IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.974/Bang/2022
Assessment Year: 2011 – 12

Bharat Mines and Minerals No.101, 1st Floor, Pride Elite 10 Museum Road Bangalore 560 001 **PAN NO : AAIFB5964G**	**Vs.**	ACIT Circle-1(2)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri K.R. Pradeep & Smt. Girija, A.Rs
Respondent by	:	Shri A. Ramesh Kumar, D.R.

Date of Hearing	23	11	2022
Date of Pronouncement	23	11	2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against order of CIT(A), NFAC dated 22.9.2022 for the assessment year 2011-12.

2. Ground Nos.1 & 2 are general in nature, which do not require any adjudication.

3. Ground Nos.3 to 12 reads as follows:-

3. "That the authorities below erred in not providing sufficient and adequate opportunity to the appellant as required under law,

thereby violating the principles of natural justice, hence the order requires to be cancelled.

4. *That the orders passed by the authorities below are in violation of the direction of the order of the Hon'ble ITAT and thereby amounts to ignoring the binding order and makes a mockery of the judicial discipline.*

5. *The authorities below erred in disallowing the deduction u/s 10B amounting to Rs. 212,38,08,115/-.*

6. *The authorities below erred in changing their opinion on the issue of allowance u/s 10B in the absence of any new information which was not already considered in the initial year.*

7. *The authorities below failed to consider that the claim for 10B was made initially in AY 2004-05 and the impugned year is the eighth year of claim.*

8. *The authorities below failed to consider that once the claim is settled in the initial year the same cannot be revisited on the same set of facts and law as held by Hon'ble High Court of Karnataka in Sami Labs Ltd vs. ACIT (334 ITR 157).*

9. *The authorities below erred in disallowing the deduction u/s 10B in the absence of any seized material for the impugned assessment year.*

10. *The authorities below erred in relying on material and statements without furnishing the same to the assessee before passing the assessment order.*

11. *The authorities below erred in relying on statements without providing opportunity to cross examine.*

12. *The authorities below erred in relying on irrelevant material while ignoring the relevant material."*

3.1. The crux of above grounds is with regard to disallowance of deduction u/s 10B of the Income-tax Act,1961 ['the Act' for short]. At the time of hearing, the ld. AR submitted that the assessee came in appeal before this Tribunal in ITA Nos.738 to 741/Bang/2015 for the assessment years 2008-09 to 2011-12, wherein the Tribunal vide

order dated 10.4.2018 has remitted the issue to the file of AO with the following observations:-

12. Grounds 7 to 12 - ***Deduction u/s. 10B of the Act.***

12.1 The Assessing Officer has made disallowance of deduction under Section 10B of the Act amounting to Rs.271,69,21,004 for the reasons mentioned in the order of assessment. Of Sri Dinesh Kumar Singhi for Assessment Years 2005-06 and 2006-07. In the impugned order of assessment for Assessment Year 2011-12 dt.30.3.2013, at para 9.2 thereof, the Assessing Officer has further observed as under :-

"9.2 Even if it were to be held subsequently by the appellate authorities that the assessee is eligible for deduction under Section 10B on the above counts, the deduction to the extent of the amount determined in the table in para 7.7 in the order in the case of Shri Dinesh Kumar Singhi for Assessment Year 2006-07 is disallowable for the reason that the profit to that extent is not derived from the EOU as no activity of production/ procuring is done therein."

12.2 On appeal, the learned CIT (Appeals) has also upheld the disallowance of deduction u/s. 10B of the Act for the reasons discussed in her appellate order in the case of Shri Dinesh Kumar Singhi.

12.3 Before us, apart from oral arguments, the counsels of both parties have filed written submissions which are extracted hereunder :12.3.1 ***Assessee's submissions****.*

" ITA 741/B/15 –AY 2011-12

The assessee filed a return of income on 31/01/2012 declaring an income of Rs.16,19,36,000/- with the following caption at the top of the return."Without prejudice and subject to our letters"(PB page 284). Subsequently the assessee received a notice u/s 143(2) dt 21/05/2012 and also notices u/s 142(1) wherein the Ld. AO sought for several details which were duly submitted by the assessee.

The assessment was concluded u/s 143(3) r.w.s 153D on 30/03/2013 determining the income at Rs.265,46,73,841/- resulting from disallowance u/s 10B of Rs.212,38,08,115/- and an addition of Rs.12,95,46,334/-.

The details of disallowance are as hereunder:

1. *Disallowance u/s 10BRs. 212,38,08,115/-*
2. *Unaccounted payments/unexplained expenditure Rs. 12,95,46,334/-*

Exfacie the proceedings culminating into order of assessment dt.30/03/2013 is illegal and not as per law. This is the eigth year of undertaking on which deduction u/s10B has been claimed. The CIT-A who heard the appeal has confirmed the addition in respect of 1 above and deleted the protective addition in Sl no.2 above. Each of the addition is discussed hereunder:

I. Disallowance u/s 10B – Rs. 212,38,08,115/-

The AO has erred in disallowing the claim u/s 10B amounting to Rs. 212,38,08,115/- for the reasons he has mentioned in the assessment order for the AY 2005-06 dt.11/03/2013 and AY 2006-07 dt.13.03.2013 in the case of Dinesh Kumar Singhi. Shri. Dinesh Kumar Singhi has filed his objection by filing appeal and the result of the appeal for AY 2005-06 & AY 2006-07 on this issue will be relevant. In any case the issue cannot be dealt afresh as the claim is for eigth year in respect of an undertaking on which the issue of deduction u/s10B was already resolved in favour of the assessee. The Hon'ble High Court of Karnataka in Sami Labs Ltd vs ACIT (334 ITR 157) – PB page 60 and Hon'ble Delhi HC in CIT vs International Tractors (CLPB page 206) has held that once the claim for initial year is settled the same cannot be revisited on the same set of facts and law. The CIT-A however has confirmed the action of the AO on this issue by holding as under:

''the facts as are applicable in the case of Sri Dinesh Kumar Singhi for AY 2005-06 to 2007-08 are applicable in respect of the appellant firm for AYs 2008-09 to 2011-12"

On this issue it is submitted that the arguments/submissions advanced in the case of Dinesh Kumar Singhi for the AY 2005-06 to AY 2007-08 may kindly be adopted for the impugned AY in appeal.

