

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER

ITA No.5359/Del/2018
Assessment Year: 2011-12

Hritnik Export Pvt. Ltd. 225, Krishna Apartments, 27, I. P. Extension, New Delhi PAN No. AAACH9458A	Vs	ITO, Ward- 12 (4) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Satyajeet Goel, CA
Respondent by	Sh. S. L. Anuragi, Sr. DR

Date of hearing:	30/07/2019
Date of Pronouncement:	26/09/2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 16.05.2018 of the CIT(A)-42, New Delhi relating to A.Y. 2011-12.

2. Facts of the case, in brief, are that the assessee is a company and engaged in the business of manufacturer and exporter of readymade garments. It filed its return of income on 29.09.2011 declaring total income of Rs.2,95,330/-. During the course of assessment proceedings the Assessing Officer noted that the assessee company has claimed deduction of Rs.46,22,783/- u/s. 10 B of the IT Act. He observed that an

order dated 27.09.2013 was received from the Development Commissioner, Noida, Special Economic Zone that a penalty of Rs.40 lacs was imposed on the assessee under the provision of section 11 of the FTDR Act 1992 read with para 6.6.1 (c) of Foreign Trade Policy 2009 to 2014 for misuse of LOP and other deeds due to unprecedented economic offence committed by the unit in the state of willful and intentional Act to defraud the Government. He, therefore, confronted the same to the assessee as to why the claim of Rs.46,22,783/- should not be disallowed. Rejecting the various explanation given by the assessee the Assessing Officer made disallowance of Rs.46,22,783/- by observing as under :-

“It is clear from above submission dated 13.03.2014 that assessee company also is not interested to recognize itself as an EOU and has also not claimed deduction u/s 10B for A.Y. 2012-13 onwards. The assessee company has not referred the reasons for not claiming deduction u/s 10B from A.Y. 2012-13 onwards. In absence of any reasons, it is obvious that assessee have committed the offences which are highlighted and enumerated in the Development Commissioner, Noida order dated 27.09.2013. In the light of above discussion and following offences explained/referred in the order dated 27.09.2013, the submission made by the assessee company regarding the claim for deduction u/s 10B is not acceptable.

- a) *Claiming drawback by concealing their status as EOU to Customs Authorities w.e.f. 03.10.2007 and also by not complying mandator*

*requirements of Customs bond and warehousing licence under Section 58 and 65 of Customs Act, 1962 except for the period from 24.09.2010 to **02.10.2010**.*

- b) Claiming 100% exemption u/s 10B of the I.T. Act, 1961 as EOU from the date of issue of LOP (03.10.2007) and simultaneously claimed duty drawback as per the notified Schedule of drawback against the same exports during the same period, which was prohibited to EOU vide para 7(c) of notification Nos. 81/2006-Cus (NT) dated 13.07.2006 (as superceded).*
- c) The unit failed in discharge of their obligations as an EOU after issue of the LOP, as are enumerated under chapter 6 of the FTP read with Chapter 6 of the HBP; that they failed to maintain proper account and submit quarterly (QPR) and annual report (APR) in the prescribed Annexure to Appendix 14- I-F during the period starting from 03.10.2007 to 02.10.2012.*
- d) They failed to submit and satisfy the competent authority for achievement of positive Net Foreign Exchange (NFE) in terms of the provisions of para of the FTP; that they failed to draw entitlement for DTA sale; if any, of finish products/scraps/waste products/by-products in terms of the provisions of para 6.8 of FTP.*

In view of above, since the assessee company has not followed the rules & regulations meant for 100% Export Oriented Unit (EOU), therefore, deduction of Rs.46,22,783/- claimed u/s.10B of the IT Act is disallowed.”

3. Similarly the Assessing Officer made addition of Rs.46,82,369/- on account of duty drawback on the ground that (a) it is only the profit and gains derived by 100% export oriented under taking eligible for deduction u/s. 10B. (b) Receipt of duty drawback is “attributable to” but is no way ‘derived from the export of article or things. (c) It is an ancillary profit of the exporter and it is not derived from export business within the ordinary meaning in the course of a business. (d) The duty drawback income is not earned on account of export of articles or things and further no foreign exchange can be brought into India by earning said income.

