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

BEFORE SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA Nos.539, 1474 & 1475/Bang/2014
Assessment years : 2009-10, 2010-11 & 2011-12

M/s. International Stones India Pvt. Ltd., No.55/12, Alankar Apartments, Flat No.1, 39th Cross, 14th Main, Jayanagar 4th T Block Bangalore – 560 041. **PAN: AABCI 1821R**	Vs.	The Deputy Commissioner of Income Tax, Circle 11(4), Bangalore.
APPELLANT		RESPONDENT

ITA Nos. 608 & 1332/Bang/2014
Assessment years : 2009-10 & 2010-11

The Deputy Commissioner of Income Tax, Circle 11(4), Bangalore.	Vs.	M/s. International Stones India Pvt. Ltd., Bangalore – 560 041. **PAN: AABCI 1821R**
APPELLANT		RESPONDENT

Appellant by	:	Shri C. Ramesh, CA
Respondent by	:	Dr. P.K. Srihari, Addl. CIT(DR)

Date of hearing	:	24.11.2015
Date of Pronouncement	:	20.01.2016

O R D E R

Per Bench :

These are cross appeals by the assessee and the department against the orders dated 31.1.2014 for the AY 2009-10 and dated 31.7.2014 for the AYs 2010-11 & 2011-12 of the CIT (Appeals)-I, Bangalore.

ITA No.539/Bang/2014 by Assessee (A.Y. 2009-10)

2. The assessee is a private limited company engaged in the manufacture and export of polished slabs and tiles. It filed its return of income for the AY 2009-10 on 30/9/2009, declaring the total income at Rs.1,12,59,435/-. Initially the return was processed u/s 143(1) of the Act and then selected for scrutiny under CASS. Statutory notices as required under the provisions of the Act were issued. In the assessment concluded u/s 143(3) of the Act vide order dated 12/12/2011, the assessee's total income has been determined at Rs.2,78,50,117/- due to the disallowances/additions of the following amounts for purposes of calculating the deduction u/s 10B of the Act:-

a)	Export of manufactured goods with the third party (Deemed exports)	Rs. 7,97,60,585
b)	Export of traded goods	Rs. 8,64,86,069
c)	Transportation Charges/ Freight incurred in Indian Rupees	Rs. 3,34,00,000
d)	Insurance in Indian Rupees	Rs. 16,65,134
	Total	**Rs.20,13,11,788**

3. Aggrieved by the order of the AO, the assessee filed appeal before the CIT(Appeals).

4. With respect to setting off of carried forward and unabsorbed depreciation against profits of the undertaking u/s. 10B amounting to Rs.26,09,261, the facts are that the assessee declared income of Rs.1,38,68,696 for the year before setting off of unabsorbed depreciation and declaring income of Rs.1,00,16,037 after adjusting unabsorbed depreciation of Rs.26,09,261 and deduction under Chapter VIA of Rs.12,43,398. The contention of the assessee before the CIT(A) was that brought forward unabsorbed depreciation of Rs.26,09,261 for the AY 2006-07 has to be allowed without factoring the same for calculation of deductible export profit u/s. 10B of the Act, following the decision of Hon'ble jurisdictional High Court in the case of *CIT v. Yokogawa India Ltd., 341 ITR 385 (Karn)*.

5. The AO has given his finding in para 3 of the assessment order as under:-

> "On perusal of computation of income filed by the assessee company it was observed that assessee has setoff b/f unabsorbed

> depreciation of Rs.26,09,261/- against the current year profits. On verification of previous year records it was found that no c/f unabsorbed depreciation is available as per the order passed u/s 143(3) for AV 2808-09 in view of the same, no set off of b/f depreciation is allowed for the current year."

6. The CIT(Appeals) observed that similar issue was raised in A.Y,. 2007-08 and 2008-09 wherein the CIT(A) decided the issue against the assessee on the ground that the AO has not reduced the same because as per para 3 of the assessment order, there was no brought forward depreciation existing for set off. The CIT(A) noted that the position was similar for the year under consideration also.

7. We are in conformity with the order of the CIT(Appeals) who has held that since the AO has not set off brought forward unabsorbed depreciation against the profit of undertaking of the current year, thus the ground of appeal is not maintainable and hence dismissed.

8. The CIT(A) further observed, however, that brought forward unabsorbed depreciation relates for the A.Y. 2006-07 and effect to the decision of the Hon'ble High Court of Karnataka ought to have been sought in previous year for A.Y. 2006-07 and not in the present appeal.

9. In our opinion, since there is no brought forward depreciation existing for set off, the first ground of appeal is dismissed as purely academic and not maintainable.

10. The second ground of appeal raised by the assessee before us is as follows:-

> "2. THIRD PARTY/DEEMED EXPORT
>
> a) The A.O. was not correct in not considering Deemed Export of Rs.797,60,585/- as part of export turn over for the purpose of calculation of deduction u/s.10B, though the Appellant has exported the goods manufactured by the Appellant company (i.e.100% EOU) through a third party.
>
> b) The A.O. was not correct in not following the decision of ITAT 'B' Bench Bangalore in the Appellant's own case for the AY 2006-07 and has not maintained the judicial discipline.(ITA No. ITA No.814/Bang/2009 dated 19.03.2010).

