IN THE INCOME TAX APPELLATE TRIBUNAL

BENCH 'C' CHENNAI

BEFORE SHRI PRADEEP PARIKH, VICE PRESIDENT
SHRI N. BARATHVAJA SANKAR, VICE PRESIDENT AND
SHRI HARI OM MARATHA, JUDICIAL MEMBER

(SPECIAL BENCH CASE)

ITA No. 1138/Mds/2007
Assessment Year: 2003-04

M/s Zylog Systems Limited 82/40, I Main Road CIT Nagar, Nandanam Chennai – 600035	V	The Income Tax Officer, Company Ward III Chennai – 600034

ITA No. 1141/Mds/2007
Assessment Year: 2003-04

The Income Tax Officer Company Circle III(3) Chennai – 600034	V	M/s Zylog Systems Limited 82/40, I Main Road CIT Nagar, Nandanam Chennai – 600034
(Appellant)		(Respondent)

Assessee By : Shri V.D. Gopal
Revenue By: Shri Tapas Kumar Dutta

Intervener: Shri H. Padamchand Khincha
For M/s Changepond Technologies

ORDER

PER N. BARATHVAJA SANKAR, VICE PRESIDENT

The Hon'ble President, Income Tax Appellate Tribunal, vide orders dated 13.10.2009 constituted the present Special Bench to dispose of the captioned appeals as well as to adjudicate the following question of law:

> *"Whether the expenses incurred in foreign currency on computer software development onsite at the client's place outside India is to be excluded from export turnover?"*

2 Both the appeals filed by the assessee and the revenue revolve around the above mentioned question of law.

3 The brief facts of the case are that the assessee is a company engaged in the business of development of software both by way of onsite development and offshore development and it has a branch in USA for which separate accounts were maintained. In its return of income, the assessee being 100% EOU, had claimed deduction u/s 10B of IT Act in respect of the exports of software made. Before the Assessing Officer, the assessee pointed out that the profits of USA branch are eligible for double tax relief and furnished a copy of the agreement for avoidance of double taxation of income with USA. During the assessment proceedings, the Assessing Officer had observed that the assessee had total export turnover of Rs. 28,61,13,408 and out of this amount, the assessee had utilized the export proceeds to the tune of Rs. 15,14,20,226

in USA for the purpose of carrying on export activities. The Assessing Officer was of the view that since the said amount had not been received in convertible foreign exchange in India within the prescribed time u/s 10B(3) of IT Act, the said amount utilized in USA can not be treated as a part of export turnover for computing deduction u/s 10B of IT Act. The Assessing Officer also excluded from the export turnover of Rs. 3,33,46,591.81 incurred by the assessee outside India in foreign exchange in providing technical services, while computing deduction u/s 10B of IT Act. Aggrieved by this order of the Assessing Officer, the assessee moved the matter in appeal before the first appellate authority .

4 The first appellate authority allowed the assessee's appeal in respect of inclusion of Rs. 15,14,20,226 in export turnover for computing deduction u/s 10B of IT Act whereas he has rejected the claim of the assessee in respect of inclusion of Rs. 3,33,46,591.81 incurred by the assessee outside India in providing technical services to the export turn over while computing deduction u/s 10B of IT Act.

5 Now the assessee is on second appeal before us with respect to exclusion of Rs. 3,33,46,591.81 from the export turn over for computing deduction u/s 10B of IT Act whereas the Revenue is on appeal before us against the Ld. CIT(A)'s direction to include the foreign exchange of Rs. 15,14,20,226 utilised by the assessee in foreign country while computing deduction u/s 10B of IT Act.

