

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
'B' BENCH, CHENNAI

श्री वी दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष  
**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND**  
**SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.: **422/Chny/2020,**  
**672 & 1228/CHNY/2018**

निर्धारण वर्ष / Assessment Years: 2009-10, 2010-11 & 2011-12

**M/s. Handy Waterbase**  
**India Pvt. Ltd.,**  
No.37, Montieth Road,  
Egmore, Chennai – 600 008.

**The DCIT,**  
v. Company Circle II(2),  
Chennai- 34.

**PAN: AABCH 0440B**

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri T. Banusekar, CA &  
Shri Upvan Gupta, Advocate

प्रत्यर्थी की ओर से/Respondent by

: Shri Suresh Periasamy, JCIT

सुनवाई की तारीख/Date of Hearing

: 01.04.2021

घोषणा की तारीख/Date of Pronouncement

: 21.04.2021

**आदेश /O R D E R**

**Per G. MANJUNATHA, AM:**

These three appeals filed by the assessee are directed against separate, but identical orders of learned Commissioner of Income Tax (Appeals)-6, Chennai of even dated 04.12.2019,

30.11.2017 & 30.01.2018 and pertains to assessment years 2009-10, 2010-11 & 2011-12. Since facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are being disposed of by this consolidated order.

**Assessment year 2010-11:-**

2. The assessee has more or less raised common grounds of appeal for all assessment years. Therefore for the sake of brevity, grounds of appeal filed for assessment year 2010-11 in ITA No.672/Chny/2018 are reproduced as under:-

1. For that the order of the Commissioner of Income Tax (Appeals) is contrary to law, facts and circumstances of the case to the extent prejudicial to the interests of the appellant and is opposed to the principles of equity, natural justice and fair play.
2. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the order of the Assessing Officer is without jurisdiction.
3. For that the Commissioner of Income Tax (Appeals) erred in upholding the disallowance of claim of Rs.2,07,40,554/- made u/s.10B.
4. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the appellant is carrying out manufacturing activity as defined u/s. 2(29BA).
5. For that without prejudice to the above, the Commissioner of Income Tax (Appeals) failed to appreciate that even if the activity does not fall

within the meaning of the term 'manufacture', it would fall within the meaning of the term 'production' for the purposes claiming the deduction u/s.10B.

6. For that the Commissioner of Income Tax (Appeals) failed to appreciate that having fulfilled all the conditions for claiming deduction u/s.10B in the first year and having allowed the claim in that year, the appellants should be allowed deduction in the subsequent years.

3. The brief facts of the case are that the assessee company is engaged in the business of production and export of pasteurized crab meat. In the process of production of crab meat from a dead crab, a non-living object into pasteurized crab meat, an edible food product, the assessee engages various processes of manufacturing to bring in to dead crab into a pasteurized crab meat. The conversion of dead crab (non-living thing) into pasteurized crab meat results in transformation of dead crab into a distinct object with a different name (pasteurized crab meat), character (free from bacteria and has added taste) and use (edible food product with a shelf life). It also brings in to existence of new and distinct object with a different chemical composition or integral structure. The assessee claims that activity carried out by it comes under the purview of manufacture or production as defined u/s.10B of the Income Tax Act, 1961

(hereinafter the 'Act') and hence it has claimed deduction u/s 10B for total income derived from newly established 100% export oriented undertaking.

3A. The assessee has filed its return of income for the assessment year 2010-11 on 07.10.2010 admitting a total income of Rs.31,84,529/- after claiming deduction towards profit derived from 100% export oriented undertaking u/s.10B of the Act. The case was taken up for scrutiny and during the course of assessment proceedings, the AO called upon the assessee to explain as to why deduction claimed u/s.10B of the Act, cannot be rejected in view of amendment to definition of 'manufacture' by the Finance Act, 2009 w.e.f 01.04.2009 by insertion of clause (29BA) to Section (2) of the Income Tax Act, 1961. In response, the assessee submitted that activities carried out by the company for production and export of pasteurized crab meat comes under the definition of manufacture or production of goods or articles, which qualifies for deduction u/s.10B of the Act, even after insertion of definition of manufacture by the Finance Act, 2009 w.e.f. 01.04.2009. The assessee has explained the process of