The AO erred in refusing to allow adjustment of loss on forward exchange contract amounting to Rs. 15,58,03,235/-. The rejection by the AO is contrary to the provisions of law & is arbitrary. In the alternative the assessee prays that the loss may be allowed to be carried forward u/s 73 of the Act.

On the issue of 153D approval, rely on the submission given for AY 2008-09 supra.

The grounds on interest u/s 234A/B/C are consequential in nature."

12.3.2 Revenue has put forth the following written submissions :-

28. " Search under section 132 of the Act was conducted in the case of the assessee on 19/7/2010.

29. Mining lease was granted in favour of M/s.Bharat Mines and Minerals and was extended from time to time. M/s. Bharat Mines and Minerals was a partnership firm during the Assessment Year 1996–97. On the death of his father, the Shri Dinesh Kumar Singhi conducted the business as proprietary till

31/3/2007. Later from 1/4/2007 the business was conducted as firm with M/s.BMM Ispat Ltd joining as partner. Thus from the date of establishment, the business undertaking of M/s. Bharat Mines and Minerals was carried on either as a proprietary concern or as a partnership firm till date in respect of mining lease.

30. DEDUCTION UNDER SECTION 10B OF THE ACT

g. *The assessee claimed deduction under section 10B of the Act on profits derived from the export of iron ore. As per the provisions of section 10B deduction is allowable only in the profits derived from the export of goods manufactured/produced and exported from 100% export oriented unit. The deduction is available only for 10 consecutive years beginning from the year in which the undertaking begins to manufacture.*

h. *The claim of the assessee has been rejected on the following ground: –*

xix. *The unit from which iron ore has been processing/produced has not been conferred with EOU status for the period up to 30/5/2006.*

xx. *The business was in existence prior to 1/4/1994 and accordingly period of 10 years has expired. The conversion of undertaking setup in Domestic Tariff Area (DTA) is eligible for deduction under section 10B of the Act on getting approval as 100% EOU only for the unexpired period of 10 consecutive years commencing from the year in which the original DTA started manufacturing.*

xxi. *The assessee is indulging in purchase of processed iron ore and exporting the same without any value addition in the undertaking claiming to be an EOU. Such trading activity has been claimed as production and export from the so-called EOU and claim deduction under section 10B of the Act. The material found in the course of search demonstrated that the assessee has been purchasing only processed iron ore and directly exporting the same. The purchase invoices contains the details of the processed iron ore and the destination is the ports from where the iron ore is exported.*

xxii. *Mrs. Snehalatha Singi wife of the assessee was the ore raising and processing contractor in the mines belonging to M/s.Karthikeyas Manganese and Iron Ore Private Limited,Mrs.Ambika Ghorpade, M.Srinivasulu and H.G.Rangangoud. In all the above mines Mrs.Snehalatha Singi was the contractor excavating, extracting, crushing and processing the raw ore into fines and lumps. From the seized material it is found that Mrs.Snehalatha Singi was crushing and processing the iron ore in the respective mine heads through mobile crushing and screening plants at the respective mines. The mining returns of the above said mine*

owners show only dispatch of processed iron ore from the mine heads. The assessee has claimed deduction under section 10B on the export of such processed iron ore without carrying out any activity in the EOU and in fact without bringing the material into the EOU.

xxiii. Evidence found during search demonstrated that Shri Dinesh Kumar Singhi was systematically creating invoices to disguise the purchase of initial products as purchasers of raw iron ore.
xxiv. The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

31. WRONG CLAIM OF DEDUCTION BEFORE THE EOU WAS ESTABLISHMENT

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of the Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

xxv. In the application filed before the SEZ dated 3/4/2003 for conversion of existing DTA into 100% EOU for manufacture and export of iron ore, in the Pro-Forma the assessee has stated manufacturer exporter and age of machineries installed in the DTA as 10 to 12 years.

xxvi. The letter of permission dated 6/5/2003 by SEZ under Exim Policy was subject to conditions stated in Annexure. One of the condition is that the production of EOU under the scheme has to be carried out in the custom bonded area. Only when the licenses are issued, the EOU is said to be set up and it can be demarcated from the DTA by way of bonding. Without necessary license, the assessee cannot claim as an EOU. Without EOU was being set up the assessee has exported iron ore and the export invoices did not depict that the exports were from 100% EOU. From the date of Letter of Permission(LOP) till 2006, the assessee has been communicating to the SEZ authorities that the project is still under implementation and the EOU has not commenced production. The license for private bonded warehouse was issued by the customs on 29/5/2006. Without setting up valid EOU, exports were made by printing "Shipment by 100% EOU"

on the invoices. The various seized material found in the course of search establishes that the assessee has failed to implement the EOU project as per the letter of permission and the exports continued in the DTA status only.

xxvii. *The letter by the assessee (Bharat mines and minerals) dated 30/4/2006 (page 9 of assessment order) seeking for extension of time from a SEZ would clearly indicates the nonexistence of the 100% EOU. The letter of the SEZ dated 5/5/2006 (page 11 of assessment order) would further justify the nonexistence of 100% EOU. The letter dated 17/4/2006 written by assessee to SEZ authorities (page 13 of assessment order) expressing readiness of commencing the production by end of June 2006 would further justify the above stand of the revenue. The letter dated 2/7/2006 (page 15 of the assessment order) to SEZ by the assessee communicating inspection by Central excise and customs authorities and commencement of commercial production on 30/5/2006 is self-explanatory regarding the commencement of commercial production in the 100% EOU.*

xxviii. *In the quarterly and annual reports submitted by the assessee to SEZ for the first quarter financial year 2006–07, the date of commencement of production is clearly mentioned as 30/5/2006.*

xxix. *The customs authorities by letter dated 19/8/2010 has confirmed designation of private bonded warehouse from 29/5/2006 and the first shipment from 100% EOU on 11/7/2006 (page 18 of assessment order).*

xxx. *The Development Commissioner CSEZ has confirmed by letter dated 7/9/2010 (page 21 of assessment order) that exports prior to 30/5/2006 is not treated as exports from EOU.*

xxxi. *EOU manufacturers required to file application for removal of goods in prescribed Form-ARE-1 before the jurisdictional Central Excise authorities providing full description of the goods being exported from the unit and invoice would bear the description that* ***"THE SHIPMENT IS UNDER EOU"****. The above requirement has been fulfilled only after 29/5/2006 and prior to this date no ARE-1 forms were submitted. This is evident from material marked as A2/BMM/3. The above aspect also has been confirmed by accountant of Bharat Mines and Minerals whose statement were recorded under section 132(4) of the Act. No specific request for cross examination was made by the assessee.*

xxxii. The quarterly and annual performance report submitted to SEZ the assessee declared that the unit has commenced production from the EOU only since 30/5/2006. From the about is clear that EOU was not established till 30/5/2006 and not entitled for deduction under section 10 B of the Act.