6 The assessee is on second appeal before us with the following grounds of appeal:

> "1 The order of the Ld. CIT(A) is contrary to the law, facts & circumstances of the case in so far as he confirms the addition of Rs. 3,33,46,592/- representing the expenses in foreign exchange for providing technical services abroad out of the export turnover.
>
> 2 The Ld. CIT(A) erred in holding that the definition of (export turnover) u/s10B of IT Act justifies the action of the Assessing Officer in excluding the expenses in foreign exchange incurred towards technical services abroad from the export turnover u/s 10B of IT Act.
>
> 3 The Ld. CIT(A) failed to appreciate that the action of the Assessing Officer results in double additions of expenses incurred for the onsite development of computer software.
>
> 4 The Ld. CIT(A) failed to appreciate that 70% of the export turnover was separately excluded from the export turnover by the Assessing Officer himself and so the expenses not being excluded would amount to double addition.
>
> In addition to the above grounds, the assessee has filed following additional ground also:
>
> The Ld. CIT(A) should have been pleased to hold that the sum of Rs. 3,33,46,592 should not have been excluded from Export turnover as clause (III) of explanation of Sec 10B(8) is not applicable to the facts of the appellant's case wherein the above amount was incurred as expenditure in foreign exchange for onsite development of software and even if applicable, should have been excluded from total turnover also."

7 On the other hand, the revenue is on appeal before us with the following effective grounds of appeal:

"2.1 The Ld. CIT(A) erred in directing the Assessing Officer to include the foreign exchange retained by the assessee abroad (in accordance to the RBI guidelines) while computing deduction under section 10B of the IT Act.

2.2 It is submittedthat the decision relied upon by Ld. CIT(A) in the case of J.B. Boda & Co Pvt Ltd V CBDT (223 ITR 271 (S.C) and the Board's circular No. 731dated 20.12.1995 are not applicable here since the decision of the circular were concerned with section 80-O and in the context of remitting the net insurance premia and not section 10B which is the section applicable here.

2.3 The Ld. CIT(A) failed to note that Explanation 2 to section 10B(3) allows sale proceeds credited to a separate account maintained for the purpose by the assessee with any Bank outside India with the approval of the RBI and there is no such corresponding provision in Section 80-O. Hence what was relevant to section 80-O cannot be automatically considered applicable to section 10B. Since this explanation has already toned down the rigours of bringing the convertible foreign exchange within the stipulated time into India no further relaxation thereon is permissible."

8 Now let us take up assessee's appeal first in whose case, the question of law as mentioned elsewhere of this order has been referred to Special Bench. The brief facts of this issue are that while framing assessment u/s 143(3) of IT Act, the Assessing Officer asked the assessee to furnish the details of expenses incurred by the assessee in foreign currency in providing technical services outside India. Vide its letter dated 19.12.2005 the assessee has furnished the following details:

Expense details	Amount in USD	Amount in INR
1 Payroll	412,046.78	Rs.19,980,770.74
2 Sales	178,989.53	Rs. 8,679,472.56

commission		
3 Travel expenses	40,245.68	Rs. 1,951,573.80
4 Business consultancy	44,435.00	Rs. 2,154,720.24
5 Entertainment	7,564.88	Rs. 366,832.46
6 Advertisement	4,397.10	Rs. 213,222.01
	687,678.97	Rs. 3,33,46,591.31

9 According to the Assessing Officer the above expenses incurred by the assessee in foreign currency outside India cannot be reckoned for the purpose of export turn over. The intention of legislature is to give the benefit of exemption only to those export earnings which are brought into India. That is why any expenses incurred in foreign currency outside India has to be excluded from the export turnover. 'Export turnover' has been defined in Section 10B of IT Act as under:

> "Export turnover" means the consideration in respect of export by the undertaking of article or things or computer software received in, or brought into India, by the assessee in convertible foreign exchange in accordance with Sub-Sec (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the article or thing or computer software outside India or expenses, if any, incurred in foreign exchange in providing technical services outside India."

10 In view of the above explanation, the Assessing Officer excluded from the export turn over, the expenses of Rs. 3,33,46,592 incurred by the assessee outside India in providing technical services, while

computing deduction u/s 10B of IT Act. Aggrieved by this order of the Assessing Officer, the assessee moved the matter in appeal before the first appellate authority.