The A.O. held as follows :

> " On perusal of the computation of 10B filed by the assessee company it was observed that the assessee company has included deemed export amounting to Rs.7,97,60,585/ - in export turnover for the purpose of computation of deduction u/s. lOB. The company was asked to explain why the same should not be excluded from export turnover in the light of decision of IT AT, Bangalore in the case of Granite ~art Ltd, for A Y 2005-06.The assessee company replied vide letter dated 25.10.2011 stating that the assessee's claim for third party export has been allowed by the Hon'ble IT AT of Bangalore for A Y 2006-07 in assessee's own case and the same is further confirmed by CIT(A)-I, Bangalore for A Y 07-08.
>
> 6. The reply of the assessee company is not tenable as department has not accepted the above said decisions and further appeals are pending before higher appellate authorities. From the details furnished, it was found that the assessee has claimed exemption under Section lOB on account of deemed exports to the extent of Rs. 7,97,60,58!5/-. On this issue of deemed-exports, detailed reasons are given by the assessing officer

in the assessment order for the A.Y. 2006-07, 2007-08 and 2008-09 while making addition by disallowing deduction u/s. lOB of the IT Act to the corresponding extent of deemed exports while determining the total income.

7. From the relevant details filed with regard to deemed exports it is clear that it was the Merchant exporters who made exports to various parties and again it was merchant exporters only who received consideration in foreign exchange. Once the Merchant exporters bagged the orders the assessee stepped in and supplied the materials in ·the name of the merchant exporters. The export proceeds directly went to the merchant exporters. The assessee in turn received sums only in 1ndian rupees for supplying the material to the merchant exporter. The contention of the assessee is that such "deemed exports" are eligible for deduction u/s. 10B.

8. However the said contention of the assessee company is not acceptable. The word" deemed exports" does not appear in the S.10B of the Income Tax Act, 1961. Unlike S.80HHC which allows deduction to a supporting manufacturer and 5.80HHE where benefit is allowed to a third party software developer, the legislature has consciously avoided inserting such a clause in 5.10B. Wherever the section wants to confer benefits on an assessee the section expressly provides for it. In absence of any such clause in 5.10B it would be incorrect on part of the assessee to state that ,deemed exports' are covered by the provisions of S.10B.

9. It is also to be noted that the assessee never received the export proceeds. The export proceeds directly went to the merchant exporters because it was the merchant exporter who got the order from the customers abroad. Here the assessee company was only executing orders on behalf of the merchant exporters.

10. Further Hon,ble ITAT in the case of M/s. Granite Mart Ltd. in ITA No.22,763/ Bang/ 2010 dt:17.09.2010 has clearly stated that the assessee cannot claim deduction u/ s lOB in respect of the so

called exports made through third parties/ export houses. The relevant portion of the order are reproduced below:

> *"This Issue to be considered* is whether *the assessee* is *entitled for deduction u/s. lOB in respect of tile sales made through third parties. \it is the case of the assessee that these third parties are exports houses and they hope exported all suet: goods sold by the assessee to them for the purpose of such export andas such they are entitled for deduction u/s. 10B. It is very interesting to note as stated above that even a deemed sale made to another export unit is held to be not ell titled for deduction u/s.* 10A in the case *already relied on us in Tata Elxsi Ltd. Vs. ACIT. Therefore, the answer to this ground is readily available in that judgment itself. By following tile ratio of the ratio of the above judgment, we come to the conclusion that the as. ;cannot claim the deduction u/s.10B in respect of the so called exports made through third parties/export houses."*

In the above judgment, Hon'ble ITAT has relied on the decision in case of Tata Elxsi Vs. ACIT. The relevant portion of the order are reproduced as under:

> *"We have heard rival submissions and perused tlte records. Chapter 8 of the Exim Policy issued by the Ministry of Commerce & Industry defines 'deemed export' as under:*
>
> *"8.1 'Deemed Exports' refers to those transactions in which goods supplied do not leave country and payment for such supplies is received either in Indian rupees or in free foreign exchange."*
> *Under cl. 8.3 benefit for deemed exports are as under :*
> *"8.3 Deemed exports shall be eligible for any / all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HBP v1.*
>
> *a) Supply of goods against advance authorisation/advance authorisation for annual requirement/DFlA.*
> *b) Deemed export drawback.*

c) *Exemption from terminal excise duty where supplies are made against ICB. In other cases, refund of terminal excise duty will be given."*

A *cursory perusal. Would indicate that sale of such software by one STP to another STP within the country would be treated as deemed export only for the purpose of duty drawback and exempt from terminal excise duty. As rightly contended by the learned D.R.* s. *1OA, with relevant proviso, stood during the relevant time itself provides tht when domestic sales of STP unit do not exceed of such articles or things or computer software. Thus the provisions of* s. 1OA *as it stood specially provide how much benefit to be given to the assessee if sales to another STP when not exceeded 25 per cent of the total products.*
The Exim Policy 2002-07 (Chapter 6, Cl. 6.12) *also clarifies other entitlements as under :*

> *"6.12 Other entitlements of EOU / EHTP / STP / BTP units are as under:*
>
> *a) Exemption from income tax as per ss. 10A and 10B of IT Act.*

