against appellate order dated 29.01.2016 passed by learned Commissioner of Income Tax (Appeals)-2, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2011-12, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 12.02.2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2011-12.

2. The grounds of appeal raised by Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

1. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in allowing exemption u/s. 10B to the assessee, even though it was the case of splitting/reconstruction of an existing business."*

3. The brief facts of the case are that the assessee is engaged in the business of providing diet, health, fitness and wellness information to consumers through network of websites, internet portals, print and all other forms of media, and content writing, web design and search engine optimization solutions. The assessee filed return of income with Revenue claiming deduction u/s. 10B of the 1961 Act amounting to Rs. 90,73,767/- for the year under consideration. The assessee filed with learned AO copies of registration with Software Technology Park of India (STPI). On verification of the details and STPI documents, It was observed by the AO that the business is already in existence prior to setting up of new STP unit for the purpose of claim u/s. 10B of the 1961 Act. The assessee was show caused by the AO vide notice u/s 142(1) dated 29.01.2014 as to why deduction u/s 10B of the 1961 Act should not be disallowed due to reasons cited below:-

'On verification of the documentary evidence filed by you in support of your claim u/s 10B, you are hereby required to show cause as to why the claim u/s 10B should not be disallowed as it is noticed that your unit was set up in May 2008 whereas the application for registration of new STP unit for the purpose of claim u/s 10B was made on 8.9.2009 which shows that the business was already in existence prior to the setting up of new unit. Hence it violates the condition laid down as per the provisions of section 10B of the I. T. Act.

The assessee in response thereof submitted before the AO that the assessee is entitled for deduction u/s. 10B of the 1961 Act. The assessee submitted opinion from M/s Dilip K. Sheth & Co. , Chartered Accountants that the assessee is entitled for exemption u/s 10B of the 1961 Act as under:

"If the unit is approved by STPI , it would qualify for deduction. It is immaterial whether STPI approves the unit prior to or subsequent to the commencement of business . In our view, even though the Unit of assessee company (EHIPL) had commenced business prior to its registration by STPI, it would qualify for exemption under I.T.Act."

The AO observed that further with regard to the question “whether exemption prior to approval by STPI would be available, the said CA’s opined that :-

“ It is apparent that the profits should be derived by an EOU. Further, a unit would become an EOU when it so approved . It would , therefore, follow that profits derived from the Unit prior to its approval by STPI would not be ‘profits derived by a hundred percent export-oriented undertaking’. Accordingly , the profits of the Unit would qualify for exemption only from the date of approval of unit as an EOU.”

The said CA’s also opined that shifting of the units of the assessee to a new location after commencement of its business would not result in splitting up or reconstruction of a business already in existence or the shifting of the unit would not result in transfer to a new business of previously used machinery or plant as contemplated in Section 10B of the 1961 Act. The assessee relied upon following judicial precedents as under:-

- a) *Kerala State Cashew Development Corp. v. CIT -205 ITR 19 (Kerala HC)*
- b) *CIT v. Hindustan General Inds. Ltd (1982) 137 ITR 851 (Delhi HC)*
- c) *CIT v. Batala Engg Co. ltd (1979) 120 ITR 683 (P&H HC)*
- d) *CIT v. Electric Lamp Mfrs (India) P Ltd (1987) 165 ITR 115 (Cal. HC)*
- e) *CIT v. Hindustan Malleables & Forgings Ltd (1991) 191 ITR 70 (Patna HC)*
- f) *CIT v. Gaekar Foam & Rubber Co Ltd (1959) 35 ITR 662 (Bom. HC)*
- g) *CIT v. Devson Ltd (1975) 98 ITR 311 (J&K HC)*

The AO rejected the contentions of the assessee and denied the benefit of exemption u/s 10B of the 1961 Act to the assessee, by an assessment order dated 12.02.2014 passed by the AO u/s. 143(3) of the 1961 Act, by holding as under:-

“ 4.9 The facts of the case are that the assessee company was incorporated on May, 2008 as a 100% subsidiary of Waterfront Media Inc., USA now known as Everyday Health Inc., USA. The assessee company established the software unit in the year 2008 at Karmayog building, 2nd floor, Parsi Panchayat Road, Andheri(E), Murnbai-400069. The assessee's business is development of 'software', viz. providing software development, content writing, web-design and search engine optimization solutions. The assessee has started developing software immediately after setting up the unit in the year 2008 by recruiting the software personnel who were the intellectual property of the assessee company in this line of business and

has shown total turnover from the business of development of software of Rs.2,07,97,660/- in the first year of operation for the year ended 31st March, 2009. The entire turnover represents 100% export of IT/ IT enabled services and software out of India to M/s Waterfront Media Inc., the holding company. The above facts indicate that assessee company has commenced the business of development of software before setting up of the new STP unit which was established almost a year later.