11 Before the Ld. CIT(A), it was submitted by the Ld. Counsel for the assessee as under:-

> The above action of the Assessing Officer has resulted in double addition of expenses incurred for the onsite development of computer software for the very purpose of export. 70% of the export turnover amounting to Rs. 15.14 crores was separately excluded by the Assessing Officer from the export turnover for relief u/s 10B of IT Act. Therefore, expenses incurred for onsite development amounting to Rs. 3.33.crores mentioned above excluded by the Assessing Officer from the total export turnover of Rs. 28.61 crores has resulted in double deduction. The said expenses represented the utilization of sale proceeds in USA and hence the same can not again be excluded from export turnover. It could have been reduced either by the amount of Rs. 15.14 crores retained in USA or Rs. 3.33 crores utilized for onsite development in USA. Therefore, the above mistake of the Assessing Officer has resulted in double addition in this case.

12 The Ld. CIT(A) after considering the submissions in the light of facts & circumstances of the case has observed as under:

> "The Assessing Officer has excluded the said amount from export turnover for the reason that one has to follow the intention of legislature which provides benefit u/s 10B of IT

Act only with respect to those export earning which are brought back to India. The expenses of technical services in foreign exchange abroad have therefore been excluded from turnover. The issue is required to be decided in favour of the Revenue in view of clear provisions of the Act. The definition of "export turnover" given in Explanation 2(iii) of Section 10B of IT Act is abundantly clear, that there is no such definition of "total turnover" given in Section 10B of IT Act and therefore, no exclusion of expenditure incurred for providing technical services can be made from the total turn over for the purpose of computing deduction u/s 10B of IT Act. From the clear definition of the export turnover, there is no scope for having any other interpretation than what has been explicitly provided therein. Therefore, action of the Assessing Officer in excluding the expenses in foreign exchange incurred for providing technical services abroad from the export turnover while computing deduction u/s 10B of IT Act has to be upheld. Thus the Ld. CIT(A) sustained the addition made by the Assessing Officer in a sum of Rs. 3,33,46,592.

13 At the time of hearing, Ld. Counsel for the assessee placed on record three paper books consisting of materials mentioned in the index thereof to the respective paper books. By placing the above paper books, the Ld. Counsel for the assessee Shri V.D. Gopal, Advocate submitted as under:

The explanation 2(iii) to Section 10B of IT Act reads as under:

"Export turnover" means the consideration in respect of export (by the undertaking) of articles or things or computer software received

> in, or brought into India, by the assessee in convertible foreign exchange in accordance with Sub-Sec (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the article or thing or computer software outside India or expenses, if any, incurred in foreign exchange in providing technical services outside India."

From the above explanation it can be seen that the expenses if any, incurred in foreign exchange in providing technical services outside India, will not be included in "export turnover". The theory of "net foreign exchange" discussed by Chennai Bench of Income Tax Appellate Tribunal in California Software Co. Ltd., is not valid. "Technical services" is contemplated in Explanation 2(3). The assessee is not involved in rendering technical services in foreign country. The assessee has only sent its staff to the foreign country, namely, New Jersy of USA for development of software. It is only on-site work at USA done by the assessee for developing software. "On-site work" would include expenses incurred in foreign soils. Explanation 3 to Section 10B of IT Act reads as under:

> "For the removal of doubts, it is hereby declared that the profits and gains derived from on-site development of computer software (including services for development of software) outside India, shall be deemed to be profits and gains from export of computer software outside India"

From the above Explanation, it can be seen that people are encouraged for on-site development of software. The combined reading of

Explanation 2(iii) and Explanation 3 as narrated above, would show that the expenses incurred by the assessee in foreign soils for on-site development, is nothing but export turnover. On the other hand, "technical services" would mean advises given to third party and any expenditure incurred on it. The circular No. 564 dated 5.7.99 by the C.B.D.T in respect of deduction u/s 80 HHC of IT Act is more relevant. Paras No. 5 & 6 of the said Circular reads as under:

> "5 The Finance Act, 1990 has amended section 28 by inserting therein, clauses (iiia), (iiib) and (iiic) with retrospective effect with a view to ensuring that cash compensatory support (CCS), duty drawback (DDK) and profit on sale of import entitlement licences (I/L) shall be taxable under the head "Profits and gains of business or profession". In view of this amendment, it is clarified that the three export incentives shall have to be included in the profits of the business for computing the deduction under section 80 HHC.
>
> 6 The term "export turnover" under the existing provisions, means the sale proceeds (excluding freight and insurance) receivable by the assessee in convertible foreign exchange. In other words, the FOB value of exports. The Finance Act, 1990 has restricted the definition of the term "export turnover" to mean FOB sale proceeds actually received by the assessee in convertible foreign exchange within six months of the end of the previous year or within such further period as the Chief Commissioner / Commissioner may allow in this regard."

Moreover Circular No. 54 of 2002:RB dated 29.6.2002 issued by Reserve Bank of India is also very relevant. The above circular was issued by Reserve Bank of India on the subject "maintenance of foreign currency account abroad by a Company / Firm / Body corporate incorporated in India."

In the above Circular Para No. 3 reads as under:

"3. The authorized dealers may, therefore, allow remittances for the purpose of normal business operations of the office (trading/non-trading)/branch of representative outside India as per the provisions of the Regulations in this regard subject to the following terms and conditions:

i The overseas office (trading/non—trading)/branch/representative should not create any financial liabilities contingent or otherwise for Head Office in India.

ii The overseas office (trading/non-trading)/branch/representative should not invest surplus funds abroad without prior approval of Reserve Bank of India. Any funds rendered surplus should be repatriated to India.

iii The overseas office/branch of software exporter company/firm, may repatriate to India 100% of the contract value of each 'off-site' contract as also at least 30% of the contract value of each 'on-site' contract and may utilize the balance amount (70%) of the contract value of 'on-site' contract for contract related expenses including office/branch expenses abroad. A duly audited yearly statement showing receipts under 'off-site' and 'on-site' contracts undertaken by the overseas office, expenses and repatriation thereon may be sent to the authorized dealer.

iv The details of bank account opened in the overseas country should be promptly reported to authorized dealer.

14 Shri Padamchand Khincha appeared as intervener on behalf of M/s Changepond Technologies Pvt Ltd and his submissions are as follows:

Expenditure on technical services are to be excluded from export turnover. There is difference between computer Software and technical services. Sec 80 HHE deals with software industries. Sub-sec (1) of the said Section considers two types (i) computer software and technical services. Thus there is distinction between computer software and technical services. Before amendment computer software meant computer programme. Circular No. 621 dated 19.12.91(195 ITR (St) 154 at Para No. 34.2 mentions as under:

> "The tax concession will be available with regard to profits from export of software not only through magnetic media or on paper but also through satellite data link and consultancy delivered at the location of foreign client outside India.

Thus after the amendment expenditure incurred 'on site' outside India should not be excluded from the export turnover. Software has number of stages. Circular No. 694 dated 23.11.1994 (211 ITR (ST) 26) (Page 5 of the paper book) at para No. 5 & 7 has mentioned as under:

> "5 Since computer programmes are not physical goods but are developed as a result of an intellectual analysis of the systems and methods followed by the purchaser of the programme, it is often prepared on site, with the software personnel going to the client's premises. Doubts have been raised whether units taking up such

> production of software at the client's premises would be eligible for the tax holiday.
>
> 6 The Government's policy on tax incentive to software export is reflected in the provisions of section 80 HHE introduced in 1991. Under this provision, technical services provided outside India, for the development or production of computer software, are included for the purpose of the tax incentive.
>
> 7 Similarly, for the purpose of section 10A or 10B, as long as a unit in the EPZ/EOU/STP itself produces computer programmes and export them, it should not matter whether the programme is actually written within the premises of the unit. It is, accordingly clarified that, where a unit in the EPZ/EOU/STP develops software sur place, that is, at the client's site abroad, such unit should not be denied the tax holiday under Section 10A or 10B on the ground that it was prepared on site, as long as the software is a product of the unit, i.e., it is produced by the unit.

15 From the above it can be seen that the expenditure incurred at client's site abroad is eligible for deduction u/s 10A and 10B. The memorandum explaining the provisions of Finance Bill, 2001 (248 ITR (St) 35 had well explained Clause 39. It is mentioned as under:

> "It is proposed to insert an Explanation after sub-sec (1) of the said sec so as to clarify that the profits and gains derived from on site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.

The bill also clarifies that export of computer software shall include development of software at the client's site which would also be eligible for the benefit under these provisions. The development of software can be compared to bridge construction where various stages are involved. These are all well explained in the decision of Bangalore Bench in the

case of Infosys Technoligies Ltd (page 21 to 38 of paper book). The list of case laws supporting the assessee's contentions are listed as under:

Infosys Technologies Limited V JCIT, ITA No. 50, 732 to 734, 742, 793 to 795 vide order dated 31.3.2005 – ITAT Bangalore Bench

Infosys Technologies Limited V JCIT (SR)-6, Bangalore, ITA No. 1922, dated 7.4.2006, Assessment Year 1998-99

Infosys Technologies Limited V JCIT, ITA No. 140 & 149, 108 TTJ 282

ACIT V. Infosys Technologies Limited, ITA No. 653 & 969, Assessment Year 2002-03 & 2003-04 order dated 17.10.2007 reported in 172 Taxman 134 (Mag)

ACIT V. Infosys Technologies Limited, ITA No. 635, Assessment Year 2001-02 order dated 2.11.2007

Infosys Technologies Limited V DCIT (SR)-35, ITA No. 3086 & 5703 order dated 2.11.2007

Infosys Technologies Limited V JCIT, ITA No. 627 order dated 2.11.2007

i-Gate Global Solution Ltd V. ACIT, ITA No. 2291 Assessment Year 2001-02 order dated 11.8.2006

DCIT V. i-Gate Global Solution Ltd, ITA No. 391 & 392 Assessment Year 2002-03 & 2003-04 order dated 30.11.2007

ACIT V. i-Gate Global Solution Ltd, ITA No. 624 & 625, Assessment Year 2002-2003 & 2003-04 decision dated 18.12.2009

Mphasis Ltd V. ACIT 2008-TIOL-366

ACIT V. Hewlett Packard Global Soft Ltd (2008) Tax Corp (ITAT) 18026 decision dated 19.9.2008

Relq Software Pvt Ltd in ITA No. 767 vide order dated 16.5.2008

Changepond Technologies P Ltd V. ACIT (2008) 22 SOT 220 (Chennai)

Patni Telecom (P) Ltd V ITO (2008) 022 SOT 0026 (Hyderabad)

DCIT V. Softsil India Ltd (2008) 22 SOT 271 (Hyd)

ACIT V, Kshema Technolgies Ltd (2009) TIOL-440-ITAT-BANG

Relo Software (P) Ltd V ITO (2009) 123 TTJ 0856 (Bang)

The expenditure incurred in foreign currency on client's site at foreign country cannot be excluded from export turnover unless it is excluded from total turnover otherwise numerator and denominator should consist same items as held by Special Bench in the case of ITO V. Sak Soft Ltd (2009) 313 ITR (AT) 353 ITAT (Chen) SB.

16 Per contra, Ld. D.R. for the revenue submitted that the basic definition is in sub-sec (4). He posed a question why there is separate sub-sections and explanations. Sub-section 4 only talks about profits and gains and export turnover is different. On site development cannot be without technical services. The decision of Madras Bench in the case of Polaris Software says that there is no software development without technical services. There is ambiguity in the definition of export turnover. Accordingly in view of the decision of Hon'ble Supreme Court in the case of IPCA Laborataries if the words are clear strict interpretation is to be given. Each limb section is defined in the Act. He relied on the following decisions:

California Software Co Ltd V. ACIT, 118 TTJ (Chennai) 842

ITO Company Ward III (1) V. Polaris Software

Ld. D.R. for the revenue also reiterated the contents of the assessment order as his submissions in addition to the above submissions.

17 In reply Shri V.D. Gopal, Ld. Counsel for the assessee submitted that a person cannot provide services to the self. In technical services there is no export contents, therefore, it is excluded from the export turnover whereas in assessee's case no services are rendered to any outsider at a foreign country.

18 Shri Padamchand Kincha, Ld. Counsel for the assessee for the intervener submitted that if on site work is equated to technical services then the work done in India also would be technical service which would violate the statute. He also submitted that in the decision of California Software Co Ltd V. ACIT, there was presumption where in the intervener's case Sec 10A and Sec 10B were given and the fact of STP is not objected. He also submitted that in that case in the case of intervener audit report was also not objected.

19 We have heard the rival submissions and considered the facts and materials on record including contents of the paper book submitted by the Ld. Counsel for the assessee and the intervener and also relevant circulars of CBDT and Reserve Bank of India referred to by the Ld. Counsels for the assessee and intervener during their arguments.

20 There is no dispute about the fact that the assessee is a company engaged in business of development of software both by way of on site development and off shore development and also that it has branch in USA for which separate

accounts were maintained. There is also no dispute about the fact the there is approval of the authorized dealer namely Central Bank of India, Chennai for opening the overseas branch at New Jersy, USA.

21 Now we are called upon to adjudicate whether the Assessing Officer and the Ld. CIT(A) were right in excluding from the "export turnover" Rs. 3,33,46,592/- incurred by the assessee outside India in foreign exchange in providing technical services, while computing deduction u/s 10B of IT Act. For adjudicating this issue first of all we should consider what is "soft ware" and what is "technical services". Explanation (ii) to sub-sec 9A of Sec 10B defines computer software. Explanation reads as under:

"Clause (ii): "for the purpose of this section –

(i) Computer software means

(a) any computer programme recorded on any disk, tape, perforated media or other information storage device or;

(b) Any customized electronic data or any product or service of similar nature as may be notified by the Board which is transmitted or exported from India to any place outside India by any means."

"Clause (iii) of Explanation (2) to sub-section 9A of Section 10B defines export turnover as under:

(iii) "Export turnover" means the consideration in respect of export (by the undertaking) of articles or computer software received in, or brought into India by the assessee in convertible foreign exchange in accordance with sub-sec (3) but does not include freight, telecommunication charges

or insurance attributable to the delivery of articles or things or computer software outside India or expenses, if any incurred in foreign exchange in providing technical services outside India."

The combined reading of the definition of software as given in clause (i) of Explanation (2) and "export turnover" as defined in clause (iii) above, would go to show that "export turnover" of computer software means consideration received in respect of export of computer software but does not include freight, telecommunication charges or insurance to the delivery of computer software outside India or expenses incurred in foreign exchange in providing technical services outside India. "

22 In this case the assessee pleads that it has not rendered any technical services outside India to third party. Whatever the services were rendered in foreign country and expenses incurred as pay roll etc were incurred in connection with staff of the foreign branch in foreign country.

23 Now we have to consider what is technical services. Explanation (2) to Sec 9(vii) reads as under:

"For the purpose of this clause "fees have technical services" means any consideration (including any lump sum consideration) for rendering of any managerial, technical or consultancy services (including the provision of services of technical or software personnel) but does not include consideration for any construction, assembly, mining of like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "salaries".

The department has not brought any thing on record to show during the hearing, that the assessee company was involved in rendering any managerial consultancy services at foreign country. Also it was not brought on record that the company was involved in providing the technical services to other personnel or any outside agency. All the services rendered by the company were to its staff located at New Jersy for the fulfillment of objects namely development of software. We find force in the contentions of the Ld. Counsel for the assessee that a person can not provide services to self. There is also force in the contentions of the Ld. Counsel for the assessee that in the case of California Software Co Ltd, Chennai Bench of ITAT, there is presumption by the Bench that technical services were rendered by the assessee to self. The circular No. 621 dated 19.12.91, Circular No. 694 dated 23.11.94 also go to show that the expenditure incurred on site abroad is eligible for deduction u/s 10B of the IT Act.

24 To sum up, in this case whatever the expenditure has been incurred on foreign soil in a sum of Rs. 3,33,46,592 were incurred in connection with development of software by the employees of the assessee company at foreign branch and nothing has been incurred on managerial or technical services rendered to any outsider in foreign soil. In view of this discussion we are inclined to allow the ground of the assessee that Rs. 3,33,46,592/- should not be excluded from the export turnover for computing deduction u/s 10B of IT Act. We answer the question referred to us in favour of the assessee. Thus the appeal of the assessee is allowed.

25 Now let us turn to revenue's appeal, the grounds of whom had already been extracted elsewhere of this order. Ld. D.R. for the revenue reiterated the grounds of appeal as his submissions. He also relied on the submissions made by him in the assessee's appeal which are extracted elsewhere of this order.

26 Ld. Counsel for the assessee supported the order of Ld. CIT(A) and reiterated the contents of the Ld. CIT(A)'s order in respect of the issue of inclusion of foreign exchange retained by the assessee abroad while computing deduction u/s 10B of IT Act. He also relied on the submissions made in assessee's appeal (extracted elsewhere of this order).

27 We have heard the rival submissions and considered the facts and materials on record. The Ld. CIT(A) while allowing the assessee's claim in respect of this issue, has observed as under:

> "2.2 I have carefully perused the facts and examined all the submissions of the appellant on this issue. I am of the considered view that one limb of the Government cannot be allowed to defeat the operations of the other limb. Section 10B of the Act requires that foreign exchange in lieu of the exports should be brought to India within the prescribed time. However, the RBI allows the assessee to retain the said foreign exchange in foreign countries for the specific purposes and due approval is also granted for that purpose. The RBI and FEMA also monitor the utilization of such foreign exchange and the assessees are required to file periodic reports to those authorities. In such situation, the circulars of the RBI allowing its retention, utilization or capitalization abroad cannot be ignored. This becomes more important when provisions of Section 10B(3) are considered which provide that the sale proceeds of the articles or computer software exported out of India are required to be brought in India in convertible foreign exchange within a period of six months from

the end of the previous year or within such further time as the competent authority may allow in this behalf. Explanation (1) to Section 10B prescribes the competent authority to be the RBI or any other authority as authorized under any law for the time being in force for regulating payments and dealing in foreign exchange. In the present case, the competent authority involved is RBI under whose schemes and circulars the appellant has capitalized the foreign exchange earning and invested the same in approved joint ventures in USA. Therefore, the said reinvestment of export earning is deemed to have been received in India. In other words, it is just like bringing the foreign exchange in India and thereafter remitting the same abroad for investment in the joint venture. The Hon'ble Supreme Court in the case of J.B. Boda & Co (supra) while deciding similar issue relating to deduction u/s 80-O had held that "two way traffic of receiving foreign exchange here and sending it back is a ritual which is unnecessary". The Hon'ble Court had relied on the Board's Circular No.731 dated 20.12.2005, 217 ITR (ST) 5 to decide this matte5r in favour of the assessee.

2.3 Keeping in view the discussions held above, I am of the considered view that Assessing Officer was not justified in excluding a part to the export proceeds retained by the appellant abroad in accordance with the RBI guidelines while computing deduction u/s 10B of the Act. The said expenses have been incurred by the appellant for the on-site development of products abroad through its branch office and the utilization of the said proceeds by the appellant abroad for specific expenses related to exports have not been doubted by the Assessing Officer. The appellant