Further, from the perusal of the Exim Policy (Chnpter 6) *extracted above, it is seen that whatever benefit given should be as per the provisions of 5s.* 10A *and .10B of the IT Act. Apart from the benefit conferred under the aforesaid chapter, nothing has been indicated in respect of any deemed export when the issue is considered under the IT Act. The Exim Policy extracted above (Chapter* 8.1 *and* 8.3) *obviously does not include in respect of benefit to be given under IT Act other that one referred to under Chapter 6.12(a). When this being consciously omitted in the policy, we do not find any force in the stand taken by the learned counsel for assessee to treat the sales effected to other STP by the assessee as deemed export. This ground fails."*

11. In assessee's own case for AY 2008-09 CIT(A) held that deemed export cannot be treated as export for the purpose of deduction u/s. 1OB and dismissed the appeal filed by the assessee. In the view of same and the order passed by Hon'ble ITAT in the case M/s Granite Mart Ltd, the assessee company cannot claim benefit u/s.1OB on account of exports made by

merchant exporter and therefore the c laim of deduction u/s. lOB on such exports i.e. deemed exports is denied. Accordingly the export turn over has been determined after excluding the deemed exports for the purpose of computation of deduction u/s. 10B of the IT Act."

10(a) We find that the ITAT, B Bench in ITA No.814/Bang/2009 A.Y. 2006-07 held as follows :-

"3. The next issue is with regards to exclusion of deemed exports amounting to Rs.;13,05,22,177 for the purpose of calculating deduction u/s. 10B. In appeal, *the CIT(A) granted relief. We find that the as. Filed declaration from M/s. S.K. International, New Delhi as well as M/s. ELE Stones (India) Pvt. Ltd., certifying the payments of Rs.9,76,52,462 & Rs.3,28,69,715 totaling Rs.;13,05,22,177 had been realised in convertible foreign exchange against materials purchased from the assessee under the third party export basis. The Chapter VI of the Foreign Trade Policy as well as the policy statement of the Government of India clarifies that even the third party exports were eligible for benefit available u/s. 10B of the Act. The third party exports are also considered as exports and since the consideration in respect of such third party exports made by 100% EOU which manufactures the article or things are received in or brought into India in convertible foreign exchange, either by tghe 100% EOU itself or through the third party exporter then such exports amounts to export turnover and are fully eligible for benefits u/s. 10B of the IT Act. The three essential ingredients of exports was found to be present in the instant case which reads as under :*

1. *The goods are manufactured by 100% EOU.*
2. *The goods are exported out of the country as per FTP provisions.*
3. *Convertible foreign exchange is brought into India.*
4. *The CIT(A) observed from the summary of year wise direct exports and exports made through third parties furnished by the assessee that it has been consistently indulging in export though third party mainly M/s. S.K. ;International and M/s. ELE Stones (India) Ltd. On receipt of confirmed export orders from respective overseas customers for export cut and polished granite slabs, titles, slates etc. the above parties placed purchase orders on the assessee along with disclaimer certificates declaring that they will not be claiming export benefit on the third party export sales made by them thereby transferring the same to the manufacturers viz. The assessee and also simultaneously undertaking to indicate the assessee as the 100% EOU manufacturer of the materials being exported in the shipping bills filed with the customs authorities. Copies of purchase*

orders, invoices, disclaimer certificates, application made for removal of excisable goods for export (form A.R.E. 1) & shipping bills were produced before CIT(A) to substantiate. In view of the foregoing analysis and in the light of the inconvertible evidence filed on behalf of assessee, the CIT(A) held that the deemed export totalling to Rs.;13,05,22,177 should not be excluded for the purpose of calculating deduction u/s.10B of the IT Act. We uphold the same."

10 (b) The co-ordinate Bench in ITA No.888/Bang/2010 for the A.Y.2007-08 held as follows :

" 13. Now, we take up the appeal of the revenue. Grievance of the revenue is that learned CIT(A) deemed exports of Rs.;13,20,96,953 also as part of export turnover for computing eligible deduction under section 10B. As per the revenue such directions were given disregarding decision of the co-ordinate bench in the case of M/s. Tata Elxsi Ltd. Vs. ACIT 115 TTJ 423. Further, as per the revenue the reasoning given by the learned CIT(A) was not in accordance with section 10B(3) and definition of export turnover in explanation (iii).

14. Learned DR strongly assailing the order of the learned CIT(A) submitted that co-ordinate bench had in the case of M/s. Granite Mart Ltd. Vs. ITO (ITA No.22 & 763/Bang/2010 dated 17.09.2010) held that neither deemed exports, nor third parties export would be eligible for a claim of deduction under section lOB of the Act, that too, after considering the decision of M/s. Tata Elxsi Ltd., (supra). Reliance was also placed on the decision of Hyderabad Bench of this Tribunal in the case of ACIT Vs. Badhra Consulting Ltd.,(2010) 134 TTJ 214 and the judgment of Hon'ble Kerala High Court in the case of CIT Vs Electronic Controls & Discharge Systems (P) Ltd., (2011) 245 CTR 465.

15. Per contra, learned AR placing reliance on a Co-ordinate Bench decision dated 19-10-2010 in revenue's appeal ITA No.814/Bang/2009 where assessee was the respondent, submitted that for assessment year 2006-07, the issue was decided in favour of the assessee by the learned CIT(A) and this was confirmed by the Tribunal. Reliance was also placed on the decision of Chennai Bench of this Tribunal in the case of CIT Vs Janani Holding(ITA No.1094/MDS/20 10 dated 28-02-2011).