4.10 On verification of the documents filed with STPI, it is seen that the application for registration of new STP unit has been made on 07.08.2009 and the address of the new STP unit shown is the same unit from which the assessee's existing business exists i.e. Karmayog Building, Andheri(E). It is seen the Government has communicated vide letter dated 11.09.2009 for setting up the 100% export oriented STP unit at Karmayog bldg., which is the existing unit, subject to certain terms and conditions. Thereafter, the assessee company has made an application vide letter dated 12.10.2009 to the Assistant Commissioner of Customs, 100% EOU section, New Custom House, Mumbai-38 for grant of license for Private Custom Bonded warehouse for their 100% EOU for computer software under the STPI scheme. The Asstt. Commissioner of Customs, 100% EOU, Mumbai vide letter dated 3.11.2009 has granted permission to manufacture computer software and IT enabled services in Bond under section 65 of the Customs Act, 1962 read with supplementary Regulations under the Manufacture and Other Operations in the Warehouse Regulations, 1966. It is further noted that the assessee company vide letter dated 09.11.2009 has intimated the STPI that it has commenced the commercial production as a customs bonded STP unit on and with effect from 5.11.2009, pursuant to clause 10 of the letter of permission. Thereafter, the assessee company relocated its STP unit at 102/B, Akruti Centre, 1st Floor, MIDC, Andheri(E), Mumbai-69 w.e.f 19.12.2009 as per the permission granted by the STPI. It is pertinent to note here that there is no commencement of any new commercial production as claimed above by the assessee in its letter to the Customs Department but only the continuation of the same existing business of development of software with the same employees of the existing unit.

4.11 Further, on verification of the details of the employees furnished by the assessee, it is noticed that mostly all the employees who executed the software development work in respect of the new STPI Unit set up after 11.09.2009 were recruited before the new unit came into existence. It is seen that the software personnel who were the intellectual property in this line of business who have been working in the existing business had been transferred to the new unit. As per the list of 62 employees furnished by the assessee, it is noticed that 36 employees have been recruited prior to set up of new unit w.e.f. 11.09.2009, which consisted of 26 employees recruited in the year 2008-09 and another 10 employees recruited during the period from April, 2009 to 11th sept., 2009, prior to establishing of new unit and the employees employed after the new unit came into existence w.e.f

11.09.2009 and upto the period 31.3.2009 were only 12. The assessee's employee details show that most of the staff who executed software development work in respect of the new STP unit were recruited before the new unit came into existence. The above facts show that the assessee company was thus trying to shift the business from the old unit to the new STP unit to take advantage of tax exemption.

4.12 Considering the facts and circumstances of the case as discussed above, it can be seen that when the unit was first setup in the year 2008, the assessee was carrying on the business of development of software and in the new unit also, the assessee had done the same business of development of software using the same employees from the existing business. Hence, this is a case of assessee doing the same business using the same employees. Therefore, it is not a case of different business requiring different specialization, being taken up for which setting up of a new unit could be said to have become a business necessity. Hence the new STP unit is not separate and independent. Also, the export of software in the old unit as well as the new unit is made to the same customer. The assessee has only taken the new premises on lease and recruited a few employees.

4.13 In this case, it is to be noted that the main business of the assessee i.e., the work of development of software which is entitled for exemption u/s. 10B, has been undertaken by the existing employees of the old unit, who had been transferred to the new unit. As mentioned above, the employee records clearly show that most of the staff who executed software development work in respect of the new unit were recruited before the new unit came into existence. Hence, in this case, the business itself i.e. the software development activity has been diverted to the new unit and the business of both units remain the same. The assessee company was thus trying to shift the business from the old unit to the new unit to take advantage of tax exemption. Thus it is a case of the same people doing the same business, the only difference being that the people have been shifted to the new office. The existing business of the assessee was development of software and in the new unit also, the assessee has done the same business of software development using the same employees and, therefore, it cannot be a case of the new unit being a separate and independent unit. Since the software development activity in the new unit had been carried out mainly by the employees of existing unit, it is a mere case of splitting/reconstruction of existing business. In view of the above, the exemption u/s 10B is not allowable to the assessee company.

4.14 The judicial decisions relied upon by the assessee will not help the case of the assessee company as the facts, of those cases are distinguishable from the facts of this case as in this case the same existing business has been done in the new unit by the existing staff taken from the old unit which means the business itself has been diverted to the new unit and the business of both unit remain the same, whereas the facts in the above mentioned judicial cases are different from the facts of this case and

hence, the above cited judicial decisions cannot be applied to the facts of this case. Needless to mention here that each case has to be evaluated on its own facts to determine whether it is a case of splitting up of existing business or not. In the assessee's case, the business itself has been shifted to the new STP unit, and the business of both the unit remain the same.

4.15 In view of the foregoing discussion, I am of the view that the new STP unit had been set up by splitting up/reconstruction of the existing business and is thus not eligible for deduction u/s 10B of the I.T. Act."