4. In appeal the Ld. CIT(A) upheld both the additions by observing as under :-

5.2 *“The issue involved in this case is whether the AO is correct in making disallowance of Rs. 46,22,783 of deduction claimed u/s 10B of the Income Tax Act or not?”*

5.3 *At the outset, the facts of the case are that the assessee company is engaged in the business of manufacturer and exporter of readymade garments. During the year, the assessee company has claimed deduction of Rs. 46,22,783/- u/s 10B of the Income Tax Act. During the year, the AO received copy of the order dated 27.09.2013 of Sh. Jayant Mishra, Development Commissioner, NOIDA Special Economic Zone, Noida. Vide this order, a penalty of Rs. 40,00,000/- was imposed under the provisions of section 11 of the FTDR Act, 1992 read with para 6.6.1(c) of Foreign Trade policy for*

misusing of letter of permission (LOP) by the assessee unit. The AO has reproduced the gist of the order in the assessment order itself.

5.4 The AO observed in the assessment order that the Development Commissioner in its order dated 27.09.2013 has emphasized that the assessee company has not followed all the terms and conditions laid down under EOU status to claim tax exemption notification. The conclusion drawn by Development Commissioner in its order dated 27.09.2013 is re-produced as under for ready reference:-

“(i) I hold that the unit was an EOU against the LOP dated 03.10.2007 to 02.10.2012 issued to them. The said LOP is not renewed thereafter and stands cancelled in terms of the Rule 10 of the Foreign Trade(Regulation) Rules, 1993 read with Section 9(4) of the FTDR Act, 1994 and in terms of Para6 of the LUT executed by the unit, read with Para 6.6.1(c) of the FTP.

(ii) I hold that all provisions of chapter 6 of FTP read with chapter 6 of HBP and the Appendix made there under in the HBP Vol.1 are applicable w.e.f. 03.10.2007 and the obligations under the said provisions for an EOU should be arrived at for its discharge.

(iii) The unit is directed to furnish APRs/QPRs for the period w.e.f. 03.10.2007 to 02.10.2012;

(iv) I suspend the importer and exporter code (IEC) in terms of section 8 of the FTDR Act, 1992 for a period of sec month from the date of issue of this order;

(v) The duty drawback against the exports as well as duty

on D.T.A clearances and any other benefits availed during the period of operation as on EOU may be looked into by the appropriate jurisdictional authorities; and

(vi) I impose of penalty of Rs. 40,00,000/-(Rupees Forty Lakhs Only) under the provisions of section 11 of the FTDR Act, 1992 read with the Para 6.6.1(c) of Foreign Trade Policy 2009-14 for the misuse of the LOP and other deeds discussed above. The unit should pay this penalty immediately on receipt of this order."

5.5 *The appellant took a position that the aforesaid order of Development Commissioner was issued beyond the jurisdictional power of the said authority. The appellant clarified that the duty drawback is allowable as export income u/s 10B of the Act as decided by CIT(A)/Hon'ble ITAT for FY 2008-09 & 2009-10. Further, the appellant emphasized that the letter of permission is sufficient to claim deduction u/s 10B of the Act. The assessee company reiterated that it has not taken any direct/ I indirect benefit in the scheme under reference except for claiming the exemption u/s 10B of the Act. Further, the assessee company informed the Assessing Officer that it has already applied for the de-bounding of the unit to stop to avail the status of EOU for the A.Y. 2012-13 and onwards.*

5.6 *The AO observed that the company has not given any reasons for discontinuation of EOU status as well as of claim of deduction u/s 10B from A.Y. 2012-13 onwards. The AO laid emphasis on the fact that the assessee claimed drawback by concealing its status as EOU to Customs Authorities w.e.f. 03.10.2007 I and also did not comply with the mandatory*

requirements of Customs bond and warehousing license under Section 58 and 65 of the Customs Act 1962.

5.7 The AO also held that the unit failed in discharge of its obligations as an EOU after the issuance of the Letter of Permission (LOP) as enumerated under Chapter 6 of the Foreign Trade Policy (FTP) read with Chapter 6 of the Foreign Trade Policy (FTP) read with Chapter 6 of Handbook of Procedure (HBP). It is also held by the AO that the assessee company failed to submit and satisfy the competent authority for achievement of positive Net Foreign Exchange in terms of provisions of FTP. Accordingly, the AO disallowed the claim of exemption u/s 10B of the Act. During the appellate proceedings, the appellant relied upon the decision of Hon'ble Delhi High Court in its own case where the Hon'ble High Court has accepted the claim of exemption u/s 10B of the Act. The appellant reiterated that its claim is in conformity with the approval granted by NSEZ. The appellant, further, pointed out that Letter of Permission (LOP) granted by the NSEZ is still relevant and operative.

