

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI**

Before Sh. N. K. Saini, AM And Sh. H. S. Sidhu, JM

ITA No. 2188/Del/2012 : Asstt. Year : 2008-09

M/s Earth Stone Group, E-99, Greater Kailash, New Delhi-110048	Vs	Addl. Commissioner of Income Tax, Range-23, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABFE8552A		

**Assessee by : Sh. Rakesh Jain, Adv. & Gurjeet Singh, CA
Revenue by : Sh. V. R. Sonbhadra, Sr. DR**

Date of Hearing : 23.03.2016	Date of Pronouncement : 18.04.2016
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ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 24.02.2012 of Id. CIT(A)-XXIII, New Delhi.

2. Following grounds have been raised in this appeal:

Against the Assessment Order dt.31.12.2010, the Assessee preferred an Appeal before the Ld. CIT(A) by raising the following grounds:

“1. On the facts and circumstances of the case and in law, the Ld. A.O. erred in holding that the definition of the Export Turn Over u/s 10B of the I.T. Act excludes the Deemed Export.

2. On the facts and circumstances of the case and in law, the Ld. A.O. erred in disallowing the

deduction claimed u/s 10B of the income-tax Act at Rs. 1,52,51,935/-.

3. That the Appellant prays for addition, deletion, amendment and modification in the ground of appeal before the disposal of the same in the interest of substantial justice to the applicant.

The Ld. CIT(A) confirmed the order of the A.O. He had further held that –

I) The Section does not recognize the Foreign Exchange received by a third party allegedly on behalf of the Assessee.

II) Conditions laid down u/s 10B are not fulfilled as the sale proceeds are not brought into India by the Assessee in convertible Foreign Exchange. On the above facts, following grounds of Appeal are raised:

a) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the Assessee Firm is not entitled to Exemption u/s 10B on a sum of Rs.1,52,51,935/-.

b) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not giving a finding that the definition of Export Turn Over u/s 10B of the Act also includes Deemed Export.”

c) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not holding that the export of goods through Partner Sh. Lokesh Arora,

are Deemed Export of the Assessee Firm and therefore, entitled to deduction u/s 10B.

d) The Appellant prays for addition, deletion, amendment or modification of any grounds of Appeal.”

3. From the above grounds it is gathered that only grievance of the assessee in this appeal relates to the disallowance of deduction claimed u/s 10B of the Income Tax Act, 1961 (hereinafter referred to as the Act).

4. Facts of the case in brief are that the assessee is 100% Export Oriented Unit (EOU), dealing in manufacturing and processing of Marble, sand stone, slate stone, tiles, limestone, quartzite etc. and filed the return of income on 27.09.2008 declaring Nil income after claiming the deduction u/s 10B of the Act amounting to Rs.9,64,64,001/-. The said return was processed u/s 143(1) of the Act on the same income. Later on, the case was selected for scrutiny. During the course of assessment proceedings, the AO on examination of account of the assessee found that it had made local sale to its sister concern M/s Stone World which is the proprietary concern of one of the partners Sh. Lokesh Arora. He, therefore, asked the assessee to explain as to

why its claim for deduction u/s 10B of the Act should not be disallowed. In response, the assessee submitted as under:

“1. Deemed Export: The firm has made deemed export through Stone world having value of Rs. 403 lacs during the A.Y. 2008-09.

2. As per provisions of EOU, a 100% EOU is entitled to do the Deemed Export through third party and all the benefits are available to them. As per provisions, EOU need not export their manufactured goods themselves but may use an export house/trading house/star trading house or other EOUs subject to certain conditions EOUs may execute export orders also through third parties given that the goods will be directly transferred from the customs bonded factory to the part of shipment find all export benefits will be to EOUs only,

3. The assessee has bona-fide reason to believe that the export made through third party are covered under the scheme is entitled for all benefits including exemption of Income Tax u/s 10B of the Income Tax Act, 1961.

4. The assessee has taken the opinion and did the export sales accordingly with bona-fide intention that the sales are exempted u/s 10B as it is earlier also in case of Section 80HHC. There was no mala-fide intention illegally claim the exemption.

