

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 517/MUM/2016  
Assessment Year: 2010-11**

Hydro Pneumatic Accessories India Pvt. Ltd. 17, Raja Industrial Estate, P.K. Road, Nahur Village, Mulund (W), Mumbai- 400080. <b>PAN No. AAACH1351A</b> <b>Appellant</b>	Vs.	ITO-10(3)(1), Mumbai.      <b>Respondent</b>
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**ITA No. 713/MUM/2016  
Assessment Year: 2010-11**

ITO-15(2)(1), Room No. 452, 4 <sup>th</sup> floor, Aayakar Bhavan, Maharshi Karve Road, Mumbai- 400020.  <b>Appellant</b>	Vs.	Hydro Pneumatic Accessories India Pvt. Ltd. 17, Raja Industrial Estate, P.K. Road, Nahur Village, Mulund (W), Mumbai- 400080. <b>PAN No. AAACH1351A</b> <b>Respondent</b>
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Assessee by : Mr. Dharan V. Gandhi, AR  
Revenue by : Mr. Abiram Kartikeyan, DR

Date of Hearing : 31/07/2018  
Date of pronouncement: 26/10/2018

ORDER

PER N.K. PRADHAN, AM

The captioned cross appeals- one by the assessee and one by the Revenue – are directed against the order of the Commissioner of Income Tax (Appeals)-24, Mumbai [in short ‘CIT(A)’] and arise out of the assessment completed u/s 143(3) of the Income Tax Act 1961 (the ‘Act’). As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

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2. The grounds of appeals filed by the assessee read as under:
  1. Partial disallowance of Deduction u/s 10B-Rs.22,20,268/-
    - a. The Ld. CIT(A) erred in confirming the disallowance of the freight charges paid for Rs.22,20,268/- without appreciating the fact that the freight charges are embedded in the sales (export-turn over) and is a part and parcel of invoice therefore, the disallowance is uncalled for and the same may be allowed for the claim.
    - b. Without prejudice to the above, the Ld. CIT(A) should have appreciated that without freights payment the sales would not have been possible, hence, the same should be allowed.
    - c. Levy of Penal Interest

The appellant, on merits, denies its liabilities to penal interest.

3. Briefly stated, the facts of the case are that the assessee claimed a deduction of Rs.4,77,96,512/- u/s 10B of the Act. During the course of assessment proceedings, the AO vide notice issued u/s 142(1) dated 13.12.2011 and 17.07.2012 asked the assessee to furnish the necessary

documentary evidence in support of its above claim. However, till the date of assessment dated 26.03.2013 the assessee failed to furnish any documentary evidence like activities stated to be undertaken in the eligible unit, remittances received, remittance certificate, claim regarding EOU status etc. in support of its above claim. The assessee could only file a copy of report in Form 56G in support of its claim made in the return of income. As the assessee failed to give reasons, which prevented it from furnishing the requisite details and evidence, the AO disallowed the claim of deduction of Rs.4,77,96,512/- made by the AO u/s 10B of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) thus held at para 2.4.5 of his order dated 27.11.2015 the following:

“Having considered the entire gamut of facts, I find that the appellant’s claim for exemption u/s 10B has been accepted by Ld. AO in earlier years and as late as 16.12.2010 while deciding the appellant’s case for AY 2008-09, the same has been accepted except for a partial disallowance in respect of freight charges which was treated as income from other sources. I also find that the above issue was a subject matter of adjudication before the Ld. CIT(A)-22, Mumbai where the order of the Ld. AO has not been disturbed. Similar decision was also rendered by the then Ld. CIT(A)-X, Mumbai where the entire issue of section 10B was under challenge and vide order dated 21.08.2009 in Appeal No. CIT(A)-X/IT-89/2003-09, the then Ld. CIT(A)-X, Mumbai had held that the appellant had fully complied with the provisions of section 10B for claiming the deduction which was also accepted by the then Ld. AO in the Remand Report. In view of the consistency of stand taken by Revenue in allowing deduction u/s 10B in earlier years and the same having been considered by the Ld. Cs.I.T.(A) in earlier years, I do not find any merit in the disallowance made

by Ld. AO as far as Ground No. 3 is concerned. However, the same is subject to the decision in respect of Ground No.3(b)) which is by way of partial disallowance of Rs.22,20,268/- on protective basis.”

5. Before us, the Ld. counsel of the assessee, in support of his contentions, has relied on the decision in *CIT v. Gem Plus Jewellery India Ltd.* (2011) 330 ITR 175 (Bom) and *Riviera Home Furnishing v. Addl. CIT* (2016) 65 taxmann.com 287 (Delhi). On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A) confirming the disallowance of freight charges of Rs.22,20,268/-.

6. We have heard the rival submissions and perused the relevant materials on record. In *Gem Plus Jewellery India Ltd.* (supra), the Hon’ble Bombay High Court has held that :

“The expression ‘total turnover’ has not been defined at all by Parliament for the purposes of section 10A. However, the expression ‘export turnover’ has been defined. The definition of ‘export turnover’ excludes freight and insurance. Since export turnover has been defined by Parliament and there is a specific exclusion of freight and insurance, the expression ‘export turnover’ cannot have a different meaning when it forms a constituent part of the total turnover for the purposes of the application of the formula. A construction of a statutory provision which would lead to an absurdity must be avoided. Moreover, a receipt such as freight and insurance which does not have any element of profit cannot be included in the total turnover. Freight and insurance do not have an element of turnover. For this reason in addition, these two items would have to be excluded from the total turnover particularly in the absence of a legislative prescription to the contrary.”

