IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri George George K., Judicial Member and Shri Laxmi Prasad Sahu, Accountant Member

ITA No. 448/Coch/2016
(Assessment Year: 2010-11

The Income Tax Officer -(1) Arattukulangara Complex A.N. Puram, Alapuzha 688011	Vs.	M/s. Extraweave Pvt. Ltd. 264B/CMC 1 Sakteeswara Junction Cherthala 688524

PAN – AABCE5438L

Appellant **Respondent**

Appellant by: Shri R. Krishan, CA
Respondent by: Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing: 22.06.2022
Date of Pronouncement: 24.06.2022

O R D E R

Per: L.P. Sahu, A.M.

This is an appeal filed by the Revenue against the order of the learned CIT(A), Kottayam dated 21.07.2016 for AY 2010-11.

2. The brief facts of the case are that the assessee company engaged in the business of manufacturing and export of woven/tufted carpets, powerloom floor coverings, jute coverings, trading in handlooms coir floor coverings etc. It has filed the return of income on08.10.2010 declaring NIL income after claiming deduction of Rs.1,82,40.147/- under Section 10B of the Income Tax Act, 1961 (hereinafter "the Act") and after setting off carry forward losses. The case was selected for scrutiny through CASS and notice was issued under Section 143(2) of the Act to the assessee., On 30.03.2012 the assessee filed revised return of income which was taken into consideration. The assessee company was approved as a 100% EOU by the Board of Approval on 29.03.2000 for a period of 5 years and

subsequently it was extended vide Green Card No. 139/CSEZ/2005 dated 29.03.2005. The commercial production was started on 01.062001. Form NO. 56G was also filed, which was verified by the AO and he found that the unit is eligible for exemption under Section 10B of the Act irrespective of the profit derived from the export of article and things during the impugned assessment year which falls within a period of 10 years. During the course of assessment proceedings the AO has made various additions and against which the assessee filed appeal before the learned CIT(A), The learned CIT(A) allowed the appeal of the assessee against the grounds taken by the assessee. Aggrieved by the order of the CIT(A), Revenue is in appeal before the Tribunal on the following grounds of appeal: -

> *"The order of the learned Commissioner of Income tax (Appeals), Kottayam in so far as the points stated below are concerned, is opposed to law on the facts and in the circumstances of the case.*
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> *2. The Ld. Commissioner of Income Tax (Appeals) has erred in holding that disallowance of Rs. 55,78,022/- u/s 40(a)(ia) is not warranted even though the assessee neither deducted tax at source from the payments made to non- residents nor did it file the declaration as required under section 195(6) of the Act r. w. Rule 37BB of the I T Rules.*
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> *3. The Ld. CIT(A) ought to have realized that the term "any sum" mentioned in section 195(6) covered all payments made to non-residents and that the declaration u I s 195 (6) r. w. s Rule 37BB is one among the safeguards in the Act to prevent revenue leakage.*
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> *4. The Ld. CIT (Appeals) has erred in holding that the value of deemed export of Rs.13,67,2801 - in respect of exports made through the assessee's sister concern be also included for computation of deduction u/s 10B of the Act, even though the sale proceeds to the extent of Rs. 13,67,280/ - were not brought into India directly "by the assessee" as required under section 10B(3) of the Act.*
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> *5. The value of deemed export was brought into India by the assessee's sister concern M/s. Wilton Weavers Pvt. Ltd. and hence, it cannot be included in the export turnover eligible for deduction u/s 10B of the Act.*
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> *6. The Ld. CIT (A) has erred in holding that the business profit eligible for deduction u/s 10B should be computed before setting off unabsorbed depreciation loss of Rs. 3,36,17,037/- carried forward from previous years.*
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> *6. The Hon'ble jurisdictional High Court in the case of M/s.*

Patspin India Limited (245 CTR 97 (Ker.) has held that the business profit is to be computed necessarily after setting off unabsorbed depreciation carried forward from previous years.

For these and other grounds that may be advanced at the time of hearing, the order of the learned Commissioner of Income tax (Appeals) on the above points may be set aside and that of the Assessing Officer restored."

3. In respect of ground Nos. 2 & 3 there was a disallowance of Rs.55,78,022/- under Section 40(a)(i) of the Act for non-deduction of tax in respect of payments made to non-residents. Payments were made towards exhibition expenses, commission and sample testing charges to the non-residents. As per the AO TDS has to be deducted by the assessee before remitting the amount outside India for making payments to the non-residents as per section 195 of the Act. Accordingly he disallowed the amount. The learned CIT(A), after considering the judgement quoted in his order, allowed the appeal of the assessee.