manufacture of dead crab into pasteurized crab meat with the help of various judicial precedents and argued that conversion of dead crab into pasteurized crab meat results in to transformation of dead crab into a distinct object with a different name and hence, it has satisfied the definition of manufacture as provided in Section 2(29BA) of the Act. The assessee further submitted that it has commenced a newly established 100% export oriented undertaking in the year 2004 and has claimed deduction towards profit derived from the undertaking from assessment year 2004-05 and such deduction has been allowed for past seven years. Therefore, unless there is change in facts and activity carried out by the assessee for the impugned assessment year, no different view can be taken merely for the reason that the Act has been amended by insertion of definition of manufacture into the statute. The assessee has also challenged the action of the AO in light of the principles of consistency and doctrine of legitimate expectations and argued that once the assessee is treated as a qualified unit eligible for claiming deduction u/s.10B of the Act, then there cannot be a different view in subsequent years unless there is change in activity carried out by the assessee.

4. The AO after considering relevant submissions of the assessee and also taken note of newly inserted definition of manufacture by sub-clause (29BA) of section 2 of the Act, observed that activity carried out by the assessee, i.e. production and export of pasteurized crab meat does not come under the definition of manufacture as per the new term inserted by the Finance Act, 2009 w.e.f. 01.04.2009 and hence, even if the assessee was allowed benefit of deduction u/s.10B of the Act for earlier years, but from the present assessment year, deduction cannot be allowed because of change in law by insertion of term manufacture by the Finance Act, 2009 and hence there is no merit in the arguments taken by the assessee that the activity carried by the company comes under the definition of manufacture even after amendment by the Finance Act, 2009 by insertion of clause (29BA) to section 2 of the Act. The Id.AO has also rejected various case laws cited by the assessee on the ground that those case laws are rendered before insertion of the word 'manufacture' to the list of definition u/s.2 of the Act. Prior to the definition of word 'manufacture' there were different interpretation for manufacture. However, by insertion of clause

29BA, the term manufacturing has been clearly defined, as per which, manufacture with its grammatical variations means a change in a non-living physical object or article or thing resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use or bringing into existence a new and distinct object or article or thing with a different chemical composition or integral structure. In this case, the activity carried out by the assessee does not change the name, character and use, of dead crab to any other new product. Even after process, the crab meat remains same. Therefore, he opined that profit derived by the assessee company from the newly established 100% export oriented undertaking is not eligible for deduction u/s.10B of the Act and hence disallowed deduction claimed towards profit of ineligible undertaking amounting to Rs.2,07,40,554/- and added back to total income of the assessee.

5. Being aggrieved by the assessment order, the assessee preferred an appeal before the Id.CIT(A). Before the Id.CIT(A), the assessee has filed detailed written submissions on the issue

along with plethora of judicial precedents including the decision of Hon'ble Supreme Court in the case of ITO v. Arihant Tiles and Marbles Pvt. Ltd., [2010] 320 ITR 79, which has been reproduced at page No.2 to 25 of Id.CIT(A) order. The sum and substance of arguments of the assessee before the Id.CIT(A) are that conversion of dead crab into pasteurized crab meat amounts to manufacture as per definition u/s.2(29BA) of the Act, because the manufacturing starts only after the crab dies i.e., only after the same becomes a non-living physical thing and hence it fulfills the condition prescribed u/s.29BA that there must be a change in the non-living physical object or article or thing. Further, it results in transformation of the object into a new and distinct object. The assessee has also challenged the reason given by the AO for rejection of deduction claimed u/s.10B of the Act, on the ground of principles of consistency and doctrine of principles of legitimate expectations and argued that once the Department has accepted the fact that the assessee was engaged in the activity of manufacture or production of goods, articles or things then the same cannot be treated as no manufacturing activity merely for the reason that the term manufacturing has been defined by

insertion of new definition u/s. 2(29BA) of the Act, unless there is change in activity carried out by the assessee.