4. Aggrieved by an assessment order dated 12.02.2014 passed by the AO u/s. 143(3) of the 1961 Act , the assessee filed an appeal before Id. CIT(A) who allowed the appeal of the assessee vide appellate order dated 29.01.2016, by holding as under:-

" 3.2. I have gone through the assessment order dated 12.02.2014 wherein the AO is of the opinion that the appellant is running the same business using the same employees from the existing business by setting up of new unit by change of location and the appellant company is not eligible to claim deduction 10B of the I.T. Act. On the other hand, the AR of the appellant argues that the appellant's company was not formed by splitting up or reconstruction of appellant's existing business and has fulfilled all the conditions as per section 10B of the I.T. Act and therefore, the deduction should be allowed to the appellant company. In support of this, the appellant company filed a copy of the letter issued by the Software Technology Parks of India, Mumbai, Ref. No. STPI/MUM/ VIII(A)(1527)/2009(09)/ PM/9380 dated 19.12.2009 the contents of which are reproduced as under :

*"M/s. Everyday Health India Private Ltd.,
Karmayog Building, 2nd floor,
Parsi Panchayat Road,
Andheri (East), Mumbai 400 069*

SUB : Relocation of STP Unit.

This has referenced to your letter no. NIL dated 04.12.2009, regarding permission to relocate operation in another location. This office has issued approval letter no. STP/MUM/VHI(A)/(1527)/2009(09)/SKA/6783 dated 11.09.2009, for the STP unit M/s. Everyday Health India Private Limited.

Existing STP Unit Location :

Karmayog Building, 2nd floor, Parsi Panchayat Road, ANdheri (East), Mumbai 400 069.

We have noted that the company has taken mentioned below location for relocate their operations in one place i.e.

New STP location :

102B, Akruti trade centre, 1st floor, Road no. 7, MIDC, ANdheri (East), Mumbai 400 093.

The case has been examined by this and it may be noted that unit is relocating their operations as per letter dated 04.12.2009, In view of above we have "No Objection" in M/s. Everyday Health India Private Limited to relocate their operation at location :102 B, Akruti Trade Centre, 1st Floor, Road no. 7, MIDC, ANdheri (East), Mumbai 400 093."

With regard to AY 2010-11, it is understood that Section 10B deduction has already been granted by the AO being the first year if claim. For the AY 2011-12, AO has not granted Section 10B deduction. Further AO himself mentions that The Asst. Commissioner of Customs, 100% EOU, Mumbai vide letter dated 3.11.2009 has granted permission to manufacture computer software and IT enables services in Bond under section 65 of the Customs Act, 1962 read with supplementary Regulations under the Manufacture and Other Operations in the Warehouse Regulations, 1966. The Act does not allow 10B deduction to any undertaking w.e.f. AY 2012-13. The relevant proviso is as under :

"Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April,[2012] and subsequent years."

As the appellant company has obtained permission to relocate the existing unit at Karmayog Bldg., 2nd floor, Parsi Panchayat Road, Andheri (East), Mumbai 400 069 to 102B, Akruti Trade Centre, 1st floor, Road no. 7, MIDC, Andheri (East), Mumbai 400 093 and also approval letter dated 11.09.2009 from Software Technology Parks of India, I am of the opinion that the appellant is eligible for deduction u/s. 10B of the I.T. Act. I, therefore, direct the AO to allow such deduction.

4. In the result, the appeal is allowed."

5. Aggrieved by the appellate order dated 29.01.2016 passed by learned CIT(A), the Revenue has come in an appeal before the tribunal. The Ld. DR on behalf of the Revenue submitted that he would like to place reliance on the assessment order dated 12.02.2014 passed by the AO u/s 143(3) of the 1961 Act. On the other hand, the Ld. Counsel for the assessee submitted that the AO himself has allowed deduction u/s. 10B of the 1961 Act vide assessment order dated 21.02.2013 passed u/s. 143(3) of the 1961 Act for AY 2010-11, wherein the AO after considering the replies of the assessee allowed deduction u/s. 10B by holding as under:-

" 4. It is seen from the financial statements and audit reports submitted by the assessee that the assessee is 100 % Export Oriented Unit and

claiming exemption u/s. 10B of the Income Tax, 1961 for the first year of Rs. 16,38,470/- in respect of Export Turnover of Rs. 6,36,32,138/-. In this regard, the assessee company filed Report under section 10B of the Income Tax Act 1961 in Form No. 56G dated 12/07/2010 in which has stated that the assessee company is registered as EOU in Software Technology Park of India w.e.f. 11/09/2009 and doing the business from registered office at 102-B. Akruti Trade Centre, Road No. 7, MIDC, Andheri(E), Mumbai 400 093 and engaged in the export of computer software during the year ended on 31st march, 2010. It is also submitted that the assessee claiming exemption u/s. 10 first time in the 9th year out of 10 consecutive assessment years as provided in Section 10B Section 10B of the Income Tax Act, 1961.