4. Considering the rival submissions we observed that the CIT(A) has decided the issue as under: -

"8. I have considered the issue, arguments advanced and the case laws cited. Apparently, it is not in dispute that the payments were to non-residents, whose income is not chargeable to tax in India. The centre of controversy seems to be the words "any other sum" as appearing in Section 195 of the IT Act. According to the AO, it would bring within it's ambit all payments made to non-residents. Section 195 reads as follows:

Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) (or section 194LD) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head : "Salaries" shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force.

Thus, it can be seen that the words "any other sum" in the section is followed by the words "chargeable under the provisions of this Act". This postulates that for fastening the appellant with a liability, the payment must be liable for tax in India.

9. In Vijay Ship Breaking Corporation and Others Vs. CIT 314 ITR 309 (SC), the apex court held that liability to deduct tax arises

only if the tax was assessable in India. The court in that case held that "since tax was not assessable in India. there was no question of TDS being deducted by the assessee. Respectfully following the Supreme Court decision, I hold that there was no liability for the appellant to deduct tax at source u/s 195(1) and accordingly the addition of Rs. 55,78,022/- is deleted."

5. From the above order of the CIT(A) we observed that he has done a good reasoned order and it does not require any interference and the above findings of the learned CIT(A) is supported by the judgement of the Hon'ble Apex Court in the case of Vijay Ship Breaking Corporation and Others. In the impugned case the amount remitted to non-resident is not taxable in India, therefore the question of T.D.S. on the said payment does not arises. Accordingly, we confirm the order of the CIT(A) and reject the grounds taken by the Revenue on this issue. In view of this ground Nos. 2 & 3 are dismissed.

6. In respect of ground No. 4 & 5 the AO observed that there was a export turnover of Rs.43.00 crores computed by the assessee inclusive of the value of deemed export of Rs.13,67,280/-. In this regard the assessee submitted that there was a deemed export represents third party export made to M/s. Wilton Weavers Pvt. Ltd. as per para 9.62 of the Import Export Policy. It was a sister concern of the assessee and it has exported the goods and the sale proceeds was received by M/s. Wilton Weavers Pvt. Ltd. According to the assessee it was an export turnover and the details were submitted before the AO. The AO after examining the issue observed as under: -

"13.2. The assessee's contentions were examined in detail. The order form issued by the exporter to the assessee doesn't make any direction that the goods are to be exported to the third party concerned. It specifies the condition and rate at which the goods to be supplied and it specifies that the bills of the assessee are to be sent directly to the exporter or through their bankers and not to the third party at the receiving end. As claimed by the assessee, it was observed_that the name & address of the assessee was mentioned as manufacturer supplier in a column of the invoice issued by the exporter. But it is inferred that such mentioning is not intended for transfer of any sale proceeds from the third party to the manufacturer, but to emphasis and appraise the third party

of the quality and rating of the products exported, so as to enable the later to choose from the consignments received, the top quality products in future transactions.

13.3. As for the condition to be satisfied to claim exemption under section 10B(3), the sale proceeds of articles or things or computer software exported out of India should be received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf. Here it is pertinent to note that the words "by the assessee" have been included in the section so that the primary duty in bringing the sale proceeds in convertible foreign exchange to India is not allowed to be shifted to any person other than the assessee itself. In the case of the assessee, the duty has been shifted to another exporter.

13.4. Hence it follows that whatever may be the definition or interpretation given to the word "export" under Import-Export Policy or other provisions of law, the pertinent question is not whether a transaction is export or not but which type of export makes the assessee eligible for deduction under section 10B of the IT Act. As for the answer, it has been unambiguously clarified in the relevant provisions that export should be out of India and that the sale proceeds are received in India by the assessee in convertible foreign exchange. As all the conditions have to be satisfied cumulatively, the assessee's contention fails on merits. The value corresponding to such deemed export turnover is therefore excluded from the export turnover for computing deduction under section 10B of the Act.

13.5. In view of the above discussions, the value of export turnover for the purpose of computation of deduction under section 10B is determined to be Rs.42,86,44,856 and the ratio of such export turnover to the total turnover of Rs.44,73,,20,296 is found to be 0.95825."

7. Aggrieved by the above findings of the AO the assessee filed appeal before the CIT(A). After considering the details filed by the assessee the issue has been dealt with by him in paras 10 to 16 of his order and allowed the appeal of the assessee. Aggrieved, Revenue is in appeal before the Tribunal.