5.8 I find that the main requirement of exemption under section 10B of the Act is that the appellant must be 100% EOU. A certificate in this regard is issued by Development Commissioner. I find that the status of EOU is dependent on the satisfactory completion of rules and regulations which are inter-linked. It is a scheme covered under the Foreign Trade Policy under the foreign trade (Development and Regulation Act 1992) and provides for direct taxes and indirect taxes benefits.

The fact that the Development Commissioner has found that the assessee company was misusing the Letter of Permission (LOP) issued by it. Hence, the assessee has been found to be not compliant to the provisions of Foreign Trade Policy. Accordingly, as per the order of the Development Commissioner, NOIDA Special Economic Zone, Noida, the EOU status is in dispute in view of the cancellation of LOP in terms of rule 10 of Foreign Trade (Regulation) Rules 1993 read with Section 9(4) of FTDR Act 1994 and in terms of para 6 of LUT executed by the unit read with para 6.6.1(c) of the Foreign Trade Policy.

5.9 In the backdrop of the discussion above, I find that the decision of Hon'ble Delhi High Court in the case of the assessee is distinguishable on facts as the findings of Development Commissioner were not on record at the time of decision of Hon'ble Delhi High Court. Accordingly, I hold that the AO has rightly disallowed exemption under section 10B of I. T. Act by relying upon the order of Development Commissioner dated 27.09.2013 in this case. Hence, the ground of appeal is dismissed.

6. Statistically, the appeal stands, dismissed.”

5. Aggrieved with such order of the CIT(A), the assessee is in

appeal before the Tribunal by raising the following grounds of appeal :-

1. *“(i) That on the facts and circumstances of the case, the Ld. CIT(A) was not justified in upholding disallowance of statutory deduction u/s.10B amounting to Rs. 46,22,783/- without appreciating the facts of the case.*

(ii) That the claim of statutory benefit u/s. 10B is in conformity with statutory provisions and past history of the case and as such it is not open to reexamine the claim in the year under reference in total disregard to past history of the case and rule of consistency.

2(i) That the Ld. CIT(A) has erred in placing reliance on provisional order of Development Commissioner which is in respect of provisions of Customs Act and has no relevance or bearing to the issue of claim of deduction u/s 10B of the Income Tax Act, 1961.

(ii) That the order of Development Commissioner having been passed without jurisdiction and being under challenge, the Ld. CIT(A) & AO have grossly erred in drawing adverse inference on the basis of same.

(iii) That even otherwise, the appellant having complied all the pre-conditions as mandated u/s. 10B of the Act, the disallowance of statutory deduction u/s 10B on extraneous grounds is illegal and not sustainable under the law.

3. *That on facts and circumstance of the case, the Id. CIT(A) was not justified in endorsing the finding of the assessing officer and confirming consequential disallowance of claim of deduction*

to the extent of Rs. 42,80,369/- u/s 10B in respect of duty draw back even though same is part of eligible profit for the purpose of deduction u/s. 10B as held by Hon'ble High Court in assessee's own case for AY 2008-09 and 2009-10.

4. *That the orders of lower authorities are not justified on facts and same are bad in law.*

5. *That the appellant craves leave to add, alter, amend, substitute, withdraw and/or vary any grounds of appeal at or before the time of hearing.”*

6. So far as the first issue is concerned the Ld. Counsel for the assessee submitted that the claim of statutory deduction u/s. 10B has been accepted and allowed by Hon'ble Delhi High Court in assessee's own case for A.Y.2008-09 and 2009-10 vide order dated 13.11.2014 and by the Tribunal for A.Y.2010-11 vide order dated 10.07.2017. He submitted that the Assessing Officer in the instant case has disallowed the claim of deduction solely on the basis of the order dated 27.09.2013 passed by the Development Commissioner, Noida Special Economic Zone as per which the assessee was allegedly found to be violating provisions of the Customs Act. 1962. However, the Assessing Officer has never disputed the manufacturing and export activity of the assessee company which is the pre-requisite condition for claiming deduction u/s.10B of the IT Act. He submitted that the conclusion of the Assessing Officer is based mainly on the order of Development Commissioner. He submitted that the assessee has been duly granted the LOP which was operative during the year under reference. Relying