4.1 The assessee company has been registered as "Export Oriented Unit". The details of foreign remittance have been filed. In support of the claim of exemption of Rs. 16,38,470/- u/s. 10B of the I.T. Act, the A.R. of the assessee produced the Auditor's certificate in Form No. 56G enclosing Annexure-A and as per Annexure A to Form No. 56G, the deduction / exemption u/s. 10B of the I.T. Act, 1961 is found to be allowed and therefore, accordingly allowed to the assessee of Rs. 16,38,470/- as per assessee's claim in the return of income.

The said assessment order passed by the AO for AY 2010-11 u/s 143(3) of the 1961 Act is placed in paper book/page 96-98. Our attention was also drawn to page no. 217 to 219 / paper book wherein written submission made before learned CIT(A) by the assessee are placed and it was submitted that without disturbing the allowance of deductions u/s. 10B of the 1961 Act for the first year in which it was claimed and allowed u/s. 10B of the Act by Revenue, no disturbance can be made in the assessment year 2011-12 keeping in view principal of consistency . The assessee placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT v. Western Outdoor Interactive P. Ltd., (2012) 349 ITR 309(Bom.) , which decision of Hon'ble Bombay high Court is placed in the paper book filed by the assessee. The reliance is also placed on the decision of ITAT-Mumbai in the case of Aditya Birla Nuvo Ltd. v. ACIT , reported in (2015) 56 taxmann.com 168 (Mumbai-trib.). Reliance is also placed on CBDT circular no. 1/2005 dated 06.01.2005 . On merits it was submitted that first year for claim of deduction u/s 10B of the 1961 Act was the assessment year 2010-11. It was submitted that the AO allowed the deduction u/s 10B of the 1961 Act for AY 2010-11 after detailed discussion in assessment order passed u/s 143(3) of the 1961 Act, detailed as under:-

“ 4. It is seen from the financial statements and audit reports submitted by the assessee that the assessee is 100 % Export Oriented Unit and claiming exemption u/s. 10B of the Income Tax, 1961 for the first year of Rs.

16,38,470/- in respect of Export Turnover of Rs. 6,36,32,138/-. In this regard, the assessee company filed Report under section 10B of the Income Tax Act 1961 in Form No. 56G dated 12/07/2010 in which has stated that the assessee company is registered as EOU in Software Technology Park of India w.e.f. 11/09/2009 and doing the business from registered office at 102-B. Akruti Trade Centre, Road No. 7, MIDC, Andheri(E), Mumbai 400 093 and engaged in the export of computer software during the year ended on 31st march, 2010. It is also submitted that the assessee claiming exemption u/s. 10 first time in the 9th year out of 10 consecutive assessment years as provided in Section 10B Section 10B of the Income Tax Act, 1961.

4.1 The assessee company has been registered as "Export Oriented Unit". The details of foreign remittance have been filed. In support of the claim of exemption of Rs. 16,38,470/- u/s. 10B of the I.T. Act, the A.R. of the assessee produced the Auditor's certificate in Form No. 56G enclosing Annexure-A and as per Annexure A to Form No. 56G, the deduction / exemption u/s. 10B of the I.T. Act, 1961 is found to be allowed and therefore, accordingly allowed to the assessee of Rs. 16,38,470/- as per assessee's claim in the return of income.

Our attention was drawn to page no. 93-98 of paper book filed with tribunal wherein assessment order dated 21.02.2013 passed u/s 143(3) of the 1961 Act for AY 2010-11 is placed. It was submitted that the business activity was setup in financial year 2008-09 in the month of August 2008. The assessee was not registered as 100% EOU with STPI for financial year 2008-09 and hence no deduction was claimed u/s 10B of the 1961 Act for AY 2009-10. It was submitted that the assessee applied for registration under Software Technology Park of India as 100% EOU in the month of August 2009 for which approval was granted by STPI in the month of September 2009 in favour of assessee . It was submitted that in the month of December 2009, the assessee relocated its unit to another location for which NOC was received from STPI approving relocation of the unit. It was submitted that the first year for claiming deduction u/s 10B of the 1961 Act was the AY 2010-11 and the Revenue granted deduction u/s 10B of the 1961 Act in scrutiny assessment framed u/s 143(3) of the 1961 Act. The assessee relied upon CBDT circular no. 1/2015 dated 06.01.2005. Reliance is placed on the decision of Hon'ble Madras High Court in the case of Nagesh Chundur v. CIT, (2013) 358 ITR 521 (Madras-HC), Mumbai-tribunal decision in the case of Prothious Engineering Services P. Ltd. v. ITO reported in (2016) 46 ITR(T) 438(Mum-trib.).

6. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee is engaged in the business of providing diet, health, fitness and wellness information to consumers through network of websites, interest portals, print and all other forms of media, and content writing, web design and search engine optimization solutions. The assessee unit was setup in the month of August 2008 at Karmayog Building , 2nd Floor, Parsi Panchayat Road, Andheri(East), Mumbai-400069. The said unit was not registered as STPI unit under STPI scheme. The assessee did not claimed any deduction u/s 10B of the 1961 Act for AY 2009-10 as its unit was not registered as STPI unit. In the month of August, 2009, the assessee applied to STPI for registration as STPI unit being 100% EOU under the STPI scheme for the development and export of computer software/ITES at location situated at Karmayog building, 2nd floor, Parsi Panchayat Road, Andheri(E), Murnbai-400069. On 11th September, 2009 . STPI conveyed its approval and registered unit of the assessee as an STP unit being 100% EOU. The assessee received NOC dated 19.12.2009 from STPI for relocating its 100% EOU STPI unit to 102B, Akruti trade centre, 1st floor, Road no. 7, MIDC, Andheri (East), Mumbai-400 093. The Assistant Commissioner of Customs,Mumbai granted permission for manufacture of computer software and IT enabled services in Bond under Section 65 of the Customs Act, 1962 read with supplementary Regulations under the Manufacture and Other Operations in the Warehouse Regulations, 1966. The AO while framing assessment for AY 2010-11 under scrutiny assessment u/s 143(3) of the 1961 Act granted relief by way of deduction u/s 10B of the 1961 Act after discussing the facts in details. The relevant extract of the assessment order passed by the AO u/s 143(3) for AY 2010-11 are reproduced hereunder:

“ 4. It is seen from the financial statements and audit reports submitted by the assessee that the assessee is 100 % Export Oriented Unit and claiming exemption u/s. 10B of the Income Tax, 1961 for the first year of Rs. 16,38,470/- in respect of Export Turnover of Rs. 6,36,32,138/-. In this regard, the assessee company filed Report under section 10B of the Income Tax Act 1961 in Form No. 56G dated 12/07/2010 in which has stated that the assessee company is registered as EOU in Software Technology Park of India w.e.f. 11/09/2009 and doing the business from registered office at 102-B. Akruti Trade Centre, Road No. 7, MIDC, Andheri(E), Mumbai 400 093 and engaged in the export of computer software during the year ended on 31st march, 2010. It is also submitted that the assessee claiming exemption u/s. 10 first time in

the 9th year out of 10 consecutive assessment years as provided in Section 10B Section 10B of the Income Tax Act, 1961.

4.1 The assessee company has been registered as "Export Oriented Unit". The details of foreign remittance have been filed. In support of the claim of exemption of Rs. 16,38,470/- u/s. 10B of the I.T. Act, the A.R. of the assessee produced the Auditor's certificate in Form No. 56G enclosing Annexure-A and as per Annexure A to Form No. 56G, the deduction / exemption u/s. 10B of the I.T. Act, 1961 is found to be allowed and therefore, accordingly allowed to the assessee of Rs. 16,38,470/- as per assessee's claim in the return of income.

The learned CIT(A) has elaborately discussed the issue and granted relief to the assessee for AY 2011-12 vide appellate order dated 29.01.2016. The relevant extract of learned CIT(A) order dated 29.01.2016 for AY 2011-12 are reproduced hereunder:

“ 3.2. I have gone through the assessment order dated 12.02.2014 wherein the AO is of the opinion that the appellant is running the same business using the same employees from the existing business by setting up of new unit by change of location and the appellant company is not eligible to claim deduction 10B of the I.T. Act. On the other hand, the AR of the appellant argues that the appellant's company was not formed by splitting up or reconstruction of appellant's existing business and has fulfilled all the conditions as per section 10B of the I.T. Act and therefore, the deduction should be allowed to the appellant company. In support of this, the appellant company filed a copy of the letter issued by the Software Technology Parks of India, Mumbai, Ref. No. STPI/MUM/ VIII(A)(1527)/ 2009(09)/ PM/9380 dated 19.12.2009 the contents of which are reproduced as under :

*"M/s. Everyday Health India Private Ltd.,
Karmayog Building, 2nd floor,
Parsi Panchayat Road,
Andheri (East), Mumbai 400 069*

SUB : Relocation of STP Unit.

This has referenced to your letter no. NIL dated 04.12.2009, regarding permission to relocate operation in another location. This office has issued approval letter no. STP/MUM/VHI(A)/(1527)/2009(09)/SKA/6783 dated 11.09.2009, for the STP unit M/s. Everyday Health India Private Limited.

Existing STP Unit Location :

Karmayog Building, 2nd floor, Parsi Panchayat Road, ANdheri (East), Mumbai 400 069.

We have noted that the company has taken mentioned below location for relocate their operations in one place i.e.

New STP location :

102B, Akruti trade centre, 1st floor, Road no. 7, MIDC, ANdheri (East), Mumbai 400 093.

The case has been examined by this and it may be noted that unit is relocating their operations as per letter dated 04.12.2009, In view of above we have "No Objection" in M/s. Everyday Health India Private Limited to relocate their operation at location :102 B, Akruti Trade Centre, 1st Floor, Road no. 7, MIDC, ANdheri (East), Mumbai 400 093."