8. We have heard the rival submissions and perused the record. During the course of hearing the learned A.R. fairly admitted that similar issue has been decided by the ITAT, Cochin Bench in the case of M/s. Travancore Cocotuft Pvt. Ltd. ACIT in ITA No. 199/Coch/2018 dated

19.06.2019 and decided the issue against the assessee. The relevant part of the order is as under: -

> *"14. We have heard the rival submissions and perused the record. Admittedly, there is a Supreme Court judgment in the case of Dy. CIT vs. Metal Closures (P) Ltd. 261 Taxman 161 wherein by dismissing the SLP, the Supreme Court held as follows: "Appeal (Supreme Court-Special leave petition Deduction under section l0B--100 per cent Export Oriented Undertaking--Allowability--[Deemed Export] of goods- Where the department/preferred SLP to appeal against the judgment of Karnataka High Court in Metal Closures (P) Ltd. v. Dy. CIT [ITA Nos. 24-25/2015 c/w ITA Nos. 22-23/2015, ITA Nos. 379-38l (2016 dt. 12-6-2018]: 2019 TaxPub(DT) 297 (Karn- HC) whereby the High Court held that in the case of M/s. Tata Elxsi Ltd. v. Asstt. CIT 2015 TaxPub(DT) 5191 (Karn-HC) it was held that assesses was entitled to deduction under section l0B of the Act in respect of the [Deemed export] also and similarly following the said judgment, the issue was also decided in favour of the assessee in case of Pr. CIT V. International Stones India (P) Ltd: [ITA No. 564/2016, dt. 12-6-2018] : 2018 TaxPub(DT) 4058 (Karn-HC)], that the present assessee, who was also similarly situated, since the fact of [deemed export] made by it through a third party was not in dispute, also deserves to get the same relief and therefore, I.T.A. No. 199/Coch/2018 the present appeal filed by assessee deserves to be allowed, the Supreme Court condoned delay and dismissed the SLP. -- Department preferred SLP to appeal against the judgment of Karnataka High Court in Metal Closures (P) Ltd. V. Dy. CIT [ITA Nos. 24-25/2015 a/w ITA Nos. 22-23/2015, ITA Nos. 379-381/2016, dt. 12-6-2018] : 2019 TaxPub(DT) 297 (Karn-HC)] whereby the High Court held that in the case of M/s. Tata Elxsi Ltd V. Asstt. CIT 2015 TaxPub(DT) 5191 (Karn-HC) it was held that assessee was entitled to deduction under section l0B of the Act in respect of the [Deemed export] also and similarly following the said judgment, the issue was also decided in favour of the assessee in case of Pr. CIT V. International Stones India (P) Ltd. [ITA No. 564/2016, dt. 12-6-2018} : 2018 TaxPub(DT) 4058 (Karn- HC), that the present assessee, who was also similarly situated, since the fact of [deemed export] made by it through a third party was not in dispute, also deserves to get the same relief and therefore, the present appeal filed by assessee deserves to be allowed. Held: The Supreme Court condoned delay and dismissed the SLP."*
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> *14.1 Further, the question whether dismissal of SLP amounts to laying down law in respect of the issue disputed under SLP, has been considered by the ITAT in the case of Moradabad Development Authority, 89 taxmann.com 263 and it was held as under:*

"4 ..... Further, it is a settled legal position that a summary dismissal of SLP cannot be construed as a declaration of law by the Hon'ble Supreme Court under Article 141 of the Constitution. A mere dismissal of SLP without giving any reasons, cannot be equated with exposition of law by the Hon'ble Supreme Court so as to indicate the imprimatur on the reasoning and/or the ratio decidendi of the High Court in the judgment. In such circumstances, there is no merger of the judgment of the Hon'ble High Court. The Hon'ble Apex Court in Hemalatha Gargya v. CIT (2003) 259 ITR 1/128 Taxman 190, has held that dismissal of SLP in limine: "could not operate as a confirmation of the reasoning in the decision sought to be appealed against... ..... ".

Similar view has been taken by the Hon'ble Supreme Court in Kunhayammed v. State of Kerala (2000) 245 ITR 360/113 Taxman 470, in which their Lordships have held that an order refusing special leave to appeal does not stand substituted in place of order under challenge. In the hue of the above discussion, it is amply vivid that the mere dismissal of SLP by the Hon'ble I.T.A. No.199/Coch/2018 Supreme Court against the judgment of the Hon J&K High Court in the case of Jammu Development Authority cannot be construed as having the effect of elocution of law by the Hon'ble Supreme Court on the subject against the assessee."