32. INCORRECT CLAIM MADE AFTER THE EXPIRY OF 10 YEARS TAX HOLIDAY PERIOD

The assessing officer has adopted the finding recorded by him for the Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2005–06 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

g. In the application filed for conversion of existing DTA into EOU, the assessee has declared that it is manufacturer-exporter and the age and remaining life of the machineries already installed as 10 to 12 years. It is clearly stated that the application is for conversion of existing DTA into 100% EOU

h. The assessee and later the firm Bharat Mines and Minerals are not entitled for exemption under section 10B as the DTA was established more than 10 years ago as evidenced as under: –

xix. The assessee is in business for more than 20 years.

xx. The assessee is using the same machinery for crushing and screening plants for more than 15 years as evidenced by the accounts.

xxi. It is not disputed that the assessee is exporting the products and is carrying on the business at least from 1994.

xxii. The unit which is converted to EOU was established at least on 1/4/1994 as per format of registration-cum-membership certificate issued by Export Promotion Council dated 21/6/2005.

xxiii. In the application for membership to Export Promotion Council the assessee has declared that the date of establishment as 1/4/1994 for manufacture of iron ore and the same is evident from extract at (page 27 of assessment order).

xxiv. The assessee's claiming deduction under section 80HHC from 1996–97 till 2004–05 and may be even prior to this period, would demonstrate the existence of unit 10 years much prior to the current year and period of 10 years has expired.

4. On the above aspects the Assessing Officer has summarised as under: –

xvi. DTA was established at Ranjitpura more than 15 years back and the assessee was processing the iron ore in that plant and exporting the same through MMTC and are directly.

xvii. The existing DTA at Ranjitpura was converted into EOU and the nature of business continue to remain the same and has continued utilising the old plant and machinery.

xviii. The assessee is consistently claiming deduction under section 80HHC as manufacturer – exporter from Assessment Year 1996–97 till 2004–05 as per the records and even maybe prior to that period. After the expiry of tax benefit under that section, the DTA was converted into EOU. Though conversion is not prohibited, the benefit would be applicable for a period of 10 consecutive years from the date of manufacture and that has expired much prior to the current Assessment Year.

xix. The assessee has formed EOU by purchasing the used machinery and such used machinery is in excess of 20% of the total machinery installed in the unit. 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose.

xx. Though conversion of DTA into EOU is permissible under section 10B and the same is applied for section 10A, it would be applicable for the unexpired period of 10 consecutive assessment years from the year in which undertaking begins to manufacture or produce any article or thing and exports such articles or things. In view of the admission made by the assessee regarding the existence of DTA as on 1/4/1994, period of 10 Conservative years has expired and the same is not extendable to the current Assessment Year.

33. PURCHASE AND EXPORT OF PROCESSED IRON ORE – NO MANUFACTURE INVOLVED IN THE EOU

The assessing officer has adopted the finding recorded by him for the Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi. The submissions for Assessment Year 2006–07 in the case of Sri.Dinesh Kumar Singhi is adopted on this aspect and for sake of convenience is reiterated below.

xxviii. The raw material (ROM) is extracted from the mines and is put to crushing and screening plants where the ROM is crusted into the finish

of the products i.e fines and lumps(calibrated ore or C ore). The finished products are fines and lumps.

xxix. *From the seized material it was found that the assessee purchased processed iron ore from various suppliers and directly exported the same without any value addition in the EOU. The sale bills wherein consignee is mentioned as BMM (Bharat mines and minerals) at genuine, Krishnapatnam Port or other destination. The ore has been put to crushing and screening plants at the mines where the processing of iron ore is taking place at the respective mines and the finished product is moved from the Mine head's for exports without processing in the EOU unit. This trading activity is claimed deduction under section 10B of the Act further the assessee indulged in preparing invoices to show the procurement of raw material and processing them in EOU.*

xxx. *Seized material referred to in page 7 and 8 of the assessment order containing sale invoices for purchase of iron ore fines would demonstrate the above aspect of purchase of processed iron ore. The purchases made by the assessee are against Form-H which is treated as deemed export of goods. The issue of FORM-H by the assessee to the suppliers of iron ore makes it clear that the goods have been purchased for the sake of exports. Most of the purchases have been delivered by the suppliers at the berths at various ports like Goa, Chennai etc which are loading points for exports. The details of such purchases of processor iron ore as found in the seized material is tabulated at page 9 to 13 of the assessment order.*

xxxi. *Similar transactions with various persons has been in detail tabulated with respect to the purchase of processed ore and supply directly to the port or for rail transport. Attention of this Hon'ble tribunal is invited to Rs 13 to 17 of the assessment order for the sake of brevity.*

xxxii. *Various seized material has been referred to from page 17 to 20 of the assessment order in support of the contention of the revenue that the iron ore was processed in the mines itself and the same has been purchased and exported by the assessee without even entering the same to the EOU unit. The trading of iron ore is not eligible for section 10B deduction. Further the assessee has not demonstrated the movement of raw ore from mines to EOU and movement of processed iron ore(fines and lumps) to the designated place for export and the respective permits from the respective authorities under various statutes which are mandatory.*

xxxiii. *The accountant of the assessee has admitted that crushing and screening plants are operational at all the mines and the processed ore is being directly exported without further value addition by the EOU of the assessee. Even the mine owner has stated that the assessee has installed the crushing and screening plants at the Minehead and is processing the iron ore in the Minehead itself and the finished product was being transported out of the mines. Mr Bharat S Ghorpade agent of KMIORE*

and Mrs Ambika Ghorpade has admitted crushing and screening of iron ore by mine owners at the mine heads and the same is being purchased by the assessee for the purpose of export. (Reference to statement of Sri Manjunath, Sri Srinivasulu and Mr.Bharat S Ghorpade at page 22 to 24 of the assessment order).

xxxiv. The seized material in the form of transportation bills found in the course of search would clearly demonstrate processing of iron ore by installing screening plants at the Minehead and transporting the same directly to the designated place of export without carrying out any activity in the EOU. (Reference invited to page 25 and 26 of the assessment order)

xxxv. Insofar as the contention of the revenue that invoices for purchase of processed door were manipulated to reflect as invoice for purchase of ROM. Sample copy is placed at page 28 and 29 to evidence the above manipulation.

xxxvi. On confrontation of the evidence regarding trading exports of iron ore, the assessee has admitted wrongful claim of deduction under section 10B of the Act. Even in the course of statement on oath on 3/11/2010 on confrontation, the wrong claim has been admitted.