6.1 In the case of *Riviera Home Furnishing v. Addl. CIT* (2016) 65 taxmann.com 287 (Delhi), the assessee, a 100% Export Oriented

Undertaking (EOU) 'eligible' for deduction u/s 10B, claimed deduction in respect of the income earned from deemed export drawback customer claims, freight subsidy and interest on Fixed Deposit Receipts (FDRs) made for business purposes. The AO excluded the above receipts from the computation of eligible income u/s 10B(4) on the view that the said receipts did not fall within the expression 'profit derived' from export of article. The CIT(A) disallowed the appeal of the assessee. On second appeal, the Tribunal agreed with the contention of the assessee as regards the deemed exports drawback forming part of the income eligible for deduction u/s 10B. However, as regards other three items, viz., customer claims, freight subsidy and interest on FDRs made for business purposes, the Tribunal upheld the view of the AO and the CIT(A). On appeal, the Hon'ble Delhi High Court held that the freight subsidy received by the assessee in respect of business carried on was part of profit of business of undertaking and thus eligible for deduction u/s 10B of the Act.

6.2 Facts being identical, we follow the ratio laid down in *Gem Plus Jewellery India Ltd.* (supra) and *Riviera Home Furnishing* (supra) and delete the disallowance of freight charges of Rs.22,20,268/- confirmed by the Ld. CIT(A) on protective basis.

7. In the result, the appeal filed by the assessee is allowed.

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8. The grounds of appeal filed by the revenue read as under:

1. That on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing the claim of exemption u/s. 10B of the Act of

Rs.4,77,96,512/- even after the assessee has not discharge its onus to prove eligibility to avail such claim except filing of Form 56F.

2. That on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred by not appreciating that section 10B nowhere envisage that once exemption allowed in earlier year, the claim of such exemption be allowable on mere principle of consistency as each year is distinct year and assessee has to substantiate its eligibility to claim such exemption for every year.
3. That on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred by not according any opportunity to verify whether the assessee satisfied the conditions laid down under provisions of section 10B(3) & 10B(4) of the Act for claiming such exemption.

9. We have mentioned at para 3 hereinbefore the reasons given by the AO for disallowing the deduction of Rs.4,77,96,512/- claimed by the assessee u/s 10B of the Act. In appeal, the Ld. CIT(A) followed the following decision of his predecessor for the AY 2009-10 :

“I have gone through the assessment order, perused the submissions made by the appellant and also discussed the case with the A.R. of the appellant. The appellant before me failed to produce copy of Form No. 56G Annexure-II despite giving opportunity. However, from perusal of the submissions as above it appears that the A.O. has excluded freight charges and sundry balances written off from the profit. Identical issue had come up before me in appellant's own case in AY 2008-09 wherein vide my order No. CIT(A)-22/ITO 10(3)(1)/IT-192/2010-11 dated 22.03.2011 the exclusion of freight charges and sundry balances written off for calculating deduction u/s 10B was upheld. The appellant has admitted that the facts for the year are identical to last year and an appeal against the order of the CIT(A) has been filed before Hon'ble ITAT. In view of these facts and the legal position, the deduction u/s 10B recomputed by AO is upheld.”

10. Before us, the Ld. DR relies on the order of the AO. It is submitted by him that section 10B, nowhere envisages that once exemption is allowed in earlier year, the claim of such exemption be allowable on the principle of consistency, as each year is distinct year and the assessee has to substantiate its eligibility to claim such exemptions for every year.

On the other hand, the Ld. counsel of the assessee submits the following status of allowability of claim u/s 10B for various assessment years.

Sr No.	Assessment Year	AO	CIT	Remarks
1.	AY 2006-07	Entire deduction u/s 10B disallowed	Allowed by CIT(A) after getting remand report from the AO	No appeal by the Department
2.	AY 2007-08	Fully allowed by the AO	NA	NA
3.	AY 2008-09	Deduction u/s 10B disallowed only qua freight charges and sundry balances written back.	Upheld AO's order	Matter pending before Tribunal
4.	AY 2009-10	Deduction u/s 10B computed based on Total income computed as per the Act and not as per P&L Account	Upheld AO's order	Matter withdrawn before the Tribunal due to smallness of amount
5.	AY 2011-12	Deduction u/s 10B disallowed only qua freight charges	Upheld AO's order	Assessee in process of filing Tribunal appeal.

Thus the Ld. counsel submits that the AO having accepted the assessee's claim of exemption u/s 10B in the initial year AY 2005-06, keeping in mind the principles of consistency, its claim of exemption should have been accepted. It is further stated that in spite of providing the audit report in Form 56G with the computation and in spite of having all the assessment records of earlier years, the AO disallowed the entire expenditure without doubting the status of the assessee being a 100% EOU for last many years. Reliance is placed by him on the decision in *Bajaj Tempo Ltd.* 196 ITR 188 (SC). 11.

11. We have heard the rival submissions and perused the relevant materials on record. We have examined the status of allowability of claim u/s 10B made by the assessee for AYs 2006-07, 2007-08, 2008-09, 2009-10 and 2011-12 delineated at para 10 hereinbefore. In the instant case the assessee had filed before the AO the audit report in Form No. 56G. Thus keeping in mind, the rules of consistency, the claim made by the assessee u/s 10B is held to be allowable. Therefore, we uphold the order of the Ld. CIT(A).

12. In the result, the appeal filed by the revenue is dismissed.

13. To sum up, the appeal filed by the assessee is allowed, whereas the appeal filed by the revenue is dismissed.

**Order pronounced in the open Court on 26/10/2018.**

Sd/-  
(C.N. PRASAD)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 26/10/2018

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

(Sr. Private Secretary)  
**ITAT, Mumbai**