16. We have heard the rival contentions and perused the orders. Assessee had included deemed exports of Rs.13,20,96,9531- as a part of its export turnover while

claiming deduction under section 1OB. AO had disallowed this claim for a reason that exports were effected by the merchant exporters, who alone had received the foreign exchange. AO also noted that assessee had received the consideration for sale from such merchant exporters only in Indian rupee and there was no concept of "deemed exports" in section 1OB of the Act. Learned CIT(A), accepted the claim of the assessee, noting that co-ordinate bench decision in Tata Elxsi Ltd., case (supra), though a detailed and well reasoned one was given prior to the decision in assessee's case for AY: 2006-07. He preferred to follow the latter. Observation of the Co-ordinate Bench in revenue's appeal for AY: 2006-07 (ITA No.814(B)/2009 dated 19-03-2010) on this issue reads as under :

> *" The CIT(A) observed from the summary of year wise direct exports and exports made through third parties furnished by the assessee that it has been consistently indulging in export through third party mainly M/s. S.K.International and M/s. ELE Stones (Ind.) Ltd., On receipt of confirmed export orders from respective overseas customers for export cut and polished granite slabs, titles, slates etc., the above parties placed purchase orders on the assessee along with disclaimer certificates declaring that they will not be claiming export benefit on the third party export sales made by them thereby transferring the same to the manufacturers viz., the assessee and also simultaneously undertaking to indicate the assessee as the 100% EOU manufacturer of the materials being exported in the shipping bills filed with the customs authorities. Copies of purchase orders, invoices, disclaimer certificates, application made for removal of excisable goods for export (form A.R.E 1) & Shipping bills were produced before the CIT(A} to substantiate. In view of the foregoing analysis and in the light of the incontrovertible evidence filed on behalf of assessee, the CIT(A) held that the deemed export totaling Rs.13,05,22,177/- should not be excluded for the purpose of calculating deduction u/s. 10B of the IT Act. We uphold the*

same."

As against this Co-ordinate Bench of this Tribunal in the case of Granite Mart Ltd.,(supra), held as under at para-8 & 9 of its order dated 17-09-2010.

> *"8. Next, we will consider the ground raised by the assessee* m *respect of. the claim of exemption made u/* s *lOB on the sales made to another export oriented units. This issue was also considered by the ITAT A Bench in the case mentioned above ie. TATA ELXSI Ltd, Vs A CIT,* 115 *TTJ* 423. *After examining the scheme of section u/ s lOA which is in pari passu to sec.* 1*OB, the Tribunal held that such deemed export is entitled only for the benefits of duty draw back and exemption from basic excise duty. Such deemed exports do not get entitled for the deduction. u/ s lOA. As the above judgment squarely applies to the present case, we hold that the assessee company is not entitled for deduction u/ slOB in respect of sales made to other export units. This ground of the assessee is rejected.*
> *9. The third issue to be considered* is *whether the assessee is entitled for deduction u/s. lOB in respect of -ttie sales made through third parties. It is the case oj the assessee that these third parties are export houses and they have exported all such goods sold by the* assessee *to them for the purpose of such export and* as *such they are entitled for deduction u/s. lOB. It* is *very interesting* to *note as stated above that even a deemed sale made to another export unit is held tobe not entitled for deduction u/s. 10A inthe case already relied onus in TATA ELXSI LTD Vs. ACIT. Therefore, the answer to this ground is readily available in that judgment itself. By following the ratio of the above judgment, we come to the conclusion that the as. Cannot claim the deduction u/s.10B in respect of the so-called exports made through third parties/export houses."*

17. Thus in the case of Granit Mart Ltd. (supra), co-ordinate bench decision in Tata Elxsi Ltd. (supra) has been considered. However, in the former decision dt.19.3.2010, though it was in assessee's own case, and though a reference has been made at para two to Tata Elxsi Ltd. decision, this was in relation to the claim

of the assessee for excluding transport & insurance charges both from export turnover and total turnover.
18. In any case, we find that Hon'ble Kerala High Court in the case of Electronic Controls & Discharge Systems (P) Ltd., (supra), in a judgment rendered on 27th July, 2011 has considered the very same issue."

The Tribunal further held :

" 19. Once a High Court has given a judgment, though a non-jurisdictional one, we are bound to follow it, unless assessee is able to show a contrary judgment from the jurisdictional High Court. Decisions of lower authorities would pale into insignificance. Assessee here has not been able to bring any decision from the jurisdictional High Court, which go in its favour. We therefore, are inclined to follow the view taken by the Kerala High Court. We set aside the order of the learned CIT(A) and restore the order of the learned A.O. and direct that deemed exports shall not be considered as part of export turnover while computing deduction under section 10B of the Act, 1961."

11. The CIT(Appeals) held as follows:-

> "Similar issue has been raised in appeal for the assessment year 2008-09 and my predecessor dismissed the appellant's ground of appeal by observing thus :-
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> > "7.1. This issue had been decided in favour of the appellant in ITA.NO.125/DC-11(4)/A-I/09-10, dt.29-04-2010 by the CIT(A) following decision of ITAT in its own case of A.Y. 2006-07 disregarding the earlier decision of the same ITAT in the case of M/s. Tata Elxsi Vs. ACIT (A. Y.2002-03) 115 JTJ (Bang) 423. However the A.O. has cited the most recent judgement of the ITAT on the same issue vide., M/s. Granite Mart Ltd., (A. Y. 2005-0 6) dt. 17-09-2010.
> >
> > 7.2. In view of such latest decision brought to my knowledge by the assessment order I have no other go but to dismiss this ground of appeal, although allowed in appeal of AY-2007-08. Ground of appeal is dismissed."