With regard to AY 2010-11, it is understood that Section 10B deduction has already been granted by the AO being the first year if claim. For the AY 2011-12, AO has not granted Section 10B deduction. Further AO himself mentions that The Asst. Commissioner of Customs, 100% EOU, Mumbai vide letter dated 3.11.2009 has granted permission to manufacture computer software and IT enables services in Bond under section 65 of the Customs Act, 1962 read with supplementary Regulations under the Manufacture and Other Operations in the Warehouse Regulations, 1966. The Act does not allow 10B deduction to any undertaking w.e.f. AY 2012-13. The relevant proviso is as under :

"Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April,[2012] and subsequent years."

As the appellat company has obtained permission to relocate the existing unit at Karmayog Bldg., 2nd floor, Parsi Panchayat Road, Andheri (East), Mumbai 400 069 to 102B, Akruti Trade Centre, 1st floor, Road no. 7, MIDC, Andheri (East), Mumbai 400 093 and also approval letter dated 11.09.2009 from Software Technology Parks of India, I am of the opinion that the appellat is eligible for deduction u/s. 10B of the I.T. Act. I, therefore, direct the AO to allow such deduction.

4. *In the result, the appeal is allowed."*

We have also observed that there is no splitting or reconstruction of the unit and it is only that the unit was first setup in Domestic Tariff Area(DTA) which was later approved as 100% EOU STPI unit and later on the unit was relocated to a new location as 100% EOU unit for which requisite permissions were also obtained by the assessee from the relevant authorities. We have observed that the assessee has not split or reconstructed its business and the same business is continuing which was earlier located in DTA which was later approved as 100% EOU STPI unit and thereafter shifting of unit to a new place/location took place with the approval of authorities. We have observed that there is no evidence on

record that the assessee used old plant and machinery or it violated any of the conditions stipulated under STPI scheme r.w.s. 10B of the 1961 Act . We have also observed that CBDT circular no. 1/2005 dated 06.01.2005 allowed the relief u/s 10B of the 1961 Act in the cases of subsequent conversion of unit set up in DTA unit into subsequently approved as 100% EOU unit by the Board appointed by Central Government in exercise of powers conferred u/s 14 of the Industries(Development and Regulation) Act, 1951, as per the terms of the said circular. The said CBDT circular no 1/2005 dated 06.01.2005 is reproduced here under:-

“Certain clarification regarding Tax holiday under section 10B of the Income-tax Act to 100% Export Oriented Undertaking

CIRCULAR NO. 1/2005, DATED 6-1-2005

1. Section 10B of the Income-tax Act provides for 100% deduction of profits derived by a hundred per cent Export Oriented Undertaking, from export of articles or things or computer software manufactured or produced by it. The deduction is available for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software. However, no deduction under section 10B is available after assessment year 2009-10.

2. The deduction under section 10B is available to an undertaking which fulfils all the following conditions:—

(i) it manufactures or produces any article or thing or computer software;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence except in the circumstances specified under section 33B of the IT Act.

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

3. Representations have been received from various quarters as to whether an undertaking set up in Domestic Tariff Area, which is subsequently approved as 100% EOU by the Board appointed by the Central Government in exercise of powers conferred under section 14 of the Industries (Development and Regulation) Act, 1951, is eligible for deduction under section 10B of the Income-tax Act.

4. The matter has been examined and it is hereby clarified that an undertaking set up in Domestic Tariff Area (DTA) and deriving profit from export of articles or things or computer software manufactured or produced by it, which is subsequently converted into a EOU, shall be

eligible for deduction under section 10B of the IT Act, on getting approval as 100% export oriented undertaking. In such a case, the deduction shall be available only from the year in which it has got the approval as 100% EOU and shall be available only for the remaining period of ten consecutive assessment years, beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software, as a DTA unit. Further, in the year of approval, the deduction shall be restricted to the profits derived from exports, from and after the date of approval of the DTA unit as 100% EOU. Moreover, the deduction to such units in any case will not be available after assessment year 2009-10.

5. To clarify the above position, certain illustrations are given as under:—

(i) Undertaking 'A' is set up in Domestic Tariff Area and starts manufacture or production of computer software in Financial Year 1999-2000 relevant to assessment year 2000-01. It gets approval as 100% EOU on 10th September, 2004 in the financial year 2004-05 relevant to assessment year 2005-06. Accordingly, it shall be eligible for deduction under section 10B from assessment year 2005-06 i.e., the year in which it fulfils the basic condition of being a 100% EOU. Further, the deduction shall be available only for the remaining period of ten years i.e. from assessment year 2005-06 to assessment year 2009-10. This deduction under section 10B for assessment year 2005-06 shall be restricted to the profits derived from exports, from and after the date of approval of the DTA unit as 100% EOU.

(ii) Undertaking 'B' set up in Domestic Tariff Area, begins to manufacture or produce computer software in financial year 1996-97 relevant to assessment year 1997-98. It gets approval as 100% EOU in financial year 2007-08 relevant to assessment year 2008-09. No deduction under section 10B shall be admissible to undertaking B as the period of 10 years expires in financial year 2005-06 relevant to assessment year 2006-07, prior to its approval as 100% EOU.