on various decisions he submitted that in the case of special deductions, Principle of consistency must be applied and followed. Further he submitted that the order of the Development Commissioner, SEZ Noida is in the context of violation of Customs Act 1962 and the same has no relevance or bearing to the issue of claim of deduction u/s.10B of the IT Act. Relying on various decisions he submitted that the provisions of Income Tax Act 1961 and Customs Act are independent of each other and any violation of Customs Act shall have no effect on operation of provisions of Income Tax Act, 1961. For the above proposition of law he relied on the decision of Hon'ble Karnataka High Court in the case of PCIT Vs. Laxmi Narayan Mining Company reported in 404 ITR 522 and CIT Vs. Caritor (India) Pvt. Ltd. reported in 369 ITR 463. He accordingly submitted that merely because the customs authorities have issued certain notice and raised certain objections which is under challenge before the appellate forum, therefore, the Assessing Officer and the CIT(A) are not justified in placing reliance on the same.

7. So far as the second issue is concerned i.e. the denial of claim of deduction u/s. 10B on duty drawback to the extent of Rs.42,80,369/- on the ground that the duty drawback is not derived from export of article or thing and no foreign exchange can be brought into India by earning said income. He submitted that the issue stands squarely covered in favour of the assessee by the decision of Hon'ble Delhi High Court in assessee's own case for A.Y.2008-09 and 2009-10 which has been followed by

the Tribunal for A. Y. 2010-11. Therefore, the second issue being a covered one in favour of the assessee, the order of the CIT(A) should be set aside on this issue and the ground raised by the assessee should be allowed.

8. The Ld. DR on the other hand heavily relied on the order of the AO and the CIT(A). He submitted that the assessee has claimed the deduction concealing their status as EOU to customs authorities w.e.f. 03.10.2007 and has not complied with the mandatory requirements of customs and warehousing license. The assessee has claimed 100% exemption u/s. 10B of the IT Act as an EOU from the date of issue of LOP and simultaneously claimed the duty drawback in violation of the provisions of the Act. He submitted that the AO and the CIT(A) have given justifiable reasons as to how and why the assessee is not entitled to claim the deduction u/s. 10B of the IT Act.

9. The Ld. DR also distinguished the decision of Hon'ble Delhi High Court on fact and submitted that the order of the CIT(A) being in accordance with law should be upheld.

10. I have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find the Assessing Officer in the instant case disallowed the claim of deduction u/s.10B of the Act on the ground that the assessee has not followed rules and regulations for 100% export oriented unit (EOU). Similarly he also rejected the claim of deduction of duty drawback amounting to Rs.42,80,369/- on the ground that

such duty drawback are not eligible for deduction u/s. 10B of the IT Act. I find the Ld. CIT(A) upheld the action of the AO, the reasons of which are already reproduced in the preceding paragraph. It is the submission of the Ld. Counsel for the assessee that the provisions of customs Act and income tax act are different and violation of the provisions of the Customs Act will not disentitle the assessee to claim the deduction u/s. 10B of the IT Act. It is also the submission of the Ld. Counsel for the assessee that the order of the Development Commissioner, Noida SEZ is under challenge and it has not attained finality. It is also the submission of the Ld. Counsel for the assessee that the orders of the Tribunal for the preceding assessment years has been upheld by the Hon'ble High court in assessee's own case for A. Y. 2008-09 and 2009-10 and the Tribunal has followed the same for A.Y.2010-11. However, in my opinion the order of the Development Commissioner, SEZ Noida raising certain serious objections were not before the AO or the CIT(A) or the Tribunal and, therefore, submission of the Ld. Counsel for the assessee that it is a covered matter in favour of the assessee cannot be accepted at this stage. However, considering the fact that the assessee has challenged the order of the Development Commissioner SEZ which is sub-judice and has not attained finality, therefore, considering the totality of the facts of the case and in the interest of justice, I deem it proper to restore the issue to the file of the AO with a direction to give an opportunity to the assessee to substantiate as to what has happened to the outcome of the issues raised by the

Development Commissioner, Noida SEZ and decide both the issues as per fact and law. While deciding the issues he shall also keep in mind the decision of the Tribunal and the Hon'ble High Court in assessee's own case.

11. So far as the various decisions relied on by the Ld. Counsel for the assessee are concerned, the same in my opinion are not applicable to the facts of the instant case since in none of the cases penalty was imposed for violation of various provisions of the customs Act. I hold and direct accordingly. The grounds raised by the assessee are allowed for statistical purpose.

12. In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 26.09.2019.

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

Neha

Date:- 26.09.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	12.09.2019
Date on which the typed draft is placed before the dictating Member	13.09.2019
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	26.09.2019
Date on which the final order is uploaded on the website of ITAT	26.09.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	