34. FORMATION OF EOU BY TRANSFER OF USER COMMISSIONER IN EXCESS OF 20%

The old machinery used by the assessee was exceeding the prescribed limit of 20%. Without prejudice to the above contention it is submitted that 20% of the old machinery is contemplated only in the circumstances when the EOU is formed by the transfer to a new business of machinery and plant previously used for any purpose. The said exception is not applicable to the present case as the EOU is not formed by transfer to a new business of machinery or plant previously used for any purpose."

12.4.1 We have heard the rival contentions, perused the written submissions and carefully considered the material on record; including the judicial pronouncements cited. In so far as the issue of deduction under Section 10B of the Act is concerned, the Assessing Officer has relied on the findings rendered in the case of Sri Dinesh Kumar Singhi for Assessment Years 2005-06 to 2007-08. The assessee in their written submissions have relied on the submissions in the case of Sri Dinesh Kumar Singhi for Assessment Years 2005-06 to 2007-08 and the ld. Standing Counsel too has relied on the submission put forth by him in the case of Dinesh Kumar Singhi for Assessment Years 2005-06 and 2006-07. We have discussed this issue in the appeal filed by Shri Dinesh Kumar Singhi these years and for the reasons discussed therein, we have held the action of the Assessing Officer as incorrect. The same decision will apply to the facts of the assessee's case also. Therefore, the grounds raised by the assessee on this issue is allowed.

12.4.2 On the issue of deduction under Section l0B of the Act both the sides have relied on the submissions made in the case of Sri Dinesh Kumar Singhi for A.Y 2005-06 and the subsequent years. The ld CIT(A) has also relied on the decision rendered by her in the case of Sri Dinesh Kumar Singhi for A.Y 2005-06. The appeal in the case of Sri Dinesh Kumar Singhi for A.Y 2005-06 has been decided by us on the ground that the action initiated u/s 153A has been incorrect and hence the merits of the issue of deduction u/s 10B of the Act has not been adjudicated by us.

12.4.3 As has been observed by the ld CIT (A), the business of the assessee was carried out as a partnership firm initially and then as a proprietary concern of Sri Dinesh Kumar Singhi. And subsequently as a partnership firm M/s Bharat Mines & Minerals. From the impugned order, it is seen that the ld CIT(A) has merely relied upon the order of the A.O, without examining and adjudicating on the detailed submissions made by the assessee. Further, from the assessment order of the A.O in case of Dinesh Kumar Singhi for A.Y 2005-06, on which reliance has been placed by the A.O and the ld CIT(A), the disallowance of deduction has been made based on certain seized materials. From that order, it is not clear/decipherable whether these seized records pertain to the assessee, whether any finding has been recorded in this regard and whether the seized records were made available and confronted to the assessee and its response obtained or not. From the order of assessment, it appears that these procedural aspects, which are germane to the finalisation of assessment proceedings pursuant to search action, have not been done. Further, from the order of assessment, it is seen that the Assessing Officer has relied upon the statement of one Sri Rajagopal Upadhayaya, while concluding that the deduction u/s l0B of the Act is not allowable. It is also not clear whether this statement was made available to the assessee and their response obtained before concluding the assessment. We have already held, in the case of Karthikeya Manganese and Iron Ore Pvt. Ltd., that statements of third persons cannot be used against the assessee unless the copies were made available to the assessee and his response in the matter is also obtained.

12.4.4 In view of the above, we are of the considered opinion that this issue of deduction u/s.10B of the Act needs to be examined afresh by the A.O, after duly considering the procedural and legal issues highlighted above and the contentions of the assessee raised both before the ld CIT(A) and before us and decide the issue, as per law. Needless to add, the assessee shall be accorded adequate opportunities to make its submissions which shall be duly considered. We therefore remand the matter back to the file of the A.O with the above directions. We hold and direct accordingly."

3.2. Against this order, the department went in appeal before the High Court in ITA No.726/2018, inter-alia the following question has been raised:

> *"1. Whether on the facts and in the circumstances of the case, the period of 10 years would commence from the relevant date of commencement of production or from the date of conferment of the status on the assessee as EOU?"*

3.3. However, in the meantime, the AO has passed the consequential order u/s 143(3) r.w.s. 254 of the Act dated 30.12.2019 by observing as under:

11.1 <u>Processing of iron ore outside EOU but showing that it is processed in the EOU:</u>

*11.1.1 During the search proceedings. it has been found that Mrs. SnehalataSinghi W/o Mr. Dinesh Kumar Singhi has entered into Ore raising and processing agreements with various mine owners and she was involved in ore excavation, extraction and processing the iron ore into fines and lumps in the respective mines and hand over the processed ore to the mine owners who inturn sell the same to **BMM** or others. The various mines where Mrs. SnehalataSinghi is having ore*
raising and processing contracts are as under.

1. Karthikeya manganese and Iro Ore Mines Private Limited (KMIORE) New Mines at Devagiri.

2. Smt. Ambika Ghorpade Mines (Old Mines), Devagiri.

3. M/s. H.G. Rangan Goud Mines at Swamihalli

4. M/s. M. Srinivasulu Mines, Donimalli (presently in the name of M/s. Sree Gavi Siddeshwara Minerals)

11.1.2 As per the agreements, the cost of raising and processing of iron ore from the mines was to be paid to the contractor Smt. Snehalata Singh by the, mine owners at the pre-determined rates mentioned in the agreements. As per the agreement, the entire iron ore fines being produced in the mines were to be purchased by M/s Bharat Mines & Minerals or Mr. Dinesh Kumar Singh or BMM Ispat Ltd. It is to be noted that even through the agreements are in the name of Mrs. Snehglata Singhi the entire activities are carried out by Mr. Dinesh Kumar Singhi.