6. The Id.CIT (A) after considering relevant submissions of the assessee and has also taken note of newly inserted word manufacturing by the Finance Act, 2009 w.e.f. 01.04.2009 observed that in the activity carried out by the assessee, there was no transformation of the object into a new and distinct object and hence there was no manufacture or production as such was involved in the process which qualifies for deduction u/s.10B of the Act. The Id.CIT(A) further observed that if at all the activity carried out by the assessee involves any change into a new, distinct and separate object then the same can be considered as a processing of goods which is not considered as manufacture after definition of the word 'manufacture' in section (2) sub-section (29BA) of the Act. The real meaning of manufacture is a change from one object to another object for the purpose of making it marketable with the aid of power, men, material and machinery. However, change in the new material cannot be termed as manufacture unless a new product which has a

separate identity emerges. If at all, original identity of the commodity continues to remain the same after going through some process and is called by the same name, it cannot be said that there is a manufacture of an article or thing. The term manufacture or production in section 10B of the Act can be considered only when a commercially new and distinct product comes into existence after undergoing manufacturing activities. Therefore, from the facts brought out by the AO in light of new definition of manufacture as per section 2(29BA) of the Act, it is very clear that activities carried out by the assessee company does not come under the definition of manufacture because it has not converted into new object which has a different character and use. Therefore, he opined that there is no error in the findings recorded by the AO to come to the conclusion that the assessee is not eligible for deduction u/s.10B of the Act in respect of profit derived from newly established 100% export oriented undertaking and hence confirmed addition made by the AO towards disallowance of deduction claimed u/s.10B of the Act. Aggrieved by the CIT(A) order, the assessee is in appeal before us.

7. The Id.AR for the assessee submitted that the Id.CIT (A) has erred in confirming the findings recorded by the Id.AO to deny the benefit of deduction claimed u/s.10B of the Act in respect of profit derived from a newly established 100% export oriented undertaking without appreciating the fact that activities carried out by the assessee for production and export of pasteurized crab meat is a manufacturing activity eligible for deduction u/s.10B of the Act. The Id.AR for the assessee further submitted that the assessee's business activity is to process dead crab (non-living thing) which is not suitable for human consumption into pasteurized meat crab which is suitable for human consumption through a series of manufacturing activities involving extensive labour and machinery. The Id.AR for the assessee referring to the process of manufacture submitted that the assessee employed more than 10 to 11 stages of process to make it a final product of pasteurized crab meat which undergoes series of test starting from receiving of dead crab at the factory to process it at various stages to make it finally a pasteurized crab meat, which is altogether a distinct object with a different name, character and use. The Id.AR for the assessee further referring to the

manufacturing process submitted that it is not a simple process of extraction of crab meat from a dead crab, but it involves a serious of process starting from mixing of measured quantities of chemical (Sodium Acid Pyrid Phosphate) as per the standards from Virginia Institute, USA and certificate from CIFT, Cochin. The process of pasteurization insofar as that the crab meat is free of all bacterial, thus making it safe for human consumption. The pasteurized product is next stored in cold rooms maintaining temperature of +1°C to 3°C till the time of shipment. The production facility is approved by USFDA and the production is carried out as per HACCP norms. From the above, it is clear that the dead crab which is not suitable for human consumption passes through a series of manufacturing activities involving extensive labour and machine, controlled activities to transform into pasteurized crab meat making it suitable for human consumption.

8. The Id.AR for the assessee referring to newly inserted word 'manufacture' by Finance Act, 2009 u/s.2(29BA) of the Act, submitted that even after insertion of amendment to the

definition of manufacture by the Finance Act, the activities carried out by the assessee comes under the term 'manufacture' because as per the new definition, the process of manufacture involves change in a non-living physical object, article or thing resulting in transformation of object, article or thing into a new and distinct object having a different name, character and use. Further, the process employed by the assessee is bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure. In the instance case, the assessee is engaged in the business of export of pasteurized crab meat and in the process it employees more than 11 stages of processing to make it a final product which is altogether a different and distinct goods. Therefore, the activity undertaken by the assessee is squarely covered even under new definition of manufacture as defined u/s.2 (29BA) of the Act. The Id.AR for the assessee referring to the decision of Hon'ble High Court of Kerala in the case of CIT vs. Marwell Sea Foods [1987] 166 ITR 624 submitted that processed or frozen fish or fish products are regarded as articles of manufacture or produce for the purpose of development rebate. When processed frozen fish or fish products

are considered as articles manufactured or produced then the processing of pasteurized crab meat cannot be regarded as not manufactured goods or articles or things. The Id.AR for the assessee referring to series of decisions of various High Courts and Supreme Courts including the decision of Hon'ble Supreme Court in the case of ITO v. Arihant Tiles & Marbles (P) Ltd., *supra*, submitted that any activity which involved in emergence of new and distinct commodity can be considered as manufacture or production and hence, when a person engaged in processing of commodity, i.e. fresh crab into pasteurized crab meat definitely comes within the ambit of term 'manufacture'.