14.2 As rightly pointed out by the Ld. DR, dismissal of SLP by the Supreme Court cannot lay down any ratio decidendi or precedent value so as to be followed by the Tribunal. As such, we are inclined to dismiss this ground of appeal of the assessee by following the judgment of the Jurisdictional High Court in the case of Electronic Controls &. Discharge Systems (P) Ltd. (245 CTR 0465) wherein it was held as under:

"6. After hearing both sides and after going through the above referred provisions of the Income-Tax Act and the provisions of the Special Economic Zones Act, 2005, we are unable to uphold the order of the Tribunal because the concept of deemed export under the Special Economic Zones Act is not incorporated in the scheme of exemption under section l0A of the Income-Tax Act and it is the settled position that the Income-Tax Act is a self-contained code and the validity or correctness of the assessment has to be considered with reference to statutory provisions. It is not as if the Special Economic Zones Act, 2005 or the Foreign Exchange Regulation Act or the Foreign Exchange Management Act are not referred to in the Income-Tax Act. The Income-Tax Act refers to several statutes in different places and wherever required, provisions of such statutes are incorporated in the Act through reference or by incorporation. It is not as if the Parliament is unaware of other statutes which have specific purposes. Inter-unit transfers in Economic Zones are treated as exports for the purpose of Customs Act and the Central Excise Act. However, when section l0A, provides for exemption only on profits derived on export

proceeds received in convertible foreign exchange, the Legislature never intended the benefit to be extended to local sales made by the units in the Special Economic Zone, whether as 5 part of Domestic Tariff Area sales or inter-unit sales within the Zone or units in other Zones. In fact all Special Economic Zones are allowed to make 25 per cent sales to Domestic Tariff Area and the profit derived from such sales are not entitled to exemption. Exemption under section 10A(3) is specifically geared to profits on actual exports, that too, made against receipt of convertible foreign exchange. We are of the view that if the provisions of the Special Economic Zones Act, 2005, are brought into extend the exemption on profits derived on inter-unit sale made by industries within the Export Processing Zone, the court will be re-writing the legislation which is exactly what the Tribunal has done. In fact, the unit which purchased components from the assessee must be manufacturing final products and being a unit in the Special Economic Zone will be exporting the final product, on which that unit will get exemption on the entire profits which include the value of the components supplied by the assessee. Probably the Legislature did not want duplicity in exemption on export profit. That is why inter-unit sales in the Export Processing Zone are not treated as export within the meaning of section l0A of the Income-Tax Act, no matter such transfers are treated as exports for the purpose of Customs and Excise duty exemption. When the exemption is only on actual profits derived on exports made against receipt in convertible foreign exchange, the Tribunal, in our view, has no justification to extend it to profits received on local sales within India against payment received in Indian rupees. For the above reasons, we are unable to sustain the orders of the Tribunal and we, therefore, allow the appeals by reversing the orders of the Tribunal and by restoring the orders cancelled by the Tribunal." Thus, we do not find any infirmity in the order of the CIT(A) and the same is confirmed."

Respectfully following the above judgement we allow the grounds raised by the Revenue on this issue.

9. In respect of Ground Nos. 6 & 7, during the assessment proceedings the AO observed that there was a brought forward loss of Rs.3,76,54,670/- and the balance after setting off was calculated by the AO at Rs. 68,30,684/- is as under: -

Brought forward losses	Total	Amount of set off	Balance
Depreciation	3,36,17,037	2,98,15,179	38,01,858
Business loss	40,37,633	10,08,807	30,28,826
Total	3,76,54,670	3,08,23,986	68,30,684

In this regard the assessee submitted that the profit from the exempted unit is to be calculated on standalone basis and details were submitted. The AO after considering the submissions of the assessee not agreed to not to set off losses from profit of the eligible unit under Section 10B of the Act. Aggrieved by the order of the AO the assessee filed appeal before the CIT(A). After considering the submission of the assessee the CIT(A) decided the issue in favour of the assessee. Aggrieved, Revenue is in appeal before the Tribunal.

10. Considering the rival submission we observed from the details available before us that unabsorbed depreciation and business loss cannot be set off from the profit of eligible unit under Section 10B of the Act. The profit of the exempted unit is to be calculated on standalone basis for eligibility or exemption under Section 10Bof the Act. The learned CIT(A) has decided the issue as under: -