12. Following the decision of the ITAT in ITA No.888/Bang/2010 for the A.Y. 2007-08 at para 10(b), we direct that deemed exports shall not be

considered as part of the export turnover while computing deduction u/s. 10B of the IT Act, 1961.

13. The 3rd ground of appeal reads as follows:-

> "3) TRADED GOODS
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> a) The Appellant has taken additional ground before the A.O. at the time of scrutiny assessment, about considering the Traded Goods of Rs.8,64,86,069/- as part of Export Turnover for the purpose of calculation of deduction under section 10B as all these traded goods are exported out of India and the proceeds are received in foreign exchange with in the stipulated time.
>
> b) The A.O. has erred in not considering and appreciating the provisions of law as detailed in section 10B and not following the decision of Hon'ble Tribunal of Mumbai in the matter of T. Two International (P) Ltd. 26 SOT 582 (MUM) 2008.
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> c) The CIT (A) was not correct in not considering the additional Ground filed before him on 13.01.2014 in respect of Alternative Ground on Export of Traded Goods being: If the Export of Traded Goods is reduced from Export Turnover, the same amount is to be reduced from total Turnover for the purpose of calculation of deduction u/s.10B by following the order of Jurisdictional Hon'ble ITAT in the matter to Subex Ltd (ITA No.1430/B2010 dated 13.11.2013).

14. With respect to export of traded goods, the facts are that the assessee has purchased certain granite material from the local buyers (including EOU Units) and exported such material under assessee's LC from Chennai Port. The assessee's purchases are domestic purchases and the sale of all Traded Goods are export turnover. The assessee strongly relied before the CIT(Appeals) on the decision of

Mumbai Tribunal in the matter of *T. Two International (P) Ltd. 26 SOT 583 (MUM) 2008*, wherein the provisions of section 10B are clearly examined and interpreted and submitted that though the decision is for the AY 2001-02, there is no substantial change in provisions of section 10 after that date. The assessee further relied on the decision of Hon'ble ITAT Special Bench, Indore in the matter of *Maral Overseas Ltd Vs. Addl. CIT, , Range 5, Indore* vide ITA No.777 & 900 of 2004 and 295 & 296 of 2006 dated 28.03.2012, where in at pages 32 to 36 (from para 77up to para 80), it has discussed the eligibility of deduction in respect of Export incentives received by the Assessee in term of provision of section 10B(1) read with section 10B (4) of the Act and concluded as follows:-

> "Though section 10B (1) refers to profits "derived" by the EOU, the manner of determining such eligible profits has to be done as per the formula. Section 10B (4) does not require an Assessee. to establish a direct nexus with the business of the undertaking and once an income forms part of the business of the undertaking, the same would be included in the profits of the business of the undertaking and be eligible for deduction."

15. The CIT(Appeals) observed that the AO pointed out in the assessment order that the Assessee has not filed Revised Form 56G for Traded Goods. According to the assessee, the AO had not instructed for filing of Revised Form 56G at the time of scrutiny assessment and hence the same was not filed before the AO. However, the assessee filed revised From 56G for traded goods before him.

16. The CIT(Appeals) held as follows:-

"5.1 Similar issue has been raised in appeal for assessment year 2007-08 and my predecessor decided the issue by holding thus:-

"5.2. The ground as well as the citation was considered. Firstly, it must be pointed out that the decision is not from jurisdictional ITAT and therefore not binding. Secondly, I find the ITAT itself, before giving decision in para 9.2. of the order stated that not much precedents are available being the first year of implementation of changed law from 1-4-2001 and the issue being virgin, there is scope for much deliberation on each issue raised in that appeal. Thirdly, I consider the word "derived" is most important in the frame work providing for deduction either u/s.10A or u/s.10B of I.T.Act. The word "derive" shows and means a direct connection/nexus as distinguished from the concept of "attributable to". The word "derived by the assessee" implies there must be direct nexus amongst -

(i) the manufacture and
(ii) export and also
(iii) the receipts of sale proceeds in CFE

and if one is lacking, the same would not be entitled to be covered in the definition of "Export Turnover". Admittedly, exported /traded goods are not manufactured or produced by the appellant. They are purchased from other trade concerns in India and then exported. The insertion of Sec.10B is intended not only to enhance the foreign exchange reserve but also to provide incentive to set up new industrial undertakings. Thus, Sec.10B is applicable only when the goods exported out of India must be produced by the same industrial undertaking and not only that the sale proceeds in CFE must also be received by the assessee. In fact, all this has been summarised

in Circular NO.1/2005 dated: 6-1-2005 in the beginning when it states

"Section 10B of the I.T.Act provides for 100% deduction of profits derived by a hundred percent EOU from export of articles or things or computer software <u>manufactured</u> or <u>produced by it</u>"

(underlines are mine for emphasis)

> This Circular is binding and therefore has to be given strict interpretation. Thus, since the traded goods exported are not manufactured by the appellant, it cannot be treated as export turnover even if the sale proceeds are received in CFE by the appellant."