9. The Id.AR for the assessee without prejudice to his first argument submitted that assuming for a moment but not accepting the assessee activity does not amount to manufacture, but it is certainly a production because the term production having wider scope as per which conversion of any item into a different and distinct marketable product amounts to production which is eligible for deduction under the Act. The Id.AR for the assessee further submitted that even assuming for a moment the

activity carried out by the assessee is neither manufacturing nor production as per the new narrowed scope definition as per section 2(29BA) of the Act, but deduction claimed for the impugned assessment year cannot be denied because the Department has accepted the activities carried out by the assessee as manufacture and has allowed deduction for past seven years starting from assessment year 2004-05 to assessment year 2008-09. Further only from impugned assessment year, the AO has denied benefit of deduction by virtue of insertion of the term 'manufacture' u/s. 2(29BA) by the Finance Act, 2009 but without any changes in process employed by the assessee in the year 2004-05 when the deduction was first allowed u/s.10B of the Act and when the deduction was denied in the year 2009-10. The Id.AR for the assessee further referring to series of decisions submitted that once the business activity of the assessee has been accepted as manufacturer by other Government authorities, a contrary stand cannot be taken for the purpose of section 10B of the Act. The assessee is registered under Central Excise as a manufacturer of excisable commodity namely pasteurized meat. The assessee is also approved by the

Development Commissioner under Madras Export Processing Zone as 100% EOU for manufacture and export of pasteurized crab meat, processed crab meat, frozen crab meat, etc. Therefore, when two Government authorities have recognized the activity carried out by the assessee as a manufacturer then for the purpose of Income Tax Act, no different stand can be taken unless the activities carried out by the assessee is not coming under the manufacturing activity as per MEPZ Act. The Id.AR for the assessee further referring to EXIM policy submitted that the purpose of Section 10B is to give effect to EXIM policy and hence the definition of manufacture as per EXIM policy cannot be ignored. As per EXIM policy, the definition of manufacture includes process or bringing into existence and hence the EOU approval letter itself states that the assessee is involved in manufacture of pasteurized crab meat, processed crab meat and other marine products. The assessee is registered under Central Excise Act, 1944 for manufacturing of pasteurized crab meat which is classified separately and has different HSN codes. Under Customs and GST laws, it was treated as distinct commodities. Further, section 10AA defines the term 'manufacture' to have the

same meaning as defined in section 2(r) of Special Economic Zone Act, 2005. The definition u/s.2(r) in a liberal sense which is why reference was made to this section in section 10AA. The assessee claiming deduction u/s.10B cannot be put to a disadvantage only because a different narrower definition is applicable for EOU unit.

10. The Id.AR for the assessee further referring to various decisions on the issue of Doctrine of promissory estoppels submitted that when deduction u/s.10B of the Act was allowed in first year, the AO ought to have allowed such deduction in subsequent years by following the principles of Doctrine of promissory estoppels. The Id.AR for the assessee referring to the decision of Hon'ble Supreme Court in the case of Motilal Padampat Sugar Mills Limited v. State of UP [1979] 118 ITR 326 submitted that whatever be the nature of function, the Government is discharging, it is subject to the rule of promissory estoppels. Therefore, the privilege granted to the assessee u/s.10B of the Act cannot be withdrawn by subsequent clarification or amendment due to the doctrine of promissory

estoppels. In this case, the activity undertaken by the assessee was recognized as a manufacturing or production activity which qualifies for deduction u/s.10B and as such, deduction was allowed for seven years. It is an admitted fact as per provisions of section 10B of the Act, that newly established 100% EOU are eligible for 100% tax deduction for 10 consecutive years. In this case, the assessee was allowed deduction for seven years but such deduction was denied from 8<sup>th</sup> year onwards by taking note of the amended term 'manufacture' as per section 2(29BA) without there being any changes in physical activities carried out by the assessee in its manufacturing facility. Therefore, principles of doctrine of estoppels as well as doctrine of legitimate expectations demands that the authority which is performing its function while discharging the statutory functions should bound to understand the purpose and intention of allowing benefit to the assessee which is setting up units at 100% export oriented zones. In this case, the AO except bringing into amended definition of manufacture has not made out a case of change in activities carried out by the assessee, when it was first time allowed deduction u/s.10B of the Act and the facts present while

disallowing deduction claimed for the impugned assessment year. Therefore, the AO as well as the Id.CIT (A) were completely erred in denial of deduction u/s.10B of the Act.