> *"17. The appellant disputes the manner of computation of deduction u/s l0B. The AO noticed that appellant had unabsorbed depreciation carried forward from the earlier year. The AO computed the business income of the appellant at Rs. 2.86.43.083/- before set off of any unabsorbed loss or depreciation. Against this, he set off unabsorbed depreciation brought forward to that extent and arrived at NIL income. According to the AO. since income form business is 'NIL', deduction allowable u/s l0B is also 'NIL'. The AO has relied on the decision of the jurisdictional High Court in Patspin India Ltd. 245 CTR 97 (Ker) to the effect that the business profit is to be computed necessarily after setting off unabsorbed deprecation carried forward from previous years. Against this stand of the AO, the AR contents that as far as the issue is concerned, the principles have been clearly laid down by the Hon. Supreme Court. in the case of CIT Vs Mother India Refrigeration Industries (P) Ltd. 155 ITR 711 (SC) wherein the Apex Court has observed that legal fictions are created only for some definite purpose and these must be limited to that purpose and should not be extended beyond that legitimate field. The court also held that there cannot be any modification/deviation from the basic and well recognised principle of commercial accountancy by the statute.*
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> *18. I have considered the facts of the case, the arguments raised and the provisions of the Act. Section 10A/10B (6) as amended by the Financial Act. 2003 w.r.e.f. 01-04-2001 provides that depreciation and business loss of the eligible unit relating to 'the Asst. Year 2001-02 and onwards is eligible for setoff and carry*

forward for setoff against income post tax holiday. Thus it can be seen that Section 10B(6) underwent an amendment by the Financial Act 2003 w.r.e.f. 01-04-2001 by which the Act made an enabling provision to carry forward and set off losses beyond Asst. Year 2000-02[10B(6)(i) & (ii)]. In Yokogawa India Ltd. 341 ITR 385 (Kar), it was held that even after section l0A/l0B were converted into a "deduction" provision w.e.f. 01-04-2001, the benefit of relief u/s 10AI/l0B is in the nature of "exemption" with reference to "commercial profits" and that as the income of the Section 10A units has to be excluded at source itself before arriving at the gross total income, the question of setting off the loss of the current year's or the brought forward business loss (and unabsorbed depreciation) against the section l0A profits does not arise. Thus it is clear that as far as Section 10AI/10B is concerned, the income has to be excluded at source before giving effect to any brought forward losses/unabsorbed depreciation. As far as the decision of the Kerala High Court in CIT vs. Patspin India Ltd. relied on by the AO, the position is applicable only pre-amendment. After the amendment. w.e.f. 01-04-2001, business losses and unabsorbed deprecation are allowed to be carried forward. This view has been clearly explained in the memorandum explaining the Financial Bill, 2003, which is as follows:

Providing for carry forward of business losses and unabsorbed depreciation to units in Special Economic Zones and 100% Export Oriented Units.

Under the existing provisions of section 10A and 10B, the undertakings operating in a Special Economic Zone (under section l0A) and 100% Export Oriented Units (EOU's) (under section 10B) are not permitted to carry forward their business losses and unabsorbed depreciation.

With a view to rationalize the existing tax incentives in respect of such units sub-section(6) in sections 10A and 10B has been amended to do away with the restriction') on the carry forward of business losses and unabsorbed deprecation.

The amendments have been brought into effect retrospectively from 01-04-2011 and have been made applicable to business losses or unabsorbed depreciation arising in the assessment year 2001-02 and subsequent years.

19. In the appellant's case, the unit itself has commenced production only from 01-06-2001 as is brought out by the AO in Para-3 of the Asst. Order. The unabsorbed depreciation/business loss are post 01-06-2001, which are covered by the amended provisions consequent to the amendment and also following the decision of Karnataka High Court in Yokogawa India Ltd. 341 ITR 385 (Kar), I rule that the income of section 10B unit has to be excluded at source itself and the AO erred in setting off unabsorbed depreciation of Rs.2,86,43,083/- against the income

determined. I direct the AO to recomputed the income on the basis of my earlier findings in this appellate order and further direct him to allow deduction for the said amount u/s 10B as the appellant is found eligible for exemption as observed by the AO himself. The AO is also directed to determine the unabsorbed business loss/ depreciation if any to be carried forward consequent on giving effect to this order".

The issue before is, which has been decided by the CIT(A) as quoted above is squarely covered by the decision of the Hon'ble Apex Court in the case of CIT & Anr vs. M/s. Yokogawa India Ltd. (2017) 77 taxmann.com 41 (SC). Therefore we do not find any infirmity in the order of the learned CIT(A). Accordingly we uphold the order of the CIT(A). Ground Nos. 6 & 7 raised by the Revenue is rejected.

11. In the result, the appeal filed by the Revenue is partly allowed.

Dictated and pronounced in the open Court on 24th June, 2022.

Sd/-	Sd/-
(George George K.)	**(Laxmi Prasad Sahu)**
Judicial Member	**Accountant Member**

Cochin, Dated: 24th June, 2022

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -Kottayam*
4. *The CIT - Kottayamn*
5. *The DR, ITAT, Cochin*
6. *Guard File*

By Order

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Assistant Registrar
ITAT, Cochin

n.p.