

**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI**  
**BEFORE SHRI BR BASKARAN, AM & SHRI ABY T. VARKEY, JM**

आयकरअपीलसं/I.T.A. No. 1905 to 1910/Mum/2023  
(निर्धारणवर्ष / Assessment Years: 2016-17 to 2021-22)

DCIT, Central circle – 2(2) Old CGO Bldg, 806, 8 <sup>th</sup> Floor, MK Road, Mumbai – 400020.	<b>बनाम</b> / Vs.	M/s Esskay Niryat Corp Pvt Ltd., Unit No. 101, 201 & 106, 206 Yamuna SDF Complex, Phase II, Kasez Gandhidham, Kutch, Gujrat – 370230
<b>स्थायीलेखासं/ . जीआइआरसं/ . PAN/GIR No. : AAFFE2263G</b>		
(अपीलार्थी/ <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )
Assessee by:	Shri Rajiv Khandelwal a/w Shri Gagan Khandelwal	
Revenue by:	Shri Biswanath Das, CIT –DR & Shri P.D. Chougule	

सुनवाईकीतारीख / Date of Hearing: 07/02/2024  
घोषणाकीतारीख /Date of Pronouncement: 06/03/2024

**ORDER**

**Per Bench:**

All these appeals preferred by the revenue are against the common orders passed by the Learned Commissioner Income Tax (Appeals)-48 [herein after referred to as Ld. CIT(A)], Mumbai for A.Y 2016-17, 2017-18 & 2018-19 dated 01.03.2023 and the Ld. CIT(A) common order dated 21.03.2023 for AYs 2019-20, 2020-21 & 2021-22. Since issues involved are common, all the appeals for all the assessment year/years (hereinafter referred to as "AY") were heard together. Both the parties also argued them together raising similar arguments on these issues. Accordingly, for the sake of convenience and brevity, we dispose all the appeals by this consolidated order.

2. Before we advert to the grounds taken in the appeals, it would first be relevant to cull out the basic facts of the case. Search u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as "the "Act") was conducted against the JMG Group and others, on 08-02-2021 thereby triggering section 153A of the Act. Prior to the date of search, the

income-tax assessment under section (hereinafter referred to as “u/s.”) u/s 143(3) of the Act (scrutiny assessment) for AY 2016-17 stood already completed on 25-12-2018 i.e. (two years and one month before the search). Accordingly, the assessment for AY 2016-17 did not abate consequent to the search on 08.02.2021. It is undisputed that assessment-years 2017-18 and 2018-19 were also unabated assessments, accordingly the A.Y 2016-17 to A.Y 2018-19 are unabated assessment years since those assessment years were not pending before AO on the date of search (08.02.2021) as per second proviso to section 153A of the Act. With regard to A.Y 2019-20 to A.Y 2021-22 it is undisputed that they were abated assessments. The summary of the disallowances in Rupees made by the Assessing Officer (in short the AO) which are in dispute for AYs 2016-17 to 2021-22 are as follows:

A.Y	Deduction disallowed u/s 10AA of the Act (in Rupees)
2016-17	8,99,50,197
2017-18	2,46,04,261
2018-19	33,78,54,083
2019-20	17,92,87,640
2020-21	15,47,71,388
2021-22	9,94,85,868

3. Since both the parties agreed that A.Y 2016-17 to 2018-19 are unabated assessments and the disallowance made by the AO is also on a single issue (deduction disallowed u/s 10AA of the Act), we take up A.Y 2016-17 as the lead case for deciding those years of appeal. For AY 2016-17, the assessee had originally filed return of income on 16.10.2016 declaring total income of Rs. 1,74,31,910/-. It is undisputed fact that assessee had set up manufacturing unit at Special Economic Zone (‘SEZ’ in short) located at Kasez, Kandla in the allotted unit located in the Yamuna SDF complex. In the relevant year, the assessee purchased Rotary pouch packing machine (Form, Fill & Seal) i.e. FFS machines for manufacturing/packing pan masala with or without Tobacco inter-alia from M/s. Geluvu Food Products Ltd. (M/s. Geluvu/M/s. GFP) amounting to Rs.2,67,31,105/- and since it commenced commercial manufacturing activities during the relevant year (AY. 2016-17), it claimed deduction u/s 10AA of the Act for the first (1<sup>st</sup>) time, which was enquired into by AO during the original assessment u/s 143(3) of the

Act (dated 25.12.2018) by issue of notice u/s 142(1) of the Act dated 27.11.2018 and the assessee had filed the table below disclosing particulars of FFS machines purchased from M/s. Geluvu and showed that those purchases collectively represented 75% of block of plant & machinery as under: -

Invoice No	Date of Invoice	Quantity	Sr. No	Amount (in Rs)
193	24.06.2015	2	DW 2140 1120 50168 DW 2140 5120 50173	1,06,92,442
194	25.06.2015	3	DW 2180 5120 50188 DW 2140 2120 50169 DW 2190 1120 50184	1,60,38,663

4. As stated, the income tax scrutiny assessment u/s 143(3) of the Act for AY 2016-17 was completed on 25.12.2018 wherein the AO after due enquiry has accepted the deduction claimed by the assessee u/s 10AA of the Act. Then, after the search conducted on 08.02.2021, the assessee filed a return in response to notice u/s 153A of the Act, wherein the assessee reiterated the same return filed at Rs. 1,74,31,910/-. The AO took note of the claim of the assessee in respect of deduction claimed u/s 10AA of the Act and noted that the assessee had purchased 71.35% machinery from M/s Geluvu Food Products [*opening fixed asset for AY. 2016-17 is Rs.3.77 cr, out of which machinery worth Rs.2.69 cr (71.35%) was purchased from M/s. Geluvu/GFP*] and noted that the assessee has purchased machinery from M/s Geluvu at higher cost than the machinery purchased by M/s Geluvu. According to the AO, M/s Geluvu has kept the machinery (sold to assessee) for more than 35 days in its premises and thereafter transferred it to assessee's premises and that M/s. Geluvu was also dealing with tobacco, Pan masala and other products and not into trading of machinery. According to AO, from perusal of ITR filed by M/s Geluvu/GFP for AY 2016-17 reveals that it had shown reduction in WDV of plant & machinery of Rs.8,56,45,914/-, which means that the seller of machines (M/s. Geluvu) have sold used machineries and not new machineries as claimed by assessee company. Moreover, the AO noted that M/s. Geluvu/GFP have last filed its ITR in AY. 2019-20 (FY. 2018-19) and that the inspector deputed to verify the existence of that entity reported its closure. According to the AO, during search [on 09.02.2021] the statement of Shri Hitendrabhai Mansukhlal Kanjiya, (in short 'Kanjiya') the manager of the assessee company (since 2015) has admitted to question no. 23 & 24 that in its SEZ

unit, old machineries were used/installed. Further, Shri Kanjiya/manager answered that the machineries were serviced before installation and was put in use in August 2015 and also that the machineries are old/second hand at the time of installation and purchased from various parties/related parties including from M/s Geluvu Food Products. Thus, the AO noticing that assessee has claimed deduction u/s 10AA of the Act on the basis of the second hand machinery/used machineries, issued show cause notice to assessee asking why the claim u/s 10AA of the Act should not be denied. According to the AO, the assessee failed to produce any concrete evidence or a certificate to the effect that before the installation of the machinery (bought from M/s. Geluvu/GFP) they were new machines; and therefore he disallowed the claim of assessee u/s 10AA of the Act inter-alia taking note as under: *-(relevant portion only)*

7.4 The assessee filed submission/details in response to the show cause notice and the same is considered before passing this order. On perusal of the ITR of Esskay Niryat Corporation, it was seen that the opening gross fixed assets in FY 15-16 is Rs. 3.77 crores for AY 16-17, which is the year of incorporation of the assessee. Out of which Rs 2.69 crores machinery (71.35%) was purchased from M/s. Geluvu Food Products. From ITR of Geluvu Food Products for AY 16-17, it was seen by the search team that it has shown reduction in WDV in fixed assets of an amount Rs. 8,56,45,914/-Moreover, the entity M/s Geluvu Food Products was into the business of food & beverages and tobacco and not manufacturing or trading of machinery. This shows that the seller of machines M/s Geluvu Food Products have reduced its WDV, meaning they have sold used machineries and not a new one as shown and claimed in the books of Esskay Niryat Corporation. It was seen by the search team that Geluvu Food products have last filed its ITR for FY 18-19. An inspector was deputed to verify the existence of the entity at last known address as per ITR by the search team. The inspector has reported that the entity does not exist at the given place and it has closed its operations from couple of years as found from local enquiries made

7.5 .....

7.6 Further, Shri. Hitendrabhai Mansukhlal Kanjiya, who was working as a Manager at Esskay Niryat Corporation, since 2015, was confronted with these evidences and facts of the use of old machineries in the assessee factory. His statement on oath was recorded u/s 132(4) of the Act at the factory premise of the assessee at Shed No. 101, 201, 106, 206, Yamuna, SDF complex, Kasez, Gandhidham, Kutch on 09.02.2021. He also stated in response to the question no. 24 of the statement that the machinery at this premises are old and which were serviced before installation and being put in use in August, 2015. Also, he stated that all the machines, which are used in this premise are old/second hand at the time of installation and they are purchased from various parties including: M/s. Geluvu Food Products, Shree Meenakshi Food Products, Kirti Industries, Royal Rajasthan Food Products Pvt Ltd., Bhishma Pan Products Pvt. Ltd. etc. The details of such purchases made have also been placed as Annexure 1 and 2 of the statement of Shri. Hitendrabhai Mansukhlal Kanjiya recorded at the premise. Mr. Jadgish Joshi - In Qs. No: 94 of his statement recorded, was confronted about the old/second hand machines, which are used in the premise of M/s EsskayNiryat Corporation at Shed No. 101, 201, 106, 206, Yamuna, SDF complex, Kasez, Gandhidham, Kutch which was also claiming deduction u/s 10AA of the Act. and why should it not be denied. Mr. Jadgish Joshi replied that he was not aware and would submit the reply in 4 to 5 days. However, no reply to the above has been filed till date.

7.7 Further, it is mention here that the assessee has stated that 80% machinery has been purchased from Gelua Food Products and also stated that the same is unused. However, it is seen from the details provided by the assessee that the assessee has purchsed the machinery at higher cost than the machinery purchased by Gelua Food Products. Further, the assessee has not provided any concrete

evidence or a certificate which was made at the time of installation of the machinery at the premises of the assessee. Further, it is not like that M/s. Gelua Food Products has purchased the machinery and immediately transferred it to the assessee premises. It is observed that Gelua Food Products has kept the machinery for more than 35 days in its premises. Further, Gelua Food Products are also dealing in the tabacoo, pan masala and other products. On perusal to the details of the purchase made in A.Y.2016-17, it is seen that the assessee has purchased the tobacco/zardha from Gelua Food Products. Therefore, the contention of the assessee on this issue is not accepted.

7.8 In view of the above discussion, the deducted claimed w/s 10AA of the Act amounting to Rs.8,99,50,197/- is hereby disallowed.”

5. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who found that the AO has not referred to any incriminating material found during search conducted on its premises on 08.02.2021 to make disallowance of the deduction u/s 10AA of the Act. He also found that the assessments pertaining to AY 2016-17 to 2018-19 were not pending before AO on the date of search i.e. 08.02.2021, therefore, he held that these assessment years were unabated assessments; and moreover the Ld. CIT(A) found that for A.Y 2016-17 the AO after enquiry had allowed the claim of deduction u/s 10AA of the Act u/s 143(3) of the Act vide order dated 25.12.2018; and before the Ld. CIT(A) the assessee filed certificate/evidence from Government Approved Authorities to prove that the machines purchased for installation at their SEZ units were brand-new and also brought to the notice of AO that Shri Kanjiya (manager) whose statement has been heavily relied upon by AO (to draw adverse view that assessee had purchased old/used machines from M/s. Geluvu/GFP) was not relevant because he had no knowledge about the machines, since he was only handling the Liaoning work given by assessee; and the assessee also filed the affidavit of Shri Deenabandu Tak (unit in-charge of SEZ units) who asserted that the machines installed at their factory premises were brand new which included machines purchased from M/s. Geluvu/GFP. The Ld. CIT(A) taking note of

these relevant evidences, called for remand report from the AO and taking note of the remand report reproduced at page 15 of his order held as under: -

5.34 Conclusion- As stated above, the AO has not brought on record through the assessment order or through any communication regarding any incriminating document or material found or seized during the Search and Seizure action u/s 132 of the Act, which can be linked /correlated with the impugned additions made. As such, the A.O. lacks jurisdiction to make additions/disallowances which are not based on relevant incriminating material found during the course of search proceedings.

5.34 Conclusion- As stated above, the AO has not brought on record through the assessment order or through any communication regarding any incriminating document or material found or seized during the Search and Seizure action u/s 132 of the Act, which can be linked /correlated with the impugned additions made. As such, the A.O. lacks jurisdiction to make additions/disallowances which are not based on relevant incriminating material found during the course of search proceedings.

6. Thus, the Ld. CIT(A) allowed the grounds of appeal of the assessee by finding that there was no incriminating material to make the disallowance u/s 10AA of the Act for un-abated A.Y's 2016-17 to 2018-19 by relying on the binding decision of the Hon'ble Bombay High Court in PCIT vs Vimal Kumar Rathi 115 taxmann.com 219 and CIT vs Deepak Kumar Agarwal 86 taxmann.com 3 and other cases (infra), he deleted the additions.

7. Coming to A.Y 2019-20 to 2021-22, which were abated assessments, the Ld. CIT(A) found that AO has made similar disallowance of deduction u/s 10AA of the Act for all these years on the strength of same allegation for AY. 2016-17 and reiterated what he alleged against the assessee for AY. 2016-17 (ie. For purchasing used machineries from M/s. Geluvu/GFP and therefore not eligible for deduction u/s 10AA of the Act) which action of AO, the Ld. CIT(A) found to be without any material to show that the purchase of machinery from M/s. Geluvu/GFP was second hand/used machines; and that the reasons given by AO (reduction in WDV of plant & machinery of M/s. Geluvu/GFP

during AY. 2016-17) was irrelevant and has nothing to do with the trading of machineries undertaken by M/s. Geluvu. And the Ld. CIT(A) noted that assessee in order to prove the purchase of machinery for installation at their SEZ unit, had produced invoices, transportation & delivery challans of machineries (purchased from M/s. Geluvu/GFP and other entities), and certificates of Government Approved Registered Engineers; Confirmation from seller/M/s. Geluvu's/GFP that they were also into trading of machineries and they confirmed the sale of machines to assessee in June, 2015. Taking note of the remand report of AO and other contemporary evidence, the Ld. CIT(A) deleted the addition made for AY. 2019-20 to AY. 2021-22 inter-alia by holding as under: -

5.25 Summarising the above discussion, it is observed that:

- i. Statement of Shri Hitendra M. Kanjiya recorded u/s 132(4) was retracted and no other incriminating material was found during the search proceedings to establish that the machineries purchased from GFP was "old & used".
- ii. Documentary evidences in the form of affidavit of Mr. Deenbandhu Tak, Unit In-charge, invoices, transportation and delivery challans of machineries purchased by GFP and other entities, certificate of Govt. Approved Registered Engineer and certificate from GFP have been filed before the A.O. However, no adverse comment or rejection of these evidences have been made by the A.O. in the assessment order or during remand proceedings.
- iii. The reliance of the A.O. on the reduction in WDV in Plant & Machinery of GFP during A.Y. 2016-17 is unfounded and unsubstantiated and against his other observations in the assessment order.
- iv. The claim of deduction u/s 10AA in the first year (A-Y. 2016-17) has been allowed in the original scrutiny assessment passed by the A.O. u/s 143(3) of the LT. Act after examination of documents.

5.26 Considering the totality of the facts and circumstances related to the issue involved, in my considered view, the denial of deduction

claimed u/s 10AA of the se LT. Act, during the year under consideration, is not justified. Hence, the deduction u/s 10AA of the LT. Act of Rs. 17,92,87,640/- claimed during AY. 2019-20 is allowed. The A.O. is directed accordingly. Thus, the ground of appeal no. 1 is Allowed.”

**8.** Aggrieved by the aforesaid action of Ld. CIT(A), the revenue has preferred this appeal.

**9.** We have heard both the parties and perused the records. The sole issue permeating in all the six (6) appeals of revenue emanating from assessment framed u/s 153A of the Act, are regarding the assessee’s claim of deduction u/s 10AA of the Act, which has been disallowed by AO by taking note of the disputed fact regarding purchasing/installation of machinery at SEZ unit for AY. 2016-17. ( It is to be noted that AO has disallowed the assessee’s claim of deduction u/s 10AA of the Act for all assessment years from AY. 2016-17 to AY. 2021-22, only on the basis of his finding of fact which pertains to AY. 2016-17 that assessee had purchased used/second-hand machines (73%) from M/s. Geluvu/GFP and installed the same in its SEZ unit, consequently, assessee was not eligible to claim deduction u/s 10AA of the Act; and since AY. 2016-17 was the first year of assessee’s claim of deduction u/s 10AA of the Act, the AO while framing assessment u/s 153A of the Act, for other years i.e. AY. 2017-18 to AY. 2021-22 disallowed the claim of assessee for all the years following his decision for AY2016-17. Since the foundational fact for disallowance of assessee’s claim u/s 10AA of the Act is that of AY 2016-17, we will examine/adjudicate the action of AO/Ld. CIT(A) for AY. 2016-17, which will determine the fate of all the assessment year’s in appeal before us.

**10.** We note that the assessee had set up its factory in Special Economic Zone (SEZ) and had claimed for the first time deduction u/s 10AA of the Act, in A.Y 2016-17 wherein it declared total income of Rs. 1,74,31,910/- which return of income was scrutinized by the AO u/s 143(3) of the Act, wherein the AO had accepted the claim of the assessee u/s 10AA of the Act after conducting enquiry into the claim u/s 10AA of the Act vide assessment order dated 25.12.2018, wherein purchase of FFS machineries worth

Rs 2.67 crores from M/s Geluva/GFP was examined and then only allowed. Thereafter, search was conducted on 08.02.2021 at assessee's premises, pursuant to which event, notice u/s 153A of the Act were issued for AY 2016-17 to AY 2021-22; and for A.Y 2016-17, the assessee filed return reiterating the income offered in the original return of income i.e Rs.1,74,31,910/-. The AO without referring to any incriminating material found during search to suggest that the claim made by the assessee regarding deduction made under section 10AA of the Act was concocted/un-true/false, has disallowed such a claim by relying mainly on the statement of the manager of assessee company Shri Kanjiya which was recorded on 08.02.2021 wherein for a leading question No. 24 as to whether the machines purchased from the parties named therein especially from M/s Geluvu was old /second hand machinery, the manager (Shri Kanjiya) replied that to his knowledge these machineries were old / second hand at the time of installation. Based on the aforesaid statement of Shri Kanjiya the AO had a look at the return filed by the assessee wherein he noted that assessee had purchased machinery worth Rs.2.69 cr (ie. 71.35% of total purchases machinery) from M/s. Geluvu/GFP; and further the AO noted from the ITR of M/s. Geluvu that in AY. 2016-17, it had shown reduction in WDV of plant & machinery of Rs.8.56 cr. Taking note of the reduction in WDV of M/s. Geluvu, and the statement of Shri Kanjiya, the AO assumed that M/s. Geluvu/GFP had sold used (second hand) machines to assessee. And since assessee had installed in its SEZ unit used/second hand machines, according to AO, assessee was not eligible to claim deduction u/s 10AA of the Act; and further according to AO since the assessee didn't file concrete evidence in respect of installing brand new machines purchased from M/s. Geluvu/GFP; and since M/s. Geluvu/GFP had not filed any ITR from AY. 2019-20 (FY. 2018-19) and has closed its operation, the AO was pleased to disallow the claim made by the assessee u/s 10AA of the Act for all six (6) assessment year's from AY. 2016-17 to AY. 2021-22 as under: -

A.Y	Deduction disallowed u/s 10AA of the Act (in Rupees)
2016-17	8,99,50,197
2017-18	2,46,04,261
2018-19	33,78,54,083
2019-20	17,92,87,640
2020-21	15,47,71,388
2021-22	9,94,85,868

**11.** On appeal, the Ld. CIT(A) has decided the appeals of assessee by passing two common orders for AY. 2016-17 to AY. 2018-19 (*un-abated assessments*) and for AY. 2019-20 to AY. 2021-22 (*abated assessment*) by separate order dated 01.03.2023 for un-abated assessments and by order dated 21.03.2023 for un-abated assessments. Since we find that the disallowance/addition permeating in all the six appeals are emanating from facts pertaining to that of AY. 2016-17, (machinery purchased in AY. 2016-17 from M/s. Geluvu/GFP), we take note of the contents of Ld. CIT(A)'s impugned orders for both abated as well as un-abated assessments to decide all the appeals of the revenue by passing a common order.

**12.** We note that the AO has disallowed the claim made by the assessee u/s 10AA of the Act on the strength of the statement of the Shri Kanjiya/manager that the machines purchased from M/s. Geluvu/GFP were old/used (reply to leading question number Q-24) and secondly, the AO taking note of the reduction of WDV (as claimed by M/s. Geluvu/GFP) in its ITR for AY. 2016-17, the AO assumed that assessee purchased/installed used/second hand machinery in its SEZ unit, which action of assessee makes it ineligible for claiming deduction u/s 10AA of the Act. However, according to Ld. AR, the statement of Shri Kanjiya/manager was irrelevant because he never dealt with purchase/installation of machinery as he was a Liaison Officer of this unit dealing with the SEZ/export etc, whereas the competent person was Mr. Tak, whose statement was not recorded by the search team, and so assessee filed the affidavit of Shri Tak who was the unit-in-charge, from in-corporation of the SEZ unit, who asserted that only brand new machines were purchased and installed in the SEZ units and therefore, the conclusion drawn by AO on irrelevant statement of Shri Kanjiya is erroneous/fallacious. According to him, the AO has not made any attempt to summon any of the vendors who had supplied the machineries to the assessee's SEZ unit to verify the claim of assessee that it had only purchased/installed new machines; and instead has drawn adverse inference based on irrelevant material. The Ld. AR pointed out that during the search, the search party found the very same copy of the invoices issued by the vendors including M/s. Geluvu/GFP which were produced by the assessee before the predecessor AO (*during original assessment dated 25.12.2018*) and which were duly recorded in the

books of the assessee. And that the invoices shows the details of purchase of machinery such as the date, time of the issue of the invoice, mode of dispatch, vehicle number, transporter name and that the VAT No and CST number. Therefore, according to Ld AR, the purchases made of the machinery cannot be faulted. The Ld. AR further contended that before the Ld. CIT(A), the assessee asserted that the A.O. erred in making a factually incorrect statement that the assessee didn't produce any evidence to prove that machines were brand new at the time of installation of the machinery at the premises of the SEZ unit. According to the assessee, the A.O. failed to consider the certificate of approved engineer as well as the affidavit of the Unit in charge of the SEZ Unit Mr. Tak. According to assessee, the A.O. couldn't controvert the relevant certificate and affidavit filed by Shri Tak, but arbitrarily brushed them aside and held that assessee installed old/used machinery in its SEZ unit. Therefore, the assessee had again filed relevant documents (*which were produced by the assessee before the predecessor AO for proving the claim of deduction u/s 10AA of the Act wherein AO allowed the claim u/s 143(3) of the Act by order dated 25.12.2018*) to show that the machines purchased from M/s. Geluvu/GFP were brand new machines and submitted Inspection report dated 03rd March 2022 of Government Approved Registered Engineer, certifying that the FFS machineries purchased by the assessee from M/s. Geluvu/GFP were of April 2015 make and are in good working condition. As per the certificate, there is no sign of any damages and that the machines are in good working condition including the rollers, Control Panel and switches. And the assessee brought to the notice of the Ld. CIT(A) that AO erred in relying on the statement of Shri Kanjiya/manager whose statement was recorded during the search operation. It was pointed out to Ld. CIT(A) that his statement was not relevant since Shri Kanjiya was not competent to make a statement about the machineries because he didn't dealt with the machines or was not involved in the purchases of machinery from M/s. Geluvu/GFP, whereas, Shri Kanjiya/manager was the Liaison Officer whose work was to function as a Liaison Officer of the company vis-à-vis is SEZ unit; and the officer in-charge/competent person to answer any queries about machines installed in SEZ unit was Shri Deenabandhu Tak (Unit in-charge) who had sworn an affidavit that the machines purchased from M/s. Geluvu/GFP at the time of installation at the SEZ unit was brand new. And that Shri Kanjiya has retracted the statement since he has mistakenly

answered the leading question asked by the Department (question no. 24) as to whether the machines purchased/installed in AY. 2016-17 purchased from M/s. Geluvu/GFP was old/used. The Ld. CIT(A) took note of the contents of the affidavit of Mr. Deenabandhu Tak, Unit in charge wherein he has affirmed that the machineries purchased from M/s. Geluvu/GFP were brand-new and not second-hand and that unpacking, installation and running of the said machineries were completed under his supervision. The Ld. CIT(A), called for the remand report from AO vide his letter dated 10.02.2023 highlighting that he couldn't find in the assessment order the mention of any incriminating material found during search to disallow the claim u/s 10AA, and directed the AO to pin point the details of incriminating material qua disallowance u/s 10AA of the Act as well as to give copy of Panchanama. The copy of the Ld. CIT(A) letter to AO which is relevant is reproduced as under: -

“Sub: Copies of incriminating material found in the case of M/s. Esskay Niryat Corporation (PAN: AAF2263G) during search proceedings on 08.02.2021 for A.Yrs. 2016-17 to 2021- 22 (Appeal No. CIT(A)-48, Mumbai/11258/2015-16, 10535/2016-17, 10327/2017-18, 10786/2018-19, 10269/2019-20, 10049/2020-21)-reg-

Please refer to the above.

2. Major issues on which additions have been made in the case of M/s. Esskay Niryat Corporation for the assessment years 2016-17 to 2021-22 are on account of disallowance of deduction claimed u/s. 10AA of the I.T. Act, 1961.

3. During the appellate proceedings, the A.R. of the appellant has stated that no incriminating material was found during the search proceedings, hence the addition made u/s. 153A r.w.s. 143(3) is bad in law, as per various judicial decisions.

4. On perusal of the assessment orders, there is no mention or description of any incriminating material found and seized during the search proceedings in the case of the appellant in the assessment orders. The A.R. of the appellant has categorically stated that no

incriminating material was found during search proceedings at the premises of the appellant based on which impugned additions are made.

5. You are therefore, requested to examine the issues and pinpoint the details of such incriminating documents in the form of Annexure /Sr. no. etc., prepared at the time of search proceedings based on which the impugned additions are made (as no such mention found there in the assessment orders). Also please provide the copies of such documents if any found and seized and panchnama prepared during the search proceedings, so that the claim made by the appellant is examined as per the provisions of the I.T. Act and decisions of Hon'ble Courts.

6. fail. Please provide the above information on or before 17th February, 2023, without fail.”

**13.** Pursuant to the above direction of Ld. CIT(A), the AO filed his first remand report (which was received by Ld. CIT(A) on 16.02.2023) is reproduced as under: -

2. In the captioned case, the under signed has been directed to submit the supportive documents relevant to additions made in the assessment order of M/s. Esskay Niryat Corporation (PAN: AAFFE2263G) for AY 2016-17 to 2021-22. The relevant details are as follows:

SNo	Description	Contents / Qty	Remarks
1	Copy of the warrant of authorization	1 copy	
2	Copy of the panchnama	1copy	
3	Copy of the statement recorded in which the issue of the additions made	The relevant part of the statement	
4	Copy of the incriminating material in which the additions has been made in the assessment order	Tax invoice copies of various entities mentioned in the assessment order	

**14.** In the light of the first remand report, the Ld. CIT(A) found that the materials relied upon by AO to make disallowance u/s 10AA of the Act was based on (i) Copy of warrant, (ii) Copy of Panchanama, (iii) Statement recorded of Shri Kanjiya and (iv) Tax invoices copies.

**15.** The Ld. CIT(A) examined each of the material referred (supra), and found that the warrant of authorisation issued u/s 132 of the Act was in the name of the assessee and therefore cannot be incriminating. Thereafter, the Ld. CIT(A) examined the Panchanama which was dated 11.02.2021 wherein he found details of the books of accounts and documents as per Annexure-A (01 sheet) which is mentioned therein. Thereafter, the Ld. CIT(A) took note of the statement of Shri Jagdish Prasad M. Joshi recorded during search proceedings on 12.02.2021, wherein he was confronted with the question in respect of machines purchased/installed in the SEZ unit i.e. question no. 94 as well as relevant question & answer of Shri Kanjiya which has been reproduced by the Ld. CIT(A) at Page no 19 of his order which is as under: -

“आपकी फर्म Esskay Niryat Corporation में आप 10AA का deduction से रहे है, लेकिन यह देखा गया है कि फर्म में इस्तेमाल होने वाली मशीनें 2nd हैंड है और नयी नहीं है। इस बात की पुष्टि पर्चेज बिल से होती है। इस संदर्भ में, मैं आपको श्री हितेंद्र कुमार कंजिया जो कि Esskay Niryat Corporation के मैनेजर हैंका धारा 132(4) में 10.02.2021 को M/s. Esskay Niryat Corporation, शेड न. 101,201, 106, 206, यमुना एसडीएफ कोम्प्लेक्स, कारोड़, गांधीधाम, कच्छ, गुजरात पर दर्ज किया गया बयान दिखा रहा हूं। अपने इस बयान में उन्होंने प्रश्न 23 और 24 के उत्तर में बताया है कि यह मशीनें पुरानी हैं तथा इनकी मरम्मत करने के बाद इन्हें इस्तेमाल किया गया है। इसलिए यह बताइए कि आप के द्वारा लिये गये 10AA के deduction को अमान्य क्यों ना माना जाए?

Q23 I am showing you two bills of Geluyu Food Products for purchase of five (two three) Rotarypouch packing machines dtd. 24/06/2015 and 25/06/2015 15 at price of 53,46,221/- per machine. Please explain when these machines were put to use and current status of these machines.

Ans: These machines were used for packing gutka in pouches of small sizes. These were old machines and were serviced before installation and being put in use in August 2015. These machines were used for almost six months and since then they are lying idle till date.

Q24 Looking at the details provided by you, It can be seen that most of the machinery is purchased from existing food processing companies (eg. Geluvu Food Products, Shree Meenakshi Food Products Pvt Ltd., Kirti Industries, Royal Rajasthan Tobacco Products Pvt Ltd. Bhisma Pan Products Pvt Ltd etc.) and not from any manufacturer of machinery. So please explain again whether the purchased machinery is new or old/second hand.

Ans: Sir, as per my knowledge all the above-mentioned machinery was old / second hand at the time of installation.

Ans: मैं ये आपको अभी नहीं बता पाउँगा इसकी जानकारी मैं आपको ४ से ५ दिनों में दे दूँगा.

**16.** The Ld. CIT(A) taking note of the contents from the aforesaid statements found that the assessee was claiming deduction u/s 10AA of the Act since AY. 2016-17 (being first year) onwards. And that the questions were asked to Shri Jagdish Prasad about whether the machines purchased and installed in the SEZ units were old or new and also he was confronted about the answer given by Shri Kanjiya (supra), then Shri Jagdish replied that he would be able to answer the same after few days. And the Ld. CIT(A) perused the tax invoices (*forwarded by AO found during search along with remand-report*) and found that purchases were duly reflected in the regular books of accounts and that machines were duly shown in the block of assets on which depreciation has been claimed. In such a scenario, the Ld. CIT(A) was of the opinion that tax invoices and books of accounts found during search cannot be termed as incriminating material qua assessee because the same material were produced by the assessee before the AO during the first round of original scrutiny assessment proceedings u/s 143(3) of the Act dated 25.12.2018. The Ld. CIT(A) also found that the AO has neither doubted purchases of the machines nor the genuineness of the seller party (M/s. Geluvu/GFP), therefore, the Ld. CIT(A) held that the materials forwarded by the AO during the remand proceedings cannot be termed as incriminating material qua assessee qua the assessment year AY. 2016-17 and other years. Thereafter, in the light of the aforesaid facts, he found that there was no incriminating material un-earthed during search to hold that the machines purchased/installed in the SEZ unit from M/s. Geluvu/GFP was second hand/used

machines and therefore in the absence of incriminating materials qua assessee qua unabated assessment, no addition/disallowance was permissible. And for such a proposition, the Ld. CIT(A) referred to the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Gurinder Singh Bawa (2016) 386 ITR 483 and Hon'ble Delhi High Court in the case of CIT, Central-III V Kabul Chawla (380 ITR 473) (Del). The Ld. CIT(A) allowed the appeals of assessee for AY. 2016-17 to AY. 2018-19 and directed deletion of addition/disallowance made u/s 10AA of the Act. The Ld DR could not bring to our notice any incriminating material found during search qua assessee, qua AY's 2016-17 to AY 2018-19 for disallowing deduction claimed u/s 10AA of the Act and taking note that assessment for AY 2016-17 had already undergone scrutiny assessment u/s 143(3) of the Act dated 25.12.2018, wherein the AO had examined the claim of deduction and purchase of machinery from M/s Geluvu/GFP, and thereafter allowed the claim u/s 10AA of the Act; and the AO in the reassessment order passed u/s 153A of the Act, has not discussed about any incriminating material un-earthed during search to discredit the purchase of machineries from M/s Geluvu/GFP, therefore AO in unabated proceedings while framing assessment u/s 153A of the Act could not have made addition/disallowance without incriminating material as held by Hon'ble Supreme Court in PCIT vs Abhishar Buildwell 454 ITR 212. Therefore, we concur with the action of Ld CIT(A) for the unabated assessment years

**17.** We further note that the Ld. CIT(A) while adjudicating the appeals for AY. 2019-20 to AY. 2021-22 took note that they were abated assessments and also found that AO has made similar disallowance u/s 10AA of the Act on the strength of his action for AY. 2016-17 wherein he disallowed the assessee's claim u/s 10AA of the Act on the finding that purchases made by assessee from M/s. Geluvu/GFP machines for AY. 2016-17 were second-hand/used machines. It is noted that before the Ld. CIT(A), the assessee also filed additional evidence in the form of confirmation of sales from the M/s. Geluvu/GFP and that they were also engaged in the business of trading in machinery along with other business of manufacturing PAN Masala/Jarda Products. M/s. Geluvu/GFP also asserted that it never passed the inventory (*machines sold to assessee*) through fixed assets schedule and therefore, reduction in WDV shown by them had no connection with

machines sold to the assessee. M/s. Geluvu/GFP also confirmed that machines sold to the assessee were brand new and never put to use before it was sold to the assessee, which remained in the same packing in which they were received and sold as such to assessee. Since this were additional evidence from the supplier/M/s. Geluvu/GFP, the Ld. CIT(A) forwarded the same to the AO for his remand report vide letter dated 27.02.223 which is relevant is reproduced as under: -

“Sub: Calling for Remand Report in the case of M/s. Esskay Niryat Corporation (PAN: AAF2263G) for A.Yrs. 2019-20, 2020-21 & 2021-22 (Appeal No. CIT(A)-48, Mumbai/10786/2018-19, 10269/2019-20, 10049/2020-21) reg-

.....

Please refer to the above.

2. The additions in the above three years have been made by the A.O. by disallowing deduction claimed u/s 10AA of the IT. Act. In this regard, vide submission dated 17.02.2022, the appellant has filed certain written submission along with E-mail correspondence and certificate from Geluvu Food Products regarding purchase of new machineries. These details and certificate were not filed during assessment proceedings. You are therefore requested to examine these documents, make necessary verification and offer your comments on the merit of it.

3. Apart from the above, it is observed that following observations have been made in the assessment order while disallowing deduction u/s 10AA of the I.T. Act, the basis/evidences based on which these observations were made, have not been brought on record/Assessment Order. The appellant has also contended that the A.O. has not supplied such documentary evidences, so that the same could be contested with. Such observations of the A.O. are: -

(i) **Para 7.4 of the assessment order** - “From ITR of Geluvu Food Products for AY. 16-17, it was seen by the search team that it has shown reduction in WDV in fixed assets of an amount Rs. 8,56,45,914/-.

-Copy of ITR of Geluvu Food Products for A.Y. 2016-17 is required.

- Relevant Fixed Assets schedule and depreciation chart is required to ascertain whether the same machineries were discarded/reduced as were sold to the appellant.

(ii) **Para 7.7 of assessment order** - A.O.'s observation:

(a) "the assessee has purchased the machinery at higher cost than the machinery purchased by Geluvu Food Products"

(b) "It is observed that Geluvu Food Products has kept the machinery for more than 35 days in its premises"

- How the A.O. has arrived to the conclusion that the assessee has purchased the machinery at higher cost than it is purchased by Geluvu Food Products? The necessary documentary evidences are required in this required.

- On what basis, the observation has been made about the machinery kept at the premises of Geluvu Food Products for more than 35 days. The necessary documentary evidences are required in this regard.

4. Since the disposal of appeal in this case has been prioritised as per the direction of the Chief CIT, Central - I, Mumbai, you are requested to submit your factual report along with supporting evidences by 06" March, 2023 without fail."

**18.** The AO gave his remand report which was received by the office of the Ld. CIT(A) on 06.03.2023, which is reproduced as under: -

2. In view of the above the addition in the above three years have been made by the A.O. by disallowing deduction claimed u/s 10AA of the I. T. Act. In this regard appellant has filed certain written submission before you along with email correspondence and certificate from Gelulu Food Products regarding purchase of new machineries. These details and certificate were not filed during assessment proceedings. So you had requested to examine these documents and make necessary verification and offer comments on the merit of it and same are given as follows.

3. The assessee M/s Esskay Niryat Corporation did not submit these email correspondence/certificate from machine suppliers during the assessment proceedings. The Email and the certificate of M/s Geluvu Food Products with respect to the machineries purchased in May 2015 sold to the assessee in June 2015, does not provide conclusive evidence of the machines being unused for any purposes. M/s Geluvu Food Products are not the manufacturers of the machinery sold to the assessee. M/s Geluvu Food Products was engaged in the business of food and beverages and tobacco and not manufacturing or trading of machinery. The onus is on the assessee to prove the compliance with all the conditions laid down by section 10AA of the income tax act, 1961, in order to claim the benefits of the deduction. Thus, the assessee has failed to discharge the onus imposed by the act.

**4. Issue regarding Para 7.4 of the assessment order:**

4.1 The ITR of M/s Geluvu Food Products for the assessment year 2016-17 is enclosed herewith. Your kind attention is drawn to the schedule "DPM" of the ITR showing reduction in WDV of Plant & Machinery by Rs.8,56,45,914/- during the year under consideration.

4.2 The fixed assets schedule and depreciation chart is enclosed here with. It is evident from the same that there is a reduction of Rs.8,56,45,914 in the WDV of the Plant & Machinery. The same is corroborated from the schedule "DPM" of the ITR. This shows that the seller of machines has sold used machinery.

**5. Issue regarding Para 7.7 of the assessment order:**

5.1 The above evidence of the reduction in the WDV of the Plant & Machinery of M/s Geluvu Food Products coinciding with the purchase of machineries by the assessee, is in itself sufficient to prove that the machinery purchased by the assessee were put to use by M/s Geluvu Food Products, therefore, any of the following observations i.e.

A. Machinery being sold for profit by M/S Geluvu Food Products to the assessee for profit,

and

B. M/s Geluvu Food Products has kept the machinery for more than 35 days in its – premises have no relevance to the outcome of the assessment order as assessee has failed to discharge the onus that the subjected machinery was unused. It is for the assessee to discharge the onus of complying with all the conditions, cast upon it by the act, for claiming deduction under section 10AA of the Act.”

**19.** It is noted that Ld. CIT(A) after considering the two remand-reports of the AO has examined/adjudicated the reasons given by AO for disallowing the deduction u/s 10AA of the Act, which we will examine one by one.

**20.** First of all, we will deal with the AO’s finding that M/s. Geluvu/GFP was not into trading/manufacturing of FFS machines; and that ITR of M/s. Geluvu for AY. 2016-17 shows considerable reduction in WDV of Plant & Machinery (Rs.8.56 cr) which indicates that assessee had purchased second hand/used machinery from M/s. Geluvu/GFP, which makes it ineligible to claim deduction u/s 10AA of the Act. In this regard, we note that AO having perused the ITR of assessee/Esskay Niryat Corporation, it was seen that the opening gross fixed assets in FY 15-16 i.e. AY. 2016-17 is Rs. 3.77 crores, which is the year of incorporation of the assessee. Out of which Rs 2.69 crores machinery (71.35%) was purchased from M/s.Geluvu Food Products. According to AO, from perusal of the ITR of Geluvu Food Products for AY 16-17, it (M/s. Geluvu) had shown reduction in WDV of Plant & Machinery of an amount Rs. 8,56,45,914/-. Moreover, according to AO, M/s Geluvu Food Products was into the business of food & beverages and tobacco and not manufacturing or trading of machinery. These facts according to AO indicates that the so called seller of machines i.e. M/s Geluvu Food Products had sold used machineries to assessee and therefore AO inferred that M/s. Geluvu had not sold any new machines as shown and claimed in the books of assessee/Esskay Niryat Corporation. Further, according to AO, even the search

team found that M/s. Geluvu Food products had last filed its ITR for FY 18-19 i.e. AY. 2019-20 and that entity has closed its operations. All these facts according to AO, shows that M/s. Geluvu/GFP had sold used/second hand machinery to assessee's SEZ unit and therefore assessee was ineligible for deduction u/s 10AA of the Act and consequently he disallowed assessee's claim of deduction from AY. 2016-17 onwards. The Ld. CIT(A) in this regard has noted from perusal of the Fixed Assets & Depreciation Schedule of M/s. Geluvu/GFP (received from AO with the 2<sup>nd</sup> remand report) that M/s. Geluvu had opening WDV of Plant & Machinery (P&M) as on 01.04.2005 to the tune of Rs.14,06,06,147/- and the addition during the year was only Rs.1,80,161/- (*above 180 days*) and Rs.11,06,293/- (*less than 180 day*) i.e. total Rs.12,86,464/- which entered the schedule of Fixed Asset. The Ld. CIT(A) took note of the finding given by AO that the machines worth Rs.2.67 cr sold by M/s. Geluvu/GFP to assessee was purchased by M/s. Geluvu on 15/17<sup>th</sup> May, 2015 and date of sales of those machines to assessee were on 24 & 25<sup>th</sup> June, 2015, which finding of fact is crucial because M/s. Geluvu purchased the FFS machines on 15/17<sup>th</sup> May, 2015 and sold the same to assessee (within 35 days) ie. On 24/25<sup>th</sup> June, 2015. That is the reason, those machines sold to assessee never entered into schedule of Fixed Assets of M/s. Geluvu/GFP. It is true that M/s. Geluvu has shown in its schedule reduction in fixed assets (P&M) of Rs.8,56,45,914/- but that entry made in the schedule itself cannot be the sole material/evidence to draw adverse inference against the assessee's claim that it had purchased brand new machines from M/s. Geluvu. Moreover, we find that Ld. CIT(A) has forwarded to the AO the email correspondence/certificate from M/s. Geluvu/GFP/Supplier wherein it certifies/asserts the following facts: -

- a. GFP was engaged in the business of trading in machineries along with its other business of manufacturing pan masala/zarda products,
- b. The machines were purchased by GFP in May 2015 and sold to the assessee in June, 2015 and

- c. GFP never passed the inventory (Machinery) through fixed asset schedule therefore reduction in WDV has no connection with machines sold to the assessee and
- d. the impugned machines were brand new, never put to use and were sold to the assessee in the same packing in which they were received.

**21.** The AO in the second remand report (supra) could not controvert the assertion made by M/s. Geluvu/GFP that it was also engaged in the business of trading in machineries; and that it confirm that the machines sold to assessee was purchased in May, 2015, and sold to assessee in June, 2015; and that the reduction in WDV had no connection with machines sold to the assessee. And that the machines sold to assessee was brand new, which were never put to use and the machines were sold to the assessee in the same packing in which they were received as it is. And these are supported by invoices and payments made through banking channel and recorded in the regular books of assessee, which has already undergone scrutiny on 25.12.2018. The AO even in the second remand report couldn't find any infirmity in the aforesaid material to discredit the claim of assessee that it had bought new machines for its SEZ unit. In the light of the above facts, we concur with the finding of Ld. CIT(A) that it cannot be held that assessee has purchased machinery worth Rs.2.67 cr out of the discarded machines of Rs.8.67 cr of M/s. Geluvu/GFP. We find that AO has given self-contradictory observation at Para 7.7 of his order which has been taken note by Ld. CIT(A) at Para 5.24.2 of his order and the AO has rightly noted that M/s. Geluvu/GFP had kept the machines (which it sold to assessee) for more than 35 days before selling it to assessee, which is an admitted fact which only lends credence to the supplier/M/s. Geluvu/GFP assertion/confirmation given (supra) that it sold new machines to assessee in June after purchasing it on May 2015. Moreover, we note that AY. 2016-17 was the first year when assessee made the claim of deduction u/s 10AA of the Act and the AO in the original assessment has allowed it after scrutiny u/s 143(3) of the Act on 25.12.2018, wherein AO had examined the purchases of machineries from M/s Geluva/GFP and other entities. The AO in the second round u/s 153A of the Act, (after search on 08.02.2021) had disallowed the claim u/s 10AA of the Act without any incriminating material to suggest that machineries purchased from M/s

Geluva/GFB was second hand/used, so he couldn't have disturbed the action of AO in the first round; and we find that the Ld. CIT(A) has rightly appreciated the facts and after calling for remand report twice had found that AO erred in relying on the statement of Shri Kanjiya who had nothing to do with the purchase/installation of machines in the SEZ unit; and rightly took note of the contents of the affidavit of Shri Tak (*unit in-charge of SEZ unit who was present at the time of installation of machines*) wherein he affirmed the fact that the machines were brand new at the time of installation. We note that Shri Tak was unit-in-charge of the SEZ unit from its inception; and he has asserted to have witnessed the event of purchase/installation of machineries in question at the SEZ unit and his testimony that the machines installed were brand new cannot be ignored, since AO had opportunity to summon him and cross-examine him. According to us, the AO erred in discarding the affidavit of Shri Tak and relevant evidence like invoices, transportation and delivery challan of machinery purchased from M/s. Geluvu/GFP and other entities, which evidences corroborate the contents of affidavit of Shri Tak. The Ld. CIT(A) has also taken note of the certificate of Government Approved Registered Engineer and Certificate issued by M/s. Geluvu to uphold the assessee's claim of deduction u/s 10AA of the Act. In the light of the facts and circumstances discussed (supra), we fully concur with the impugned action of Ld. CIT(A) for AY. 2016-17 to AY. 2018-19 as well as his impugned action for AY. 2019-20 to AY. 2021-22. Therefore, all the six (6) appeals of the revenue stands dismissed.

**22.** In the result, the appeals filed by the revenue stands dismissed.

Order is pronounced in the open court on 06/03/2024.

Sd/-  
(B.R. Baskaran)  
Accountant Member

Sd/-  
(Aby T. Varkey)  
Judicial Member

मुंबई Mumbai; दिनांक Dated : 06/03/2024.

KKK

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त/ CIT
4. विभागीयप्रतिनिधि ,आयकरअपीलीयअधिकरण ,मुंबई/ DR, ITAT, Mumbai
5. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//

**आदेशानुसार/ BY ORDER,**

**उप/सहायकपंजीकार / (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण ,मुंबई / ITAT, Mumbai**