11. The Id. DR on the other hand supporting order of the Id.CIT(A) submitted that the facts brought out by the AO as well as the Id.CIT(A) clearly indicate that the activity carried out by the assessee for production and export of pasteurized crab meat does not come under the word 'manufacture' as defined u/s.2(29BA) of the Act and hence, the assessee is not entitled for deduction towards profit derived from 100% export oriented undertaking. Although, the assessee was allowed deduction for seven assessment years, but because of change in law by insertion of definition of manufacture by the Finance Act, 2009 w.e.f., 01.04.2009, the rule of consistency cannot be applied to the facts of the present case. No doubt, res-judicata is not applicable to the Income Tax proceedings but rule of consistency needs to be followed while framing the assessment. But such rule of consistency would come in to operation only in a situation where there is no change in facts and law. But in this case, the

law has been amended by insertion of the definition 'manufacture' as per which the activities carried out by the assessee does not qualify for deduction u/s.10B of the Act. The AO as well as the Id.CIT(A) have rightly rejected deduction claimed u/s.10B of the Act towards profit derived from newly established 100% EOU undertaking and their orders should be upheld.

12. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The facts borne out from record indicate that the assessee is engaged in the business of production and export of pasteurized crab meat right from assessment year 2004-05 onwards. The activity undertaken by the assessee starts from picking up dead crab to the factory premises and ends up with processed pasteurized crab meat. The assessee employed 10 to 11 stages of processing right from procurement of non-living dead crab and then process into chemical mixed pasteurized crab meat in a series of manufacturing process in the facility. The assessee claims that activity undertaken by the company in their facility is a manufacturing activity even under the new definition of

manufacture as per section 2(29BA) of the Act, because it results in transformation of object (dead crab) into a new distinct object (pasteurized crab meat) having different name, character and use. The assessee further claims that it brings into existence a new and distinct object with a different chemical composition or integral structure. The raw material used for manufacturing activity is dead crab (non-living thing) which qualifies as a non-living physical object or article or thing and hence fulfills the condition prescribed u/s.2(29BA) of the Act. Since, new product is developed as a result of deployment of men and machinery and what emerges is a commercially different product, it would constitute manufacture. The assessee has taken support from series of decisions of various High courts and Supreme Court to support its arguments and argued that the pasteurized crab meat is a product of human activity or effort and further the process involve bringing into existence a new product different from that of dead crab.

13. We have given our thoughtful consideration to the reason given by the AO to disallow deduction claimed u/s.10B of the Act

in light of facts brought out by the assessee and find that the assessee has employed various stages of processing right from dead crab into a pasteurized crab meat which involves storing of dead crab into chemical mixed pasteurized crab meat which was done by employing men, power and machines. Therefore, it is difficult to accept the arguments of the AO that the activities carried out by the assessee for production and export of pasteurized crab meat is not a manufacturing activity just because the term 'manufacture' has been defined by insertion of new definition by the Finance Act, 2009 u/s.2(29BA) of the Act. Be that as it may. We are not going into controversy that whether activity carried out by the assessee is a manufacturing, production or not, which qualifies for deduction u/s.10B of the Act. We are only on the limited issue of whether in the given facts and circumstances of the case, the assessee are entitled for deduction u/s.10B of the Act. Admittedly, the assessee is a newly established 100% export oriented undertaking. It has set-up a new manufacturing facility at Madras Export Processing Zone. The EOU set up by the assessee for manufacture and export of pasteurized crab meat was approved by the