5. *The assessee has brought into India all foreign exchange against sales proceeds within stipulated time as prescribed.*

6. *It is kindly note that the total sales of the firm is Rs.25,60,57.574/- against which the value of third party export is Rs.403,66,362/- lacs only. The stated amount for disallowance of Rs.9,64,64,001/- lacs is on the entire amount, which is accordance to the parameters of EOU scheme and bona-fide belief of deduction against deemed export against Rs.403 lacs.*

7. *Further, it is to be kindly noted that the overall Gross Profit and Net Profit of the firm is 59.92% and 37.42% respectively. However, the same is not at par on all transactions Deemed Export through third party is having lower gross profit and resultant lower net profit on account of:*

- *Sates rate (Margin retained by Stone World) (ARE -1 of ESG issued by Excise Department, which allows Deemed Export under the scheme of EOU and Shipping bill of Stone world having the name of Earth stone group is annexed herewith, Both the documents are having sales rates, which clearly shows that the sales rate of Stone world are higher than what it had paid to Earth Stone Group against purchases for Deemed Export.*
- *Cost of raw materials: Due to cutting, tumbling and pasting. It is having higher raw material consumption than the other material. Further, Mosaic/Listello/Boarders are not*

sold to any other party other than Stone World.

- *Packaging required as per instructions of the Third Party exporter in-accordance to the parameters of the ultimate customer in overseas market. The cost of packing material is high. It requires special purpose packaging.*
- *Consumable, stores and spare-parts consumed: The cost of consumable on Mosaic is higher due to the following reason:*
 - a. Cutting of big slabs in very small pieces*
 - b. Calibrating of stone due to reduce thickness for the Mosaic (Precision cutting)*
 - c. Consumptions of Net to paste small pieces*
 - d. Framing of the stone*
 - e. Consumptions of Glue for pasting*
 - f. Special Shrink*
 - g. Anti Fungal creates”*

5. The assessee furnished separate Trading and Profit & Loss Account for its local sales and export sales, and explained as under:

“For your kind reference we are annexing the Detailed Profit & Loss Account for both Deemed Export and Export separately along with the parameters of segregation of expenses. It is to be kindly noted that, we have not taken the following expenses for calculation of Net Profit for Deemed Export:

- *Clearing and Forwarding Expenses*
- *Donation*
- *Foreign Exchange Fluctuation*

However, you may please be noted Donation is allowable under section 80G against the Taxable Income.

8. It is to be noted that the assessee is having Bona fide belief and still believing that benefits of Deemed Export is allowable u/s 10B. However, any addition on account of Deemed Export to be done, it has to be the net profit related to said transaction, which comes to Rs.41,96,667/- and Net Profit achieved from the direct to the customer of Rs.91,61,77,775/- should not be disallowed.”

6. The AO after considering the submissions of the assessee observed that the provisions of Section 10A and 10B of the Act are special provision in respect of newly established 100% Export Oriented Undertaking in free trade zone and there is no provision of deemed export in Section 10A of the Act. He further observed that the assessee had accepted that M/s Stone World exported the purchases made by it at a higher value and in the process earned profit for itself, the foreign exchange was also received in the hands of M/s Stone World and no part of such profit or the foreign exchange was receivable by the assessee. He also observed that the assessee attempted bifurcation of its profits into

profits arising out of export business and profit earned out of local sales was also not acceptable. The AO observed that the provisions of Section 10B of the Act provides the procedure to compute the profit from export activity and the assessee though had tried to recast the profit on the basis of the nature of the turnover but it was only on estimate basis as the assessee had not maintained separate books of accounts in respect of its export business and local business. The AO held that the deduction u/s 10B of the Act was claimed excessive by the AO. He worked out the allowable deduction at Rs.8,12,12,066/- instead of Rs.9,64,64,001/- in the following manner:

<i>“Export Turnover</i>	<i>Rs.21,55,72,197/-</i>
<i>Local Sales</i>	<i>Rs.4,04,85,277/-</i>
<i>Total Turnover</i>	<i>Rs.25,60,57,474/-</i>
<i>Total Profit as per Computation</i>	<i>Rs.9,64,64,001/-</i>

Allowable deduction u/s 10B of the Act:

$$96464001 \times \frac{21,55,72,197}{25,60,57,474}$$

Or Rs.8,12,12,066/-”

Accordingly, excess deduction of Rs.1,52,51,935/- claimed by the assessee was disallowed and the income of the assessee was assessed at Rs.1,52,51,940/-.