(iii) Undertaking 'C' is set up in Domestic Tariff Area in the financial year 2000-01 relevant to assessment year 2001-02 and engaged in the business of providing computer related services, other than those notified by the Board for the purposes of section 10B. In financial year 2002-03, it acquires more than 20% of old plant and machinery and starts manufacturing computer software. It also gets approval as 100% EOU in financial year 2002-03. Undertaking 'C' shall not be eligible for deduction under section 10B, as there has been transfer of old plant and machinery.

(iv) Undertaking 'D' is set up and starts producing computer software in financial year 2003-04 relevant to assessment year 2004-05. It gets approval as 100% EOU in financial year 2006-07 relevant to assessment year 2007-08. It shall be eligible for deduction under section 10B from assessment year 2007-08. However, the deduction shall not be available after assessment year 2009-10.

(v) Undertaking 'E' is set up and starts producing computer software prior to 31-3-1994. It gets approval as 100% EOU in financial year 2004-05 relevant to assessment year 2005-06. Undertaking 'E' shall not be eligible for deduction under section 10B as the period of deduction of 10 years expires prior to assessment year 2005-06."

The assessee has relied upon of the following decisions as under :-

| S.No: | Citation |
|-------|---|
| 1. | Aditya Birla Nuvo Ltd v. ACIT ,{{[2015] 56 taxmann.com 168 / [2015] 68 SOT 403(Mum-Trib)}} |
| 2. | Nagesh Chundur v. CIT {{[2013] 358 ITR 521 (Madras -HC)}} |
| 3 | Prothious Engineering Services (P.) Ltd {{[2016] 46 ITR(T) 438 / [2017] 88 taxmann.com 47(Mum-Trib)}} |
| 4. | ACIT v. Metal Alloys Corporation {{[2015] 59 taxmann.com 370 (Rajkot- Trib)}} |
| 5. | CIT v. Sasken Communication Tech Ltd {{[2012] 347 ITR 362 (Karnataka-HC)}} |

In the case of Prothious Engineering Services P. Ltd. (supra), the Accountant Member was part of the Division Bench of Mumbai-tribunal who passed the said order , wherein the tribunal held in favour of taxpayer by holding as under:-

" 8.Even alternatively otherwise on the merits of the appeal, we have observed that assessee company has set up a new undertaking in the month of April, 2005 and obtained permission from STPI w.e.f. 19th September, 2005 by making an application in the month of July, 2005 which is one of the important condition for grant of approval u/s 10A of the Act. It is not the case of the Revenue that the assessee company has utilized the old machinery/computers etc. while setting up the new undertaking in Mumbai in April 2005 rather the case of the Revenue is that the assessee company set up an undertaking in the month of April, 2005 while it applied for the permission from STPI in July 2005 and the permission was received on 19th September 2005 while the deduction u/s. 10A of the Act was claimed w.e.f. 1st October 2005 and hence the revenue is contending that when STPI approval was received by the assessee company on 19th September 2005, it was already an existing unit being set up in April 2005 i.e. anterior to the receipt of STPI approval on 19-09-2005 and Mumbai unit cannot be

classified as the new unit and it will be deemed to be old unit at that time and hence there is reconstruction of business from domestic tariff area unit to 100% EOU when STPI permission was received, thus making it ineligible for deduction u/s 10A of the Act as the same is hit by Section 10A(2) of the Act. However, in our considered view, the assessee company is not hit by the Section 10A(2) of the Act as it could not be said that it is formed by splitting up or reconstruction of business already in existence nor it is brought on records that there is transfer to a new business of machineries or plant previously used for any purpose. The circular no 1 of 2005 issued in context of Section 10B of the Act which is reproduced below supports the stand of the assessee company :

“Certain clarification regarding Tax holiday under section 10B of the Income-tax Act to 100% Export Oriented Undertaking CIRCULAR NO. 1/2005, DATED 6-1-2005

1. Section 10B of the Income-tax Act provides for 100% deduction of profits derived by a hundred per cent Export Oriented Undertaking, from export of articles or things or computer software manufactured or produced by it. The deduction is available for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software. However, no deduction under section 10B is available after assessment year 2009-10.
2. The deduction under section 10B is available to an undertaking which fulfils all the following conditions:— (i) it manufactures or produces any article or thing or computer software; (ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence except in the circumstances specified under section 33B of the IT Act.
(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.
3. Representations have been received from various quarters as to whether an undertaking set up in Domestic Tariff Area, which is subsequently approved as 100% EOU by the Board appointed by the Central Government in exercise of powers conferred under section 14 of the Industries (Development and Regulation) Act, 1951, is eligible for deduction under section 10B of the Income-tax Act.
4. The matter has been examined and it is hereby clarified that an undertaking set up in Domestic Tariff Area (DTA) and deriving profit from export of articles or things or computer software manufactured or produced by it, which is subsequently converted into a EOU, shall be eligible for deduction under section 10B of the IT Act, on getting approval as 100% export oriented undertaking. In such a case, the deduction shall be available only from the year in which it has got the approval as 100% EOU and shall be available only for the remaining period of ten consecutive assessment years, beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer

software, as a DTA unit. Further, in the year of approval, the deduction shall be restricted to the profits derived from exports, from and after the date of approval of the DTA unit as 100% EOU. Moreover, the deduction to such units in any case will not be available after assessment year 2009-10. 5. To clarify the above position, certain illustrations are given as under:—