Development Commissioner, Govt. of India as a 100% export oriented unit for manufacture and export of goods or things. The assessee is also registered under the Central Excise Act, 1944 as a manufacturer and the goods manufactured by the assessee are treated as distinct commodities under Customs and GST laws. It is also an admitted fact that the Department has accepted the activities carried out by the assessee as a manufacturing or production of goods or article or thing, which qualifies for deduction u/s.10B of the Act and further deduction has been allowed for past 7 years right from assessment year 2004-05 to assessment year 2008-09. It was also an admitted fact that there is no change in activities carried out by the assessee in the year 2004-05 when the deduction was first allowed and in the year 2009-10 when the deduction was rejected by the AO by virtue of new word 'manufacture' inserted under clause 29BA of section 2 of the Act. As we have already stated in our earlier paragraph, we are not on the point whether the activity carried out by the assessee fits into the new term 'manufacture' as per section 2(29BA) of the Act. Although, earlier the term manufacture was not defined under the Income Tax Act, 1961,

but definition of manufacture was imported either from some other deduction / exemption provisions or other similar provisions which govern SEZ / EOU units. Further as per activities undertaken by the assessee, said activity was considered as manufacture or production for the purpose of deduction u/s.10B of the Act. Therefore, when there is no change in physical activities carried out by the assessee when deduction was denied for the impugned assessment year, and facts present at the time deduction was first allowed in the year 2004-05, can the AO deny such deduction merely for the reason that new definition inserted in the statute has disintitiled the assessee from claiming deduction provided u/s.10B of the Act. Admittedly, the purpose of Section 10B of the Act is to give effect to EXIM policy. Therefore, the statute has provided deduction all units established as 100% EOU as per EXIM Policy u/s 10B of the IT Act. In the present case, there is no doubt of whatsoever with regard to the fact that the assessee is a newly established 100% export oriented undertaking. In fact, the AO has accepted said fact and allowed deduction for 7 years. The Development Commissioner has also approved the unit of the assessee under

MEPZ and has recognized as 100% EOU unit for manufacture and export of pasteurized crab meat. Thus, there is a promise from the Government of India for 100% tax rebate to units established in MEPZ. Therefore, the issue needs to be considered in light of the principles of doctrine of legitimate expectations and doctrine of promissory estoppel. The doctrine of promissory estoppels seeks to protect rights of a promise or aggrieved party against the promisor. Thus, as per said principles whatever be the nature of function the Government is discharging, it is subject to the rule of promissory estoppel. Therefore, the privilege granted to the assessee u/s.10B of the Act cannot be withdrawn by subsequent clarification or amendment due to the doctrine of promissory estoppel. Similarly, doctrine of Legitimate Expectation means that a person may have a reasonable expectation of being treated in a certain way by administrative authorities owing to some consistent practice in the past or an express promise made by the concerned authority. The concept of legitimate expectations means that administrative decision makers should be bound by certain representations which they make to

individuals who stand to be affected by their orders. Therefore, if you consider the case of the assessee in light of doctrine of legitimate expectations when a person set-up or establishes unit under any policy of a Government on the legitimate expectation that the Government will fulfill its promises then such person is entitled for the promises made by the Government or the expectation of the person even in a situation where the law has been amended / disentitles the person from claiming such benefit. In this case, the assessee has set up a new 100% EOU on the legitimate expectation that it will get deduction towards profit derived from such unit for 10 consecutive years as per provisions of section 10B of the Act. But, the AO has denied such benefit for last three years even though there is no change in activities performed by the assessee in its production facility by virtue of amended definition of manufacture by Finance Act, 2009 w.e.f., 01.04.2009. Therefore in our considered view, if at all activity carried out by the assessee is not considered as manufacturing or production as per new definition of manufacture but benefit of deduction can be denied to only those units which are set up after 01.04.2009, but said benefit cannot be denied to

units which have already set-up their units before amendment by the Finance Act, 2009 and such units which have already claimed deduction for certain years, because provisions of section 10B of the Act provides for uninterrupted deduction for 10 consecutive years if the assessee has fulfilled the conditions prescribed therein. In this case, except by bringing a new amended term 'manufacture' AO has not made out a case that the assessee is neither fulfilled conditions prescribed therein nor activities undertaken by the assessee is substantially changed. Unless the AO has brought out clear facts to the effect that activities undertaken by the assessee were substantially changed during the impugned assessment year, deduction provided u/s.10B of the Act to a newly established 100% EOU cannot be denied by taking note of the amended provisions of the Act. Further, although res judicata is not applicable to Income Tax proceedings but principles of consistency is certainly applicable because the AO is required to follow principles of consistency in framing assessment in a case where there is no change in facts and law at the time of passing assessment order. This principle is supported by the decision of the Hon'ble Supreme Court in the case of