7. Being aggrieved the assessee carried the matter to the Id. CIT(A) and submitted that its partner Sh. Lokesh Arora, proprietor of M/s Stone World had obtained orders for export and the assessee had sold the goods through him to overseas importers. It was further submitted that the partners carried out the business severally and collectively in the name of the firm only which is not legally different from its partners and any tax benefit arising on the export of goods, even though exported by a partner would belong to the assessee firm. The assessee also referred to the Excise Department Circular No. 19 dated 11.09.2006 and submitted that an Export Oriented Unit (EOU) is eligible to get Domestic Tariff Area (DTA) sale benefits of exports effected through third party, when the shipping bill indicated the name of both the manufacturer and the third party and that the goods were directly transferred from the EOU to the port of shipment. The reliance was also placed on the following case laws:

➤ *DCIT Vs Satpuda Tapi Parisar SSK Ltd. (2010)*
326 ITR 42 (Del)

➤ *S.M. Wahi Vs DIT (2010) 324 ITR 269 (Del)*

8. The Id. CIT(A) after considering the submissions of the assessee observed that as per the provisions contained in

sub-Section (1) and (4) of Section 10B, an EOU is entitled to a deduction of profits and gains derived from the export of articles, and that the deduction is to be computed in the proportion of export turnover to total turnover. She was of the view that the assessee's contention that the export made through its partner in capacity of proprietor of his firm M/s Stone World, should be deemed exports of the firm, derived no support from the language of Section 10B of the Act. She further observed that the assessee firm and the partner are separate assessable entities, filing returns of income in independent capacities. She also observed that Section 10B of the Act does not recognize foreign exchange receipt by third party allegedly on behalf of the assessee. The Id. CIT(A) was of the view that the case laws relied upon the by the assessee were generic in nature and none of those dealt with deduction u/s 10B of the Act and that the said section not only requires that the profits be derived from export turnover to be eligible for the deduction, but also lays down the procedure for computation of the deduction when the export turnover is of a different amount than the total turnover. The Id. CIT(A) held that the AO has correctly applied the provisions of Section 10B of the Act to compute the deduction equal to the profits derived from

the export of articles or things, in the same proportion as the export turnover bears to the total turnover. Accordingly, disallowance of the alleged excess deduction claimed at Rs.1,52,51,935/- was upheld.

9. Now the assessee is in appeal. The Id. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the assessee exported the goods through M/s Stone World, proprietorship firm of one of the partners Sh. Lokesh Arora. It was submitted that in the application for removal of acceptable goods for export in Form A.R.E.1., the name of the assessee was appearing. A reference was made to page no. 116 of the assessee's paper book, which is the copy of said form dated 18.11.2007. He also referred to the copy of invoice placed at page no. 115 wherein consignee has been mentioned as overseas buyers in USA and name of the exporter is "Earth Stone Group" i.e. the assessee through M/s Stone World. Accordingly, it was submitted that the goods were directly exported on behalf of M/s Stone World by the assessee. He also referred to page no. 117 of the assessee's paper book which is the copy of declaration form in the shipping bill for export wherein name of the exporter has been mentioned as "Earth Stone Group" i.e. the assessee and it is also

mentioned that the export was made through M/s Stone World to M/s Fitex Trade Networks Road, USA. It was accordingly submitted that the goods were directly sent by the assessee for shipment to the overseas buyers in USA through a sister concern M/s Stone World. It was emphasized that the sister concern did not claim the deduction u/s 10B of the Act, a reference was made to the copy of Income Tax Return acknowledgment of Sh. Lokesh Arora, proprietor of M/s Stone World and computation of income of Sh. Lokesh Arora, which are placed at page nos. 322-324 and it was submitted that no deduction u/s 10B of the Act was claimed by Sh. Lokesh Arora, proprietor of M/s Stone World. It was accordingly submitted that the deduction claimed by the assessee was wrongly reduced by the AO and the Id. CIT(A) was not justified in confirming the action of the AO. Reliance was placed on the decision of the ITAT Bangalore Bench in the case of DCIT, Circle-11(4), Bangalore Vs M/s International Stones India Pvt. Ltd. in ITA No. 814/Bang./2009 for the assessment year 2006-07. The reliance was also placed on the judgment of the Hon^{ble} Karnataka High Court in the case of M/s Tata Elxsi Ltd. Vs ACIT, Circle-12(3), Bangalore in ITA No.

