INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 71/Del/2019
(Assessment Year: 2014-15)

Simec Indus Resources Pvt. Ltd, Flat No. 257/DDA Commercial Complex-1, Cycle Market, Jhandewalan Extn, New Delhi	Vs.	DCIT, Circle-23(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Prabhat Kumar, Adv
Revenue by:	Shri H. K. Chaudhary, CIT DR
Date of Hearing	07/08/2020
Date of pronouncement	16/09/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the ld DCIT, Circle-23(2), New Delhi u/s 143(3) read with section 144C(5) of the Income Tax Act, 1961 dated 29.11.2018 for the Assessment Year 2014-15.

2. The assessee has raised the following grounds of appeal:-

"*1. On facts and circumstances of the case and in law, the ld Dispute Resolution Panel (DRP) erred in upholding the action of the learned Assessing Officer (AO) in denying the appellant its claim for exemption u/s 10AA of the Income Tax Act, 1961 of Rs. 4,74,14,726/-.*

2. The learned DRP erred in passing its order without granting the appellant adequate opportunity of being heard."

3. The brief facts of the case shows that assessee filed its return of income on 29.11.2014 disclosing Nil income as per normal provision of the Act and t book profit u/s 115JB of the Act was disclosed of Rs. 47686863/-. The case of the assessee was selected for scrutiny. The assessee has entered into certain international transactions, but same were not in dispute as no adjustment is proposed.

4. However assessee has claimed deduction u/s 10AA of the Act of Rs. 47414726/-, The ld AO raised two issues for denying above deduction.

Firstly, assessee was required to file Form No. 56F along with return of income, however, it has not filed it along with return of income. The ld AO questioned the assessee. The assessee submitted a copy of form No. 56F on 23.12.2016. The ld AO further noted that on 27.12.2016 assessee filed form No. 56F electronically the provisions of section 10A(5) read with Rule 12 and CBDT notification No. 24/2014 dated 01.04.2014. ON objection before ld DRP this objection of the assessee was accepted and ld AO was direct to drop this objection.

5. Secondly ld AO was of the view that the assessee is not entitled to the deduction u/s 10A of the Act, as it did not specify what services it is rendering to qualify for deduction u/s 10 AA of the act. Further, the ld AO as per para 3.5 of his order noted that on 21.12.2017 the assessee was directed to produce the books of account for verification, however, same were not produced. The ld AR stated that it is deriving income only from trading of Nickel and steel. The ld AO held that assessee is not entitled to deduction u/s 10 AA for trading services.

6. On objection before the ld DRP issue of whether the assessee company was into the business of trading in nickel and steel, it held that activity of assessee is outside the purview of definition of 'entrepreneur' under SEZ Act and therefore is not entitled for deduction. Thus, This action of the ld AO was upheld by the ld DRP. Assessee cited a judicial precedent before ld DRP which was rejected holding that decision of Bommidala Enterprises Pvt Ltd 80 Taxmann.com 362 of the coordinate bench which reached upto the Hon'ble Supreme Court, is restored back to the Hon'ble High Court, therefore the issue has not reached finality, hence, the action of the ld AO was upheld. Accordingly, the return of income filed at Rs. Nil was assessed at Rs. 47414730/-.

7. Before us ld AR submitted a detailed note stating that the assessee fulfills all the conditions of the SEZ Act and also engaged in the 'services' which includes trading and therefore, should be granted deduction u/s 10A of the Act. It was further stated that in subsequent AYs , i.e. 2015-16, 2017-18 assessee has claimed the deduction and only for AY 2017-18 the case of the assessee is being scrutinized and for other years same has been accepted as it is.

8. The ld DR vehemently objected and submitted that assessee is merely a trader and therefore, a trader is not eligible for deduction u/s 10AA of the Act. He further referred to the definition of trading and stared that it means import for the purpose of re-export. Therefore, he supported the order of the ld AO.

9. We have carefully considered the rival contentions and perused the orders of the lower authorities. The assessee is having a unit in SEZ at Taluka Panvel, Maharashtra. It is engaged in warehouse trading and storage activities. It stated its activities w.e.f 01.06.2013 as per initial registration dated 23.07.2012. The assessee claimed deduction of Rs. 47414726/-. The main reasons for denial of this deduction by the revenue authorities is that SEZ undertaking of the assessee is engaged in the business of trading in nickel and steel and therefore, it is outside the definition of 'entrepreneur' under SEZ Act. Section 10AA of the Act was introduced by The Special Economic Zones Act, 2005 in the Income Tax Act, 1961 w.e.f 10.02.2006. According to provisions of section 10AA of the Act, deduction is granted to an 'entrepreneur' as defined in clause (j) of section 2 of the SEZ Act, 2005 who begins to manufacture or produce articles or provide services. The definition of 'entrepreneur' under clause (j) of section 2 of SEZ act means a persons who has been granted the letter of approval by the development Commissioner u/s 15(9) of the Act. The assessee has produced before us the letter of approval dated 23.07.2012 issued to the assessee. As per page No. 2 of the approval the assessee was granted authorized operation for trading activities of nickel, copper, zinc and other products. It is not in dispute that appellant company is engaged in import of nickel and steel and thereafter re-exporting such goods. The rules 76 of SEZ Rules provides that services for clause (z) of section 2 of the SEZ includes 'trading' also which shall mean 'import for the purpose of re-export'. It provides as under :-