11.1.3 During the course of search proceedings, evidence has been found the BMM has hired Crushing and Screening plants and has put them in the all the mines named above. Further, there is a Crushing and Screening plant owned by Mrs. Snchalata Singhi as is found in her fixed assets schedule filed along with the return of income. All the hired CSPs and the CSP of Mrs. Snchalata Singhi are erected/moved to respective mine heads and the ROM is processed in the mine heads and then the processed ore is despatched from the mines. The fact that the processed ore leaves the mine head is clear from the fact that the Mining Returns <u>filed by the abovesaid mine owners show that only the processed ore has been despatched from the Mine heads and not unprocessed ore.</u> However, BMM has claimed the deduction u/s 10B on such processed ore which has been

processed outside the EOU and then purchased and exported which is not tenable.

11.1.4 Some of the evidence found and seized during the course of search. proceedings show that the CSPs were available in respective mines and that transportation of the finished products were done directly to various destination for exports instead of moving the same to EOU of BMM.

- *Page numbers 77 & 78 of the seized marked as A2/BMM/3 dated 12-08201.0 which contain a office note dated 25-02-2010 written by Mr. K Manjunath for the approval of the MD and is also signed by the MD approving the payments. Serial number 16 of the note states that "Sree Veeranjaneya Earth Movers Extcc Power Screen engaged at KMIORE 01/12/2009 to 31/01/2010 - Rs.31,05,211". It is clear from this that the Screening Plant has been put at the mines itself for processing the ore and the finished product is thereafter transported for export under the guise of EOU export or the same is sold the local market.*
- *Page numbers 77 8:, 78 of the seized material marked as A2/BMM/3 dated 12-08-2010 which contain a office note dated 25-02-2010 written by Mr. K Manjunath for the approval of the MD and is also signed by the MD approving the payments, serial number 8 of the not states that "Aum Mines & Minerals Screening & Crushing at M. Srinivasulu Mines from 05-12-2009 to 15-01-2010 -Rs.22,41,029", it is clear from this that the CSP has been put at the mines itself for processing the ore and the finished product is thereafter transported for export under the guise of EOU export or the same is sold in the local market.*
- *M/s Bharat Mines & Minerals had put up Crushing and Screening plant at the SIOM mines of HRG through the contractors. One such work order placed by M/s Bharath Mines & Minerals was found in the seized material at page number 2 & 3 of the seized material marked as A2/BMM/3. As per this letter dated 27-06-2006. Mr. Anil Rajashekar,has been entrusted the work of screening of ROM/subgrade at HRG at the rate of Rs. 55 per tonnes with other conditions.*
- *Page 3 of A2/BMM/1 contains a ledger extract of M/s. Sri. Manjunath Earth Diggers (for crushing and screening charges) in the books of "Ages of Snehalatha Singhi (Raising Contractor) for the F.Y 2008-09.*
- *"Awes 4 of A2/BMM/1 contains a ledger extract of M/s R D mining projects Pvt Ltd (for crushing and screening charges) in the books of accounts of Snehalatha Singhi (Raising contractor) for the F.Y 2008-09.*
- *A page 5 of A2/BMM/ 1 contains a ledger extract of M/s. Yoganarasimha Mines & Minerals Private Limited (for crushing and screening charges) in the books of account of Snehalatha singhi (raising contractor) for the F.Y ' 2008-09.*

11.1.5 The above are some of the evidence found to show that the processing of iron ore used to take place at the respective mines of KMIORE, AKG, Srinivasulu and HRG. Only the processed ore used to move from the above

said mines for export/sales. Mrs. Snehalata Singlii has paid crushing and processing charges to various contractors for the work done. This shows that the contractor of ore raising (i.e. Mrs. Snehalata Singhi) has been crushing and screening the ROM in the respective mines and then handing over the finished goods to the mine owners to sell it to BMM or others. Once processed ore is purchased, the same is exported.

11.1.6, Further, more evidence in the form of transportation bills were found for the movement of iron ore from these mines directly to various destinations for the purpose of export some of these are.

- *Pages 1 and 2 of the seized material A2/BMM/ 1 contains details of unloading of trucks at K P Port on 04/12/2009. The entries at serial number 33,37 39,44 of these pages show that iron ore is transported from the Karthik (KMIORE mines) directly to K P Port without the material being taken to EOU unit at Ranjithpura for further processing.*
- *Page 37 of the seized material A2/BMM/2 contains a loading report for the dates 3/09/2009 and 14-09-2009 by M/s. Matha Logistics Co. as per which the material has been loaded at the Karthik plot and transported directly to K.Patnam port for exports. This indicates that the material has been exported without being taken to EOU unit at Ranjitpura, for further processing.*
- *Page 21 and 22 of the seized material A2/BMM/2 shows the report of M/s Balaji Minerals as per which material weighing 368.69 MT has been transported directly from the Karthikeya mines (KMIORE mines) to Chennai port on 22/07/2008 and 01/08/2008 without the same being subjected to any further processing at the **EOU** plant.*

- *Similarly, pages 11 to 12 of the seized material A2/BMM/2 contains a letter dated 06-01-2009 of M/s. Balaji Minerals as per which some part off the material has been transported directly from the Karthikeya mines (KMIORE mines) to Chennai and K. Patnam ports on 16-08-2008 without the same being subjected to any further processing to the EOU plant.*

- *Page of the seized material marked as A2/BMM/2 contains a note written and sned by Mr. K Manjunath to the Managing director (MD). As per this note, the details of the payments due for transportation by M/s. AKB (Ashok KumarBachawat), Manjubachawat and LathaKhona have been written. As per the page, the material has been transported from KIOM (Karthik Mines) to YTG (Yeshwanth Nagar), KIOM to Guntakal and Mines top to Bottom.- The transportation of material from KIOM mine directly to JSW and Guntakal indicates the transportation of the material from Karthik mines directly for expOrip or local sales without being the same processed at the EOU plant.*

- *Page 96 of the seized material A2/BMM/3 contains details of transportation of material from the Karhik (KMIORE mines) directly to K*

Patnam Port on 28-02-2010 without the material being taken to EOU unit at Ranjithpura for further processing.