17. The CIT(Appeals) concluded that section 10B provides itself in it, the stipulation that exported goods must be the goods or articles produced/manufactured in the 100% EOU as can be deduced from the word "derived by" in section 10B(1). According to the CIT(A), the condition of manufacture of exported goods is a mandate enshrined in section 10B(1) of I.T. Act which cannot be overlooked while determining the export turnover. Hence, the CIT(A) dismissed this issue.

18. The coordinate Bench of this Tribunal on a similar issue in the assessee's own case for the A.Y. 2007-08 in ITA No.888(Bang)2010 by order dated 05.09.2014 has held as follows:-

> "11. We have perused the orders and heard the rival contentions. There is no dispute that the claim on traded goods to be considered as part of its business was first made by the assessee before the CIT(A). Assessee had never made such a claim in its return or before the AO. Be that as it may, assessee is making this claim based on the decision of Mumbai Bench in the case of M/s T Two International (P) Ltd., Claim in that case was also on deduction under section 10A on profit from export of traded goods. It was held by the co-ordinate Bench as under, at para-10 of its order:
>
> > "10. The learned CIT(A) has not granted deduction to the assessee insofar as it relates to the profit from export of trading goods. From the above table, it can be seen that the assessee made export by trading in goods at Rs. 3.23 crores on which deduction was claimed. The learned CIT(A) opined that since

> such exports do not relate to the goods manufactured by the assessee, hence the benefit of deduction cannot be allowed. We are not convinced with the view canvassed by the learned CIT(A) because sub-section (1) of section 10A allows deduction in respect of profits and gains derived by an eligible undertaking "from the export of articles or things or computer software". The later part of this sub-section provides that this deduction is available for a period of ten consecutive assessment years starting with the "assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software". The reference to manufacture or production of eligible articles is only for the purposes of settling the first year of the ten consecutive assessment years in which the assessee will be entitled to deduction under this section. The qualifying amount for deduction is the "profits and gains as are derived by an undertaking from the export of articles or things or computer software". Such eligible articles are not restricted to only those which are produced or manufactured by the assessee. The material consideration is the export of the eligible goods and not whether these are manufactured or purchased by the assessee. Section 10A is akin to section 80HHC in some respects, as will be seen infra and the later section also provides for deduction in respect of profits from the export of the goods or merchandise manufactured by the assessee as well as from the export of trading goods. Thus profits from both the self manufactured as well as trading in goods have been made eligible for deduction. If the intention of the Legislature had been to restrict the deduction only from the manufacturing activity, then it would have been provided so in unambiguous terms in the section itself. Since the benefit has been granted to the profits and gains derived 'from the export of' eligible articles, without further restricting it to the articles manufactured by the assessee in its industrial undertaking, we are of the considered opinion that the learned CIT(A) was not justified in excluding the export of trading in goods worth Rs. 3.23 crores from the qualifying exports."

12 As for the claim of learned DR that there was amendment to the definition of "export turnover" with effect from 01-04-2002, we are unable to find any, that has a bearing on the issue before us. Second proviso to section 10B(1) as it earlier stood was no doubt omitted by Finance Act, 2001, with effect from 01-04-2p02. But the earlier proviso was only for fixing a limit of 25% on domestic sales, for computing profits and gains derived from exports. Here on the

> other hand, claim of the assessee is not on domestic sale, but on export sales of goods purchased as such by it. Sections 10A(i) and 10B(i) are no different, since these are similarly worded. Learned CIT(A) in our opinion, fell in error in not following the decision of Co-ordinate Bench. Assessee had already preferred a claim before AO for deduction under section l0B, though only on manufactured goods. The claim made on trading goods exported was also under same section. It cannot be considered as a claim of different genie. It is also a fact that the AO never had an opportunity to verify this claim. In all fairness we are of the opinion that the claim can be looked afresh by the AO. We therefore, set aside the order of learned CIT(A) on this issue and remit it to the AO for consideration afresh in accordance with law. Grounds 2 & 3 of the assessee is allowed for statistical purposes."

19. Following the decision of the coordinate Bench of this Tribunal in assessee's own case ITA No.888(Bang)2010 dated 05.09.2014, we allow grounds 3(a) & 3(b) raised by the assessee.

20. With respect to ground No.3(c) regarding the alternate ground in respect of export of traded goods raised before the CIT(A) and stated to be not considered by him, since we have decided the issue of deduction u/s. 10B in respect of export of traded goods, this ground becomes redundant.

21. In the result, the appeal is partly allowed.

<u>ITA Nos.608/B/14 & 1332/B/14 By Revenue</u>

22. These are appeals by the Revenue for the assessment years 2009-10 & 2010-11.

23. The only issue that arises for consideration in these appeals is as to whether the CIT(Appeals) was justified in directing the AO to exclude

freight charges, shipping freight and insurance charges from the export turnover, without reducing the same from the total turnover also, while computing deduction u/s. 10B of the Act.

24. According to the AO, as per the definition of export turnover given in clause (iv) to Explanation 2, these expenses incurred attributable to the delivery of the product or software outside India should be reduced from the export turnover. However, the provisions of section 10B do not provide for exclusion of such expenditure from total turnover. In the absence of a definition for total turnover in section 10B, the normal definition of total turnover has to be adopted and as such the expenses which are reduced from the export turnover in accordance with the specific definition cannot be reduced from the total turnover.

25. On appeal by the assessee, the CIT(Appeals) following the decision of the Hon'ble High Court of Karnataka in the case of *CIT v. Tata Elxsi Ltd., 349 ITR 98 (Karn)*, held that whatever is excluded from the export turnover, has also to be excluded from the total turnover.