> 76. The "services" for the purposes of [1]**[***clause***]** (*z*) of section 2 shall be the following, namely:—
>
> Trading, warehousing, research and development services, computer software services, including information enabled services such as back-office operations, call centers, content development or animation, data processing, engineering and design, graphic information system services, human resources services, insurance claim processing, legal data bases, medical transcription, payroll, remote maintenance, revenue accounting, support centers and web-site services, off-shore banking services, [1a]**[***professional services, rental/leasing services without operators***]**, other

business services, courier services, audio-visual services, construction and related services, distribution services (excluding retail services), educational services, environmental services, financial services, hospital services, other human health services, tourism and travel related services, recreational, cultural and sporting services, entertainment services, transport services, services auxiliary to all modes of transport, pipelines transport.

[2][Explanation.—*The expression "Trading", for the purposes of the Second Schedule of the Act, shall mean import for the purposes of re-export.*]

10. The ld DRP has also held that claim of the assessee is coveredin favour of assessee by the decision of coordinate bench in 80 Taxmann.com 362 in DCIT Vs. Boommidal Enterprises Pvt. Ltd dated 07.04.2017. The above decision has been challenged by revenue before Honourable high court, challenged further before Honourable supreme court, Honourable supreme court sent it back to Honourable High court to decide it on merit. Thus, issue is pending before the Hon'ble Andhra Pradesh High Court. Thus, at present decision of the coordinate bench binds us. Thus, at present the issue is squarely covered in favour of the assessee by the decision of coordinate bench. In that judgment as per para No. 12 wherein it has held that profit derived from a unit situated at SEZ that is engaged in the business of 'trading' in the nature of import and re-export falls within the definition of services, hence eligible for deduction u/s 10AA of the Act. The coordinate bench held as under :-

> **"9.** We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The only question arises for our consideration is whether on the facts and in the circumstances of the case, the benefit of exemption u/s. 10AA of the Act is available to the assessee, which is engaged in the business of trading activity in the nature of import and re-export of goods which falls within the meaning of the term 'services' as defined u/s. 10AA of the Act. Admittedly, the assessee has established a unit at Cochin SEZ, which was approved by the Development Commissioner vide his letter no. 9/05/2005/IL/CSEZ/1563 dated 14.3.2005. The assessee is engaged in the business of trading activity in the nature of importing Cigars, Cigarettes & Alcoholic beverages and re-exporting the same. The assessee claims that units located in SEZ, engaged in the business of import and export falls within the definition of the term 'services' as defined in clause 'Z' of section 2 of SEZ Act, 2005 and rule 76 of SEZ Rules, 2006, which defines the term 'services', which includes 'trading'. As per explanation given in SEZ Rules, 2006, the expression 'trading' for the purpose of second schedule of SEZ Act, shall mean import for the purpose of re-export and such trading is included in the list of services for the purpose of section (2) of SEZ Act. The term 'services' is not defined u/s. 10AA of the Act. Since, the term 'services' has not been defined u/s. 10AA of the Act, the definition provided under the relevant Act, has to be considered for the purpose of the

term 'services' used in the section 10AA of the Act, for the purpose of determination whether the unit is eligible for exemption u/s. 10AA of the Act.

10. The Ld. A.R. for the assessee at the time of hearing, submitted that the issue is covered by the decision of ITAT, Visakhapatnam in assessee's own case in ITA No. 331/Vizag/2011, for the assessment year 2008-09. We find that the coordinate bench of this Tribunal, in assessee's own case has considered the issue and after considering the provisions of section 10AA of the Act, the definition of the term 'services' as defined u/s. (2) of SEZ Act, 2005 and Rule 76 of SEZ Rules, 2006, held that the activity carried on by the assessee amounts to rendering of services in importing and re-exporting of goods as defined under SEZ Rules, 2006. The relevant portion of the order is extracted below:

"5. None appeared on behalf of the assessee. We have heard the Ld. Departmental Representative in this regard and carefully perused the record. As per the SEZ rules, admittedly the activity carried on by the assessee has to be considered as an activity on which assessee is entitled to claim deduction u/s. 10AA of the Act. In our opinion, ratio of the decision of the Hon'ble Kerala High Court in the case of *Girnar Industries* v. *CIT* (230 CTR 401) squarely applies to the facts of this case. No contrary decision was placed before us by the revenue to take a different view on this matter. It is no doubt true that on a principle of law, rule of consistency may not be applicable but the fact remains that the order passed by the Ld. CIT (A) is based on cogent reasons in the light of the explanation given in SEZ rules as well as the definition contained in SEZ Act, 2005 and facts being identical in the earlier years, which was accepted by the assessing officer, in order to deviate from the decision taken in the earlier years, the burden is upon the A.O. to show that the view taken by him is the only view possible in the matter and, in law assessee cannot, by any stretch of imagination, be entitled to claim deduction u/s. 10AA of the Act. Since the Ld. CIT (A) has given cogent reasons in arriving at a conclusion that the assessee is entitled to exemption u/s. 10AA of the Act on an interpretation of the provisions of the Income-tax Act as well as the SEZ Act and Rules, apart from the instructions issued by the Ministry of Commerce, we do not find any infirmity in the order passed by the Ld. CIT (A) and thus, the appeal filed by the revenue is hereby dismissed.

11. The assessee relied upon the decision of ITAT, Jaipur 'B' Bench in the case of *Goenka Diamond & Jewellers Ltd.* (*supra*), wherein the coordinate bench of this Tribunal, under similar circumstances has held as under:

"We have also reproduced Section 51 of the SEZ Act. As per this Section, it is mentioned that notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act, the provision of SEZ Act will prevail. The Hon'ble Apex Court in the case of *Tax Recovery Officer* v. *Custodian Appointed under the Special Court* 293 ITR 369 had an occasion to consider the meaning of language employed in Section 13 of the Special Court Act. In Section 13 of the Special Court Act, it was stated that provision of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The Hon'ble Apex Court held that there can be no manner of doubt that the provision of Special Court Act wherever they are applicable shall prevail over the provision of the Income tax Act. The Hon'ble Delhi High Court in the case of *CIT* v. *Vasisth Chay Vaapar Ltd.* 330 ITR 440 held that when there is a provision in another enactment which contains a non-obstanate clause than that would override the provisions of the Income Tax. Thus one will have to consider the implication of Section 51 of the SEZ Act. It means that anything in-consistent to the provision of the SEZ Act will not be

considered. Thus the word services as mentioned in Section 10AA cannot be construed in-consistently with the definition of services given in the SEZ Act. Under the SEZ act, the trading is included in the services provided the trading is export of imported goods. We therefore, feel that the assessee is entitled to deduction u/s. 10AA of the Act and therefore, the Ld. CIT (A) was justified in allowing the exemption."

12. Considering the facts and circumstances of this case and also following the ratios of the judgements discussed above, we are of the view that profit derived from the units situated at SEZ, engaged in the business of trading activity in the nature of import and re-export of goods falls within the definition of the term 'services' as defined in section 10AA of the Act. Consequently, the assessee is eligible for exemption u/s. 10AA of the Act, towards export profit derived from eligible unit located at SEZ. The CIT (A), after considering the relevant provisions of the Act, has rightly deleted additions made by the A.O. towards disallowance of exemption u/s. 10AA of the Act. We do not find any error in the order passed by the CIT (A). Hence, we uphold CIT (A) order and reject the ground raised by the revenue."

11. Similar view is also taken in case of [2020] 114 taxmann.com 176 (Mumbai - Trib.) Solitaire Diamond Exports v. Income-tax Officer-19(3)(4), Mumbai. No other judicial precedent contrary to this was shown to us. In view of this, issue is squarely covered in favour of the assessee. Accordingly, ground No. 1 is allowed.

12. Ground No. 2 of the appeal is against the violation of principal of nature justice and not granting adequate opportunity of being heard by the lower authorities. On reading of the assessment order at para No. 3.8 and the order of the ld DRP we do not find any merit in this ground hence, dismissed.

13. Accordingly, appeal of the assessee is partly allowed.

Order pronounced in the open court on 16/09/2020.

Sd/-	Sd/-
(BHAVNESH SAINI)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 16/09/2020
A K Keot

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1. Applicant
2. Respondent

3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation.	15.09.2020
Date on which the typed draft is placed before the dictating member	15.09.2020
Date on which the typed draft is placed before the other member	16.09.2020
Date on which the approved draft comes to the Sr. PS/ PS	16.09.2020
Date on which the fair order is placed before the dictating member for pronouncement	16.09.2020
Date on which the fair order comes back to the Sr. PS/ PS	16.09.2020
Date on which the final order is uploaded on the website of ITAT	16.09.2020
date on which the file goes to the Bench Clerk	16.09.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	