- *Page numbers 77 Ltd, 78 of the seized material marked as A2/BMM/3 dated 12/08/2010 which contain a office note dated 25-02-2010 written by Mr. K Manjunath for the approval of the MD and is also signed by the MD .4pixoving the payments. Serial number 16 of the note sates that Sree Veeranjayeya Earth Movers Extec Power Screen engaged at KMIORE 01/12/2009 to 31/01/2010 Rs. 31,05,211". It is clear from this that the screening plant has been put at the mines itself for processing the ore and the finished product is thereafter transported for export under the guise of EOU export or the same is sold in the local market.*

- *Pages 56 to 63 of the seized material marked as A2/BMM/3 contains loading report of M/s. Parvathi Road Lines, Bellary, as per which they have transported material from Karthik Mines (KMIORE Mines) to K. Patnam as under:*

Page Number (seized material)	*Dated*	*Total Quantity Transported (MTS)*
62	*27.02.2010*	*635.53*
61	*27.02.2010*	*172.28*
61	*28.02.2010*	*172.28*
59-60	*26.02.2010*	*688.950*

11.1.7 The above iron ore has been transported directly from the Karthik mines to Krishnapatnam port which means that the material has not been subjected to any treatment in the EOU unit thereby rendering it as trading activity the profits from which is not eligible for deduction under section 10B of the Income tax Act.

11.2 <u>Preparing invoice to show that assessee was purchasing ROM and not finished goods.</u>

*11.2.1During the course of search proceedings, it was found that Mr. Dinesh Kumar Singhi was indulging in obtaining invoices with description of the iron ore as provided by him. For instance, Pages **1** to 21 of A/BMM-off/8 contains an I invoice number 11 dated 28-07-2009 for sale of Fines by M/s. Associated Mining Company and the details of trips, dispatch for the same.*

The invoice sent by fax contains that the material supplied was fines and there arc transportation details to show that the material dispatched was fines. However, there is a noting by Mr. Dinesh Kumar Singhi on the fax copy of invoice (page 20) that the entry FINES in invoice be changed to ROM and then make payment. The final invoice shows sale of ROM even though fines are sold. The invoices before and after the noting by ***Mr.*** *Dinesh Kumar Singhi is scanned and appended below which show that he is systematically creating evidence to disguise purchase of finished product as raw material to wrongly claim deduction u/s* ***10B.***

12. CONCLUSION OF THE ISSUE OF INCORRECT CLAIM OF DEDUCTION U/S 10B

For the AY 2011-12, the deduction claimed u/s 10B is entirely disallowable for the reasons discussed at length in order. Since the EOU was formed with used machinery exceeding the threshold limit and the 10 year period has already expired from the date of commencement of the DTA Unit, the deduction claimed u/s 10B is entirely disallowed."

Against this assessee is in appeal before us.

4. We have heard the rival submissions and perused the materials available on record. The submission of the Ld. A.R. is that the issue has been remitted by the Tribunal on earlier occasion. The Ld. AO must have passed consequential order with regard to allowability of deduction u/s 10B of the Act in conformity with the direction of the Tribunal cited (supra) and also in conformity with the AO's observation in earlier assessment order dated 31.12.2008, wherein observed as under:

7.7 Mr. Dinesh Kumar Singhi has offered additional income for AYs 2007-08 to 2010-11 and stated that he had already offered 1/3rd of the total income for the A.Y.2006-07 earlier and filed his return of income. It is observed that he has not considered the purchases from some of the suppliers while computing the additional income offered by him without assigning any reason. Further, It is observed from the workings of income on the trading activity (exports) submitted by Mr. Dinesh Kumar Singhi for himself and the firm M/s. Bharat Mines & Minerals for the F.Y.2006-07 to 2009-10 that the method adopted by them is incorrect on many grounds discussed as under.

(i) Total quantity of iron ore purchased by them has not been taken into account. The firm has selectively taken only part of the purchases to work out the taxable income on the trading activity of the firm without any basis or assigning any reason. The evidence, as discussed! is clear indication that the purchases made are finished products in the form of iron ore fines and lumps directly exported by the firm/ proprietory concern without any value addition by the EOU ***unit.*** *Moreover, the firm/proprietory concern has not maintained the* ***production related*** *basic details like input — output, dispatch data of the* ***material of the EOU.*** ***In*** *the absence of such basic details and the fact that evidence to prove that the purchased iron ore has been exported directly are available. the entire purchases by the firm/proprietory concern are treated as having been directly exported without any value addition in the EOU Hence. the profits from the trading activity is worked out accordingly.*

(ii) The sales realization per MT has been arrived by dividing the Export realization divided by the quantity of iron ore exported (including wastage). The wastage should be excluded from such calculation as the same is not exported but will be cost. if any. the incorrect claim of deduction u/s 10B on this issue is reworked as under:

F.Y	2006-07	2007-08	2008-09	2009-10
Total Turnover	4462698615	5387393484	5728402165	8818722763
Total Quantity exported	1956082	1467524	1658000	2639761
Realisation PMT	2281	3671	3455	3340
Purchase cost	473803275	638605694	417874645	399579238
Purchase quantity	524710	829512	495550	511052
Purchase rate PMT	903	770	843	782
Direct Cost PMT*	29.35	107	190	273
Indirect cost PMT*	1086.68	1458	2146	1604
Profit earned PMT	261.97	1336	276	681
Total profit earned on Trading Activity	137458278	1108228032	136771800	348026412
Profit offered by the assessee	1413015	310303635	41643774	167000649
Further Disallowance of Deduction u/s 10B	**136045263**	**797924397**	**95128026**	**181025763**

* costs as per the computation given by the assessee

4.1. However, the ld AO passed the order contrary to the above order of the Tribunal as well as his own findings in earlier assessment order dated 31.12.2018. In our opinion, the issue is pending before the High Court in ITA No.726/2015 arising out of earlier order of ITAT in ITA No.741/Bang/2015 dated 10.4.2018 for adjudication. In view of this, it is appropriate to remit this issue to the file of AO to pass consequential order after final outcome of the said appeal pending with the High Court. Directed accordingly.

5. Next ground No.13 which reads as follows:

> *"13. The authorities below erred in not considering loss on forward exchange contract of Rs.15,58,03,235/- in computing the total income."*

5.1 After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal on earlier occasion in ITA Nos.738 o 741/Bang/2015 dated 10.4.2018, wherein the Tribunal has held as under:

"13. Ground No.13 — Disallowance of Loss on Forward

Exchange Contract.

13.1 The Assessing Officer, in the impugned assessment order, has disallowed an amount of Rs.15,58,03,235 on account of loss on forward exchange contract, holding the transaction to be speculative in nature. On appeal, the learned CIT (Appeals) has upheld the Assessing Officer's decision. Before us, while the assessee has assailed the decision of the authorities below, revenue has supported their order in this regard.