411/2008 vide order dated 20.10.2014 (copy of the said orders were furnished which are placed on record).

10. In his rival submissions the ld. DR reiterated the observations of the ld. CIT(A) in para 6 & 7 of the impugned order and strongly supported the said order.

11. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is noticed that the assessee is 100% Export Oriented Unit and exporting the goods directly and also through a sister concern, namely, M/s Stone World, proprietorship concern of the partner Sh. Lokesh Arora. The goods which were exported through Sh. Lokesh Arora were directly sent for shipment by the assessee which is evident from the copy of the shipping bill for export placed at page no. 117 of the assessee's paper book. In the said declaration, the name of exporter is mentioned as "Earth Stone Group" i.e. the assessee vide shipping bill No. 1723123, those goods were sent to the consignee M/s Fitex Trade Networks Road, USA through the sister concern M/s Stone World which is evident from page no. 117 and 118 of the assessee's paper book. The detail has been given in Form A.R.E.1, which is a application for removal of

excisable goods for export (copy of which is placed at page no.116 of the assessee's paper book). In the said form, a declaration has been given by the assessee that the goods were removed for the purpose of export to USA through M/s Stone World, New Delhi, shipping bill number is mentioned as 01723123. The invoice raised is placed at page no. 115 wherein consignee is overseas buyers and the name of the local buyer is M/s Stone World i.e. the sister concern of the assessee while the exporter has been mentioned as M/s Earth Stone Group i.e. the assessee, which clearly shows that the goods were directly sent by the assessee to the overseas buyers through M/s Stone World. Now question arises as to whether the assessee is eligible to claim the deduction u/s 10B of the Act on the said export sales made through third party i.e. sister concern M/s Stone World, New Delhi (a proprietorship concern of Sh. Lokesh Arora). This controversy has been settled by the Honorable Karnataka High Court in ITA No. 411/2008 in the case of M/s Tata Elxsi Ltd., Bangalore Vs ACIT, Circle-12(3), Bangalore (supra) vide order dated 20.10.2014 wherein relevant findings have been given in para 20 as under:

“20. From the aforesaid provisions, it is clear that if a assessee wants to claim the benefit of Section

10A, firstly he must export articles or things or computer software. Secondly, the said export may be done directly by him or through other exporter after fulfilling the conditions mentioned therein. Thirdly, such an export should yield foreign exchange which should be brought into the country. If all these three conditions are fulfilled, then the object of enacting Section 10A is fulfilled and the assessee would be entitled to the benefit of exemption from payment of Income Tax Act on the profits and gains derived by the Undertaking from the export.”

12. The facts of the present case are similar to the facts involved in the aforesaid referred to case of M/s Tata Elxsi Ltd. Vs ACIT. Therefore, by respectfully following the said order, we set aside the impugned order of the Id. CIT(A), particularly when, no deduction u/s 10B has been claimed by the sister concern M/s Stone World through whom export sales were made by the assessee to the overseas buyers. Therefore, it can be said that the export sales directly made to the consignee through the sister concern was the deemed export of the assessee and deduction u/s 10B of the Act was available. For the aforesaid view we are also fortified by the decision of the ITAT Bangalore Bench in ITA No. 814/Bang./2009 for the assessment year 2006-07 in the case of DCIT, Circle-11(4), Bangalore Vs M/s International Stones India Pvt. Ltd., Bangalore (supra) wherein the

relevant findings have been given in para 3 of the said order which read as under:

“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 assessee 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 realized 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 IT 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 the 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.”

13. In view of the above said discussion and by keeping in the judicial pronouncement in the aforesaid referred to cases, we direct the AO to allow the deduction u/s 10B of the Act to the assessee on the export sales made through the sister concern M/s Stone World and accordingly the disallowance made by the AO is deleted.

14. In the result, appeal of the assessee is allowed.

(Order Pronounced in the Court on 18/04/2016)

Sd/-

(H. S. Sidhu)

JUDICIAL MEMBER

Dated: 18/04/2016

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(N. K. Saini)

ACCOUNTANT MEMBER

ASSISTANT REGISTRAR