(i) Undertaking 'A' is set up in Domestic Tariff Area and starts manufacture or production of computer software in Financial Year 1999-2000 relevant to assessment year 2000-01. It gets approval as 100% EOU on 10th September, 2004 in the financial year 2004-05 relevant to assessment year 2005-06. Accordingly, it shall be eligible for deduction under section 10B from assessment year 2005-06 i.e., the year in which it fulfils the basic condition of being a 100% EOU. Further, the deduction shall be available only for the remaining period of ten years i.e. from assessment year 2005-06 to assessment year 2009-10. This deduction under section 10B for assessment year 2005-06 shall be restricted to the profits derived from exports, from and after the date of approval of the DTA unit as 100% EOU. (ii) Undertaking 'B' set up in Domestic Tariff Area, begins to manufacture or produce computer software in financial year 1996-97 relevant to assessment year 1997-98. It gets approval as 100% EOU in financial year 2007-08 relevant to assessment year 2008-09. No deduction under section 10B shall be admissible to undertaking B as the period of 10 years expires in financial year 2005-06 relevant to assessment year 2006-07, prior to its approval as 100% EOU. (iii) Undertaking 'C' is set up in Domestic Tariff Area in the financial year 2000-01 relevant to assessment year 2001-02 and engaged in the business of providing computer related services, other than those notified by the Board for the purposes of section 10B. In financial year 2002-03, it acquires more than 20% of old plant and machinery and starts manufacturing computer software. It also gets approval as 100% EOU in financial year 2002-03. Undertaking 'C' shall not be eligible for deduction under section 10B, as there has been transfer of old plant and machinery. (iv) Undertaking 'D' is set up and starts producing computer software in financial year 2003-04 relevant to assessment year 2004-05. It gets approval as 100% EOU in financial year 2006-07 relevant to assessment year 2007-08. It shall be eligible for deduction under section 10B from assessment year 2007-08. However, the deduction shall not be available after assessment year 2009-10. (v) Undertaking 'E' is set up and starts producing computer software prior to 31-3-1994. It gets approval as 100% EOU in financial year 2004-05 relevant to assessment year 2005-06. Undertaking 'E' shall not be eligible for deduction under section 10B as the period of deduction of 10 years expires prior to assessment year 2005-06.”

The following case laws also support the stand and contentions of the assessee company:

- i. Nagesh Chundur Vs. CIT [(2013) 358 ITR 521] (Mad);
- ii. Super Auto Forge Ltd., Vs. Add. CIT [(2014)365 ITR 318] (Mad);
- iii. CIT Vs. Foresee Information Systems (P) Ltd., [(2014)365 ITR 335] (Kar);
- iv. CIT Vs. Excel Softech Ltd [(2008)175 Taxman 257 (P&H-HC)];
- v. CIT Vs. Quantum Coders Ltd [ITA No. 542 of 2013] (Del)

Thus, we hold that assessee company is duly entitled for exemption u/s. 10A of the Act and in our considered view, the assessee company has rightly claimed deduction of Rs.47,13,192/- u/s. 10A of the Act w.e.f. 1st October , 2005 which the assessee company is duly entitled for the said deduction of Rs.47,13,192/- u/s 10A of the Act. Hence, we set aside the orders of the CIT(A) and hold that the assessee company is entitled for the deduction of Rs.47,13,192/- u/s.10A of the Act w.e.f. 1st October, 2005 which has been rightly claimed by the assessee company in the return of income filed with the Revenue. We order accordingly.

9. Accordingly, the appeal of the assessee company is allowed.”

The Hon'ble Madras High Court in the case of Nagesh Chundur v. CIT(supra) held that mere fact that the taxpayer initiated production prior to its registration as STPI , would not disentitle taxpayer from claiming deduction u/s 10A of the 1961 Act , while Hon'ble Karnataka High Court in the case of CIT v. Sasken Communications Tech Ltd.(supra) has held that deduction u/s. 10B of the 1961 Act shall be allowed in case of shifting of the undertaking from one State to another State with due permissions and after shifting if the undertaking has maintained integrity, identity and continuity. Thus , keeping in view our detailed discussions and reasoning, we hold that keeping in view factual matrix as is emanating from records before us, the deduction shall be allowable to the assessee u/s. 10B of the 1961 Act and the appellate order of learned CIT(A) is upheld for the reasons mentioned in this order. Revenue fails in this appeal. We order accordingly.

7. In the result, the appeal of the Revenue is dismissed.

order pronounced in the open court on 10.08.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 10.08.2018 को की गई ।

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 10.08.2018

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

**DY/ASSTT. REGISTRAR
ITAT, MUMBAI**