13.2 We have considered the rival contentions and perused and carefully considered the material on record. We find that both the authorities below have decided the issue summararily, without analyzing the transaction and deciding the nature of the same. In this view of the matter, we deem it appropriate to set aside the findings of the authorities below on this issue and remand the matter to the file of the Assessing Officer for proper consideration of the facts of the transaction and for adjudication thereon, after affording the assessee adequate opportunity of being heard in the matter

and to file details and submission in this regard which shall be duly considered. We hold and direct accordingly."

5.2 However, the A.O. has not passed the consequential order in accordance with above findings of the Tribunal. Further, the issue came for consideration in assessee's own case in ITA Nos.2378 & 2379/Bang/2018 for the assessment years 2012-13 & 2013-14 vide order dated 30.3.2012, wherein held as under:

10. "We have heard the rival submissions. In this case the assessee is engaged in the business manufacture and export of iron ore. The business of the assessee for AY 2007-08 to 2010-11 is as follows: -

FY	*Income from Export sales (Rs.)*
2007-08	*5,48,07,069*
2008-09	*5,72,84,02,165*
2009-10	*8.81,87,22,763*
2010-11	*5.26,46,10,180*
Total	*2529,24,61,177*

According to the learned D.R. the total forward exchange transaction in these two assessment years are below the total export made by the assessee in these two assessment years. As such it cannot be considered as normal hedging transaction. Otherwise it can be considered as speculative transaction. However, the assessee demonstrated before us that the n of the hedging contract is more than 1 year and thus these are undertaken with the SBI and Standard Chartered Bank d by the RBI. Further, these transactions extended for more tabulated below: -

For Assessment Year 2012-13

Sl. No	Bank	Notional Amount in Rs	Trade Date	Maturity Date	Settlement Amount Loss/Gain
1	SBI	8,74,00,000	17.08.2007	11.04.2011	10,40,000
2	SBI	2,07,00,000	26.04.2011	26.04.2011	15,86,250
3	SBI	8,54,00,000	26.07.2007	27.04.2011	34,80,000
4	SBI	8,74,00,000	17.08.2007	13.05.2011	24,60,000
5	SBI	8,54,00,000	26.07.2007	27.05.2011	50,45,000
6	SBI	8,74,00,000	17.08.2007	13.06.2011	23,40,000
7	SBI	8,54,00,000	26.07.2007	28.06.2011	45,85,000
8	SBI	8,74,00,000	17.08.2007	14.07.2011	15,60,000
9	SBI	8,54,00,000	26.07.2007	27.07.2011	25,00,000
10	SBI	8,74,00,000	17.08.2007	11.08.2011	32,45,000
11	SBI	8,54,00,000	26.07.2007	29.08.2011	63,70,000
12	SBI	8,74,00,000	17.08.2007	13.09.2011	73,20,000
13	SBI	8,54,00,000	26.07.2007	28.09.2011	1,30,00,000
14	SBI	8,74,00,000	17.08.2007	13.10.2011	1,06,85,000
15	SBI	8,54,00,000	26.07.2007	25.10.2011	1,41,00,000
16	SBI	8,74,00,000	17.08.2007	11.11.2011	1,31,60,000
17	SBI	8,54,00,000	26.07.2007	28.11.2011	1,86,35,000
18	SBI	8,74,00,000	17.08.2007	13.12.2011	1,91,70,000
19	SBI	8,54,00,000	26.07.2007	28.12.2011	2,10,55,000
20	SBI	8,74,00,000	17.08.2007	13.01.2012	1,53,90,000
21	SBI	8,54,00,000	26.07.2007	27.01.2012	1,35,30,000
22	SBI	8,74,00,000	17.07.2007	13.02.2012	1,11,20,000
23	SBI	8,54,00,000	26.07.2007	27.02.2012	1,27,00,000
24	SBI	8,74,00,000	17.08.2007	13.03.2012	1,28,80,000
25	SBI	8,54,00,000	26.07.2007	28.03.2012	1,63,40,000
26	SCB	2,20,00,000	27.04.2011	29.04.2011	2,05,000
27	SCD*	1,12,87,500	28.06.2011	30.06.2011	*95,000
28	SCD*	1,12,87,500	11.07.2011	13.07.2011	*1,37,500
29	SCD	2,07,00,000	26.04.2011	26.04.2011	15,60,000
	Total	215,95,75,000			23,45,83,750

For Assessment year 2013-14

Sl.No.	*Bank*	*Notional Amount (Rs.)*	*Trade Date*	*Maturity Date*	*Settlement Amount Loss/Gain*
1	*SBI*	*8,74,00,000*	*17.08.2007*	*13.04.2012*	*1,55,50,000*
2	*SBI*	*8.54,00,000*	*26.07.2007*	*26.04.2012*	*1,97,95,000*
3	*SBI*	*8.74,00,000*	*17.08.2007*	*11.05.2012*	*1,98,00,000*
4	*SBI*	*8,74,00,000*	*17.08.2007*	*13.06.2012*	*2,43,50,000*
5	*SBI*	*8,54,00,000*	*26.07.2007*	*27.06.2012*	*2,88,80,000*
6	*SBI*	*8,74,00,000*	*17.08.2007*	*13.07.2012*	*2,39,40,000*
7	*SBI*	*8,54,00,000*	*26.07.2007*	*27.07.2012*	*2,54,80,000*
8	*SBI*	*8,74,00,000*	*17.08.2007*	*13,08.2012*	*2,31,70,000*
	TOTAL	*69,32,00,000*			*20,67,40,000*

13. As per definition of Section 43(5) of the Act trading of shares which is done by taking delivery does not come under the purview of the said Section. Similarly in clause (d) of Section 43(5) derivative transaction in shares is also not speculation transaction as defined in the said section. Therefore, both profit/loss from all the share delivery transactions and derivative transaction are having the same meaning, so far as Section 45(3) of the Act is concerned. In view of the fact that both delivery transactions and derivative transactions are having the same meaning, so far as section 43(5) of the Act. Again, in view of the fact that both delivery transactions and derivative transactions are non-speculative as far as Section 43(5) is concerned, it follows that both will have the same treatment as far as application of Explanation to Section 73 of the Act is concerned. Therefor aggregation of the trading profit and loss from derivative transactions should be done before Explanation to Section 73 of the Act is applied. The above view was taken by the Special Bench of the Mumbai Tribunal in the case of CIT vs. Concord Commercial Pvt. Ltd. (2005) 95 ITD 117 (Mum) (SB). In this case the Special Bench held that:

> *"Before considering whether the assessee's case is hit by the deeming provision of Explanation to Section 73 of the Act, aggregate of the business profit/loss has to be worked out based on the non-speculative profits; either it is from share delivery or from share derivative."*

From the above it is concluded that both trading of shares and derivative transaction are not coming under the purview of Section 43(5) of the Act which provides definition of "Speculation" exclusively for the purpose of section 28 to 41 of the Act. Again, the fact that both the delivery based transaction in shares and derivative transaction are non-speculative as far as Section 43(5) of the Act is concerned goes to confirm that both will have treatment as regards application of the Explanation to Section 73 is ed, which creates a deeming fiction. Now, before application of the said explanation, aggregation of business profit/loss is to be workout irrespective of the fact, whether it is from share delivery transaction or derivative transaction.

14. To sum up:

(i) The assessee has entered into forex derivative transactions only in order to contain foreign exchange fluctuation risk.

ii) Thus, the loss on account forex derivative transactions are directly attributable to the normal business of the assessee.

(iii) The loss incurred by the assessee is realistic and not notional.

(iv) Only Money changers and banks are allowed to trade in foreign currency and the assessee is neither a money changer nor a bank.

(v) The assessee has only utilized the service of Stat Bank of India/ Standard & Chartered Bank in order to iron out the loss arising

out of foreign currency fluctuation risk by entering into forex derivative contract.

(vi) The Instructions issued by CBDT Instruction No.03/2010 dated 23.03.2010 has recognized the loss out of forex derivatives on actual settlement/ conclusion of contracts as allowable business loss, however they have directed the Revenue to examine whether the transactions would fall U/s. 43(5)(d) of the Act, and if so to treat the same as non-speculative transaction. By the above directions, it appears that though the CBDT has recognized the loss arising out of forex derivatives on actual settlement of the contracts, directed the Revenue to treat the same as speculative transaction when they are transacted through nationalized banks and as not speculative, when these transactions are transacted through recognized stock exchange.

(vii) It is pertinent to note here that the bankers act as an advisory agent to assessee in order to protect them from foreign exchange exposure their expertise and these services cannot be obtained by the stock exchange where their scope of service is very

viii) In the present case the assessee has taken a hedging position as mentioned in these assessment years based on the RBI guidelines. The guidelines permitted hedging to the extent of last three years annual average turnover, or current year's actual export turnover whichever is higher. Where exact amount of underline transaction was not ascertainable according to RBI guidelines, the contracts could be booked on the basis of reasonable estimate. The assessee has taken its hedging position in accordance with the guidelines of R133 and the same is not disputed.

(ix) The claim of the assessee was that the underlying exposure in respect of foreign currency is more than adequate to cover the hedging positions taken in respect of cross currency derivative contracts entered into by the assessee. The Revenue has not brought out any material on record to controvert to this claim of the assessee.

(x) The forex derivative transactions transacted by the assessee are through banks in compliance with the RBI regulations. These regulations permit the assessee to enter into such derivative transactions only by fulfilling certain conditions in the course of the business of the assessee. These regulations do not permit the assessee to enter into forex derivative contract as a separate business.

(xi) Section 73(1) of the Act restricts the set off of speculation loss against the other business income in only those cases were speculative transactions carried on by the assessee• are of such nature so as to constitute a business by itself. It is pertinent to mention here that RBI

does not permit any bank under its umbrella to entertain its client in any separate business of forex derivative transactions. Permission is granted only for the clients of the bank hedge on foreign exchange in order to minimize the risk of the currency exposure arising out of import and export trade.

(xii) jurisdictional Madras High Court in the case M/s. sugars and chemicals Ltd Vs. Axis Bank Ltd., in O.A 252 of 2008 in C.S.No.240 of 2008 O.A. Nos.526 & 527 of 2008 in C.S No.240 of 2008A. Nos.1926, 1927, 2446 and 2447 of 2008 in S.S No.240 of 2008 vide order dated 14.10.2008 reported in 8 MU 261 has held that derivative transactions ceased rto be speculative transactions or wages because pricing of the deal follows a scientific pattern on the basis of financial mathematics. Just ads actuaries scientifically determined the value of insurance risk and the premium payable, Financial Mathematician/ Portfolio Managers evaluate the price of these derivatives.

15. Thus in the present case before us, the assessee is an exporter of iron who has entered into forex derivative transactions through its bankers with a view to effectively hedge its foreign currency risk. Therefore, these forex derivative transactions have a close proximity or rather incidental to the export business of the assessee, which cannot be considered as speculative. Moreover in the case of the assessee foreign currency contracts cannot be treated as wagering contracts for the reasons discussed herein above. Section-43(5) of the Act is applicable to transactions in commodity or stocks and shares. If currency is treated as commodity, then according to Section 43(5) (a) of the Act, such transaction shall not be deemed to be speculative transaction. Further currency cannot be treated as stock or shares because inherently they have different characteristic. Further, in the case of the assessees, the foreign exchange exposure for the "relevant period" specified by "R.B.I" regulations is quiet substantial in order to justify the forex derivative transactions made by the assessee through Government recognized channel, otherwise the RBI would not have entertained the transactions and would have restrained the banks from entering into such transaction with its clients. Thus considering the totality of the facts and circumstance of the case and the decisions relied upon herein above we allow the grounds raised by the assessee's on this issue in both appeals of the assessee and accordingly we hereby direct the Revenue losses incurred by the assessee on account of forex acts against the business income of the assessee."

5.3 Further, we find that the revenue is in appeal on this issue before the High Court in ITA No.726/2018 cited (supra) by way of following question of law:

"Whether on the facts and in the circumstances of the case, the Tribunal was in respect of forward contract loss, when all the

factual aspects were available with the above and recorded perverse finding?

5.4 In view of the above, in our opinion, it is appropriate to wait for the final outcome of said appeal pending before the High Court. Accordingly, the issue is remitted to the file of AO for fresh order after the final outcome of said appeal pending before the High Court. Ordered accordingly.

6. In the result, the assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 23rd Nov, 2022

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 23rd Nov, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.