**Radhasoami Satsang vs. CIT( 1992) 193 ITR 321(SC)**

**where it was clearly held that decision made in earlier years is binding in subsequent years and should be followed.**

In this case, absolutely there is no change in fact except a minor change in law in respect of the term definition of manufacture. Further, the issue whether activities carried out by the assessee amounts to manufacture or production of goods or article or thing which qualifies for deduction u/s.10B of the Act is a highly debatable issue. If we go by the judicial precedents, various courts have held that even processing of frozen fish or marine products amounts to manufacture or production. Therefore, when an issue is debatable and if two views can be taken on the issue, then the AO cannot deny beneficial deduction allowed under Income Tax provisions to deny deductions by taken one of the view. This principle is supported by the decision of the Hon'ble Supreme Court in the case of Bajaj Tempo Ltd., vs. CIT (1992) 196 ITR 188 (SC) where it was held that *A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. Since a provision intended for promoting economic*

*growth has to be interpreted liberally the restriction on it too has to be construed so as to advance the objective of the section and not to frustrate it. Under clause (i) of sub-section (2) of section 15C formation of the undertaking by splitting up or reconstruction of an existing business by transfer to the undertaking of building, raw material or plant used in any previous business results in denial of the benefit contemplated under sub-section.*

14. In this case, on perusal of facts available on record, we find that there is no change in facts prevailing at the time when deduction was allowed to the assessee in the assessment year 2004-05 and in the assessment year 2009-10 when deduction was denied. Therefore, we are of the considered view that unless there is change in facts, the AO cannot take a different view for denying deduction claimed u/s.10B of the Act. Hence, we are of the considered view that the assessee is entitled for deduction u/s.10B of the Act in respect of profit derived from 100% export

oriented undertakings and accordingly, direct the AO to allow benefit of deduction.

15. In the result, appeal filed by the assessee for assessment year 2010-11 is allowed.

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16. The next issue that came up for our consideration for assessment years 2009-10 & 2011-12 is exchange gain / loss fluctuation is part of export turnover or not. The AO has excluded export fluctuation gain on conversion of export proceed held in EEFC account from business proceeds for computing deduction u/s.10B of the Act and the same was added under the head 'Income from other sources' resulting in double addition.

17. The Id.AR for the assessee submitted that exchange fluctuation is attributable to exports affected and ultimately goes to increase or reduce the figure of export turnover and therefore is part of export turnover. However, he fairly agreed that this

issue has not been adjudicated by the CIT(A) and accordingly, the assessee has filed a petition u/s.154 of the Act for rectification of mistake and said petition is pending for adjudication.

18. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. No doubt, exchange fluctuation whether it is gain or loss is attributable to exports effected and ultimately goes to increase or reduce figure of export turnover recorded initially by the assessee in its books of accounts and hence, it is definitely part of export turnover which qualifies for deduction u/s.10B of the Act. But, the fact remains that whether gain or loss incurred by the assessee on account of exchange fluctuation is attributable to export effected by the assessee or not needs to be examined by the AO. Moreover, the Id.CIT(A) has not adjudicated the issue although the assessee has taken a specific ground challenging the findings of the AO. Therefore, we are of the considered view that the issue needs to go back to file of the Id.CIT(A) for reconsideration of the issue and hence, we set aside the issue to

file of the Id.CIT(A) and direct him to reconsider the claim of the assessee in light of decision of ITAT, Chennai bench in the case of Changepond Technologies (P) Ltd. vs. ACIT [2008] 119 TTJ 18.

19. The next issue that came up for our consideration for assessment year 2009-10 & 2011-12 is deduction u/s.10B in respect of expenses disallowed and added back to total income. The AO has denied deduction u/s.10B of the Act in respect of various additions made towards provision written back, disallowance of expenses u/s.37 of the Act and disallowance of expenses u/s.40A(7) of the Act.

20. The Id.AR for the assessee submitted that the next consequences of any disallowance is increasing business profit and to that extent enhanced profit is eligible for deduction u/s.10B of the Act. In this regard, he has relied upon the circular issued by the CBDT in Circular No.37/2016 dated 02.11.2016. The assessee has also relied upon decision of Hon'ble High Court of Bombay in the case CIT vs. Gem Plus Jewellery India Ltd. [2011] 330 ITR 175. However, fairly agreed that the Id.CIT(A)

has not adjudicated the issue and hence, the assessee has filed a petition u/s.154 of the Act and said petition is pending for adjudication.

21. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The issue whether enhanced profit on account of disallowance of expenses is eligible for deduction under deduction / exemption provisions of the Act is no longer res-integra. Various high courts have taken a consistent view that enhanced profit on account of disallowance of various expenses goes to increase business profit and to that extent would be eligible for deduction under deduction / exemption provisions of the Act. The Hon'ble High Court of Bombay in the case of CIT vs. Gem Plus Jewellery India Ltd., *supra*, has considered an identical issue and held that enhanced profit on disallowance of expenses is eligible for deduction u/s.10B or 10A of the Act. The CBDT has accepted legal position and issued a Circular No.37/2016 dated 02.11.2016, where it was clarified that enhanced profit on account of disallowance of expenses is eligible for deduction under exemption / deduction

provisions by various section of IT Act, 1961. Therefore, we are of the considered view that assessee is entitled for deduction towards enhanced profits. But, fact remains that the issue has not been adjudicated by the Id.CIT(A) and hence, the issue has been set aside to the file of the CIT(A) and direct him to reconsider the issue in light of our findings given herein above.

22. The next issue that came up for our consideration for assessment year 2009-10 & 2011-12 is exclusion of expenses from export turnover and total turnover. The AO has excluded expenditure incurred towards freight, ECGC, container charges, insurance and FDA & customs clearance from export turnover but did not excluded from total turnover for computing deduction u/s.10B of the Act.

23. The Id.AR for the assessee submitted that there ought to be parity between numerator and denominator. Therefore expenses deducted from export turnover should be excluded from total turnover for the purpose of computation of deduction u/s.10B of the Act. In this regard, relied upon decision of Hon'ble Supreme

Court in the case of CIT v. HCL Technologies Ltd., [2018] 404 ITR 719 (SC).

24. We have heard both parties, perused materials available on record and gone through orders of the authorities below. We find that the issue of exclusion of expenses from export turnover and total turnover is squarely covered in favour of the assessee by decision of Hon'ble Supreme Court in the case of CIT vs. HCL Technologies Ltd., *supra*, where the Hon'ble Supreme Court clearly held that export turnover is a numerator and also forms a constituent element of the denomination in as much as it forms part of the total turnover. Hence, the export over as numerator must have the same meaning as the export turnover which is a constituent element of the total turnover in the denominator and hence, needs to be excluded from total turnover. Therefore, we are of considered view that the AO is erred in not bexcluding expenses from total turnover for computing deduction u/s.10B of the Act. But, fact remains that the issue has not been considered by the Id.CIT(A) and hence, assessee has filed a petition u/s.154 of the Act and said petition is pending for adjudication.

Therefore, the issue has been set aside to the file of the Id.CIT(A) and direct him to reconsider the issue in light of decision of Hon'ble Supreme Court in the case of CIT vs. HCL Technologies Ltd.

25. The next issue that came up for our consideration for assessment year 2009-10 is disallowance of expenses u/s.40(a)(iii) of the Act for Rs.50,00,000/-. The Id.AR for the assessee at the time of hearing submitted that assessee does not want to press the ground challenging disallowance of expenses u/s.40(a)(iii) of the Act. Hence, ground taken by the assessee is dismissed as not pressed.

26. The next issue that came up for our consideration for assessment year 2011-12 is disallowance of expenditure u/s.14A r.w.rule 8D of the Income Tax Rules, 1962. The Id.AR for the assessee submitted that the assessee does not want to press the ground challenging disallowance of expenses and hence ground taken by the assessee is dismissed as not pressed.

27. In the result, appeals filed by the assessee for assessment year 2009-10 & 2011-12 in ITA No.422/Chny/2020 & 1228/Chny/2018 are partly allowed for statistical purpose and appeal filed for assessment year 2010-11 in ITA No.672/Chny/2018 is allowed.

Order pronounced in the court on 21<sup>st</sup> April, 2021 at Chennai.

Sd/-

(वी दुर्गा राव)

**(V. Durga Rao)**

न्यायिक सदस्य/Judicial Member

Sd/-

(जी. मंजुनाथ)

**(G. Manjunatha)**

लेखा सदस्य /Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 21<sup>st</sup> April, 2021

**RSR**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

- |                        |                          |                              |
|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT    | 5. विभागीय प्रतिनिधि/DR  | 6. गार्ड फाईल/GF.            |