26. Aggrieved by the order of the CIT(Appeals), the revenue is in appeal before the Tribunal.

27. The only grievance of the Revenue is that the decision of Hon'ble High Court of Karnataka in *Tata Elxsi (supra)* has not attained finality and an appeal has been filed by the department before the Hon'ble Supreme

Court. We are of the view that as of today, law declared by the Hon'ble High Court of Karnataka which is the jurisdictional High Court is binding on us. We therefore hold that the order of CIT(A) does not call for any interference and accordingly the same is confirmed.

28. In the result, both the appeals by the Revenue are dismissed.

ITA No.1474/Bang/2014 by Assessee (AY 2010-11)

29. The first ground of appeal is that the AO was not correct in not considering deemed export of Rs.6,41,85,706 as part of export turnover for the purpose of calculation of deduction u/s 10B. This issue has already been considered by us in ITA No.539/Bang/2014 for the AY 2009-10 hereinabove and the issue has been decided in favour of the assessee. For the reasons stated therein, we allow the first ground of appeal.

30. The 2nd ground raised by the assessee is as follows:-

> "2) TRADED GOODS
>
> a) The Appellant has taken additional ground before the A.O. at the time of scrutiny assessment, about considering the Traded Goods of Rs.9,34,48,946/- as part of Export Turnover for the purpose of calculation of deduction under section 10B as all these traded goods are exported out of India and the proceeds are received in foreign exchange with in the stipulated time.
>
> b) The A.O. has erred in not considering and appreciating the provisions of law as detailed in section 10B and not following the decision of Hon'ble Tribunal of Mumbai in the matter of T. Two International (P) Ltd. 26 SOT 582 (MUM) 2008.

c) The Appellant relies on (its own) decision for the AY 2007-08 and AY 2008-09, where the jurisdictional Tribunal has held in favor of the Appellant, allowing the deduction for Traded goods."

31. Similar issue has been adjudicated in A.Y. 2009-10 and the issue has been decided in favour of the assessee, following the decision of the coordinate Bench of this Tribunal in assessee's own case ITA No.888(Bang)2010 dated 05.09.2014. For the reasons stated therein, ground No.2 is allowed.

32. In the result, the appeal by the assessee for A.Y. 2010-11 is allowed.

ITA No.1475/Bang/2014 by Assessee (AY 2011-12)

33. The first ground of appeal is that the AO was not correct in not considering deemed export of Rs.4,07.30,611 as part of export turnover for the purpose of calculation of deduction u/s 10B. This issue has already been considered by us in ITA No.539/Bang/2014 for the AY 2009-10 hereinabove and the issue has been decided in favour of the assessee. For the reasons stated therein, we allow the first ground of appeal.

34. The 2nd ground raised by the assessee is as follows:-

"2) TRADED GOODS

a) The Appellant has taken additional ground before the A.O. at the time of scrutiny assessment, about considering the Traded Goods of Rs.6,94,33,856/- as part of Export Turnover for the

purpose of calculation of deduction under section 10B as all these traded goods are exported out of India and the proceeds are received in foreign exchange with in the stipulated time.

b) The A.O. has erred in not considering and appreciating the provisions of law as detailed in section 10B and not following the decision of Hon'ble Tribunal of Mumbai in the matter of T. Two International (P) Ltd. 26 SOT 582 (MUM) 2008.

c) The Appellant relies on (its own) decision for the AY 2007-08 and AY 2008-09, where the jurisdictional Tribunal has held in favor of the Appellant, allowing the deduction for Traded goods."

35. Similar issue has been adjudicated in A.Y. 2009-10 and the issue has been decided in favour of the assessee, following the decision of the coordinate Bench of this Tribunal in assessee's own case ITA No.888(Bang)2010 dated 05.09.2014. For the reasons stated therein, ground No.2 is allowed.

36. The third ground raised by the assessee reads as under:-

3. The AO was not correct in not considering sale of other EOU's of Rs.40,47,265/- as part of Export Turnover for the purpose of calculation of Deduction u/s. 10B as all these goods are exported out of India and the proceeds are received in foreign exchanges within the stipulated time. Further, these exports were allowed as deduction in the earlier years since AY 2006-07."

37. The ld. counsel for the assessee submitted that the AO erred in not appreciating the provisions of section 10B and not following the previous assessments from AY 2006-07 to 2010-11 which has been approved by the

appellate authorities and the department is not in appeal on this issue in earlier years.

38. We have heard both the parties. The assessee has submitted ledger extract, sample bill, disclaimer certificate and supporting documents. The relevant extract of Foreign Trade Policy in respect of sale of other EOUs has been filed in the paperbook before us. We set aside this issue to the file of Assessing Officer to examine the details furnished by the assessee and decide the issue afresh, keeping in mind that similar issue from A.Y. 2006-07 has been approved by the revenue authorities and there has been no further appeal on this issue in the earlier years. Ground No.3 is allowed for statistical purposes.

39. Ground No.4 reads as follows:-

> "4. The A.O. was not correct in treating the interest of Fixed Deposits under income from other sources as this is part of business income and kept for bank guarantee purpose and not an income earned on investments of surplus funds."

40. The assessee declared interest on deposits of Rs.14,63,737 in the return of income. During the assessment proceedings, additional interest of Rs.4,60,221 as per 26AS statement was declared by the assessee. The AO considered the interest on deposits to the extent of Rs.19,56,968 as income from other sources.

41. On appeal before the CIT(Appeals), the assessee submitted that these deposits are kept for margin money against the borrowed funds for export realization purposes and the rates of interest earned on these margin money is less than the interest paid on borrowed funds. It was further submitted that without margin money deposit, the assessee will not be able to fulfill the export obligations and bank guarantee commitments. The assessee pointed out that these deposits are not investments out of surplus funds, but for conducting day to day affairs of the assessee company and the deployment of these deposits are not in the hands of the assessee company, but are necessary for fulfilling the sanction terms of the bank. Hence these deposits were part of business income as considered in AYs 2005-06 to 2010-11 and not to be treated as income from other sources. Reliance was placed on the following decisions:-

a) CIT v. Chinna Constructions (2006) 297 ITR 70 (Kar)
b) CIT v. Koshika Telecom Ltd. (2006) 286 ITR 479 (Del)
c) ACIT v. Allied Construction (2007) 106 TTJ 616 (Del Trib.)

42. The CIT(Appeals) was of the view that interest received from bank was not connected with the business of the undertaking of the assessee. Relying on the decisions of *K. Ravindramatham Nair v. Dy. CIT (2003) 262 ITR 669 (Ker)* and *MKR Frozen Food Expert v. ITO (2010) 126 ITD 1 (Del)*, the CIT(A) held that there was no linkage between the borrowings from the bank and placing fixed deposits with the bank, the interest earned from the bank did not have direct or proximate connection with the business of

export of EOU. Therefore, he held that the interest so received was taxable under the residuary head and upheld the order of the AO.

43. Before us, the ld. counsel for the assessee reiterated the submissions made before the lower authorities. The assessee has filed copies of ledger account for the interest earned during the period and sanction of credit facilities vide letter dated 28.02.2011 of State Bank of India relied on the decision of the Delhi Bench of the Tribunal in the case of *Universal Precision Screws v. ACIT*, 38 ITR (Trib) 233 (ITAT[Del]), wherein it was held as under:-

> "7. After considering the rival submissions and perusing the relevant material on record, we find that the Assessing Officer held interest income as ineligible for deduction under section 10B(1) as it was not "derived from" the eligible business. The view point of the Assessing Officer would have been correct if there had been no further elaboration of the expression "such profits and gains as are derived by a hundred per cent. export oriented undertaking from the export of articles or things". The position under consideration is not akin to some of the sections employing this expression without any further amplification of the same. Sub-section (4) of section 10B gives meaning to the expression "profits derived from export of articles or things" to mean the amount which bears to the "profits of the business" of the undertaking the same proportion as the export turnover in respect of such articles or things, etc., bears to the total turnover of the business carried on by the undertaking. A bare perusal of sub-section (4) in juxta position to sub-section (1) of section 10B transpires that the expression "derived by" used in sub-section (1) cannot be construed in its literal sense to mean encompassing only such items of income which have direct or immediate nexus with the eligible undertaking. The meaning given to this expression in sub-section (4) as referring to "the profits of the business" makes the expression more liberal to cover any income which is connected with "the business" and should not be

> necessarily "derived from the industrial undertaking" alone. Turning to the nature of present interest income, being arising from fixed deposit receipts obtained for margin money for the purposes of availing credit limits from banks, it becomes vivid that such interest bears the requisite characteristics of a "business income." The Mumbai Bench of the Tribunal in Livingstones Jewellery P. Ltd. v. Deputy CIT [2009] *31 SOT 323* (Mumbai) has held that interest derived by an exporter from fixed deposits made with the bank for obtaining credit limits is eligible for the benefit under section 10A. Similar view has been expressed in Asst. CIT v. Motorola India Electronics P. Ltd. [2007] *295 ITR (AT) 376* (Bang) by holding that the interest income having close nexus with the business activity of the assessee is assessable as income from business and, hence, eligible for the benefit under section 10A and section 10B. In view of the above discussion, we hold that the assessee is entitled to deduction under section 10B of the Act in respect of the interest income earned on fixed deposit receipts made for the purposes of keeping margin money or for availing of any other credit facility from banks.
>
> 8. The impugned order on the issue of deduction under section 10B is set aside and the matter is sent back to the Assessing Officer for computing deduction under section 10B afresh in conformity with our above findings and conclusions."

44. We set aside this issue to the file of the Assessing Officer to look into the copies of ledger account for the interest earned during the period which has been filed by the assessee and the other evidences filed with respect to the credit facilities availed from State Bank of India, and the A.O shall decide the issue afresh keeping in mind the decision of the Mumbai Bench of Tribunal in the case of Universal Precision Screws (supra).

45. In the result, the appeal of the assessee is partly allowed for statistical purposes.

46. Thus, ITA Nos.539 & 1474/B/14 by the assessee are allowed, ITA No.1475/B/14 by the assessee is partly allowed and ITA Nos.608 & 1332/B/14 by the Revenue are dismissed.

Pronounced in the open court on this 20th day of January, 2016.

Sd/-	Sd/-
(INTURI RAMA RAO) Accountant Member	(ASHA VIJAYARAGHAVAN) Judicial Member

Bangalore,
Dated, the 20th January, 2016.

/D S/ GPR /DS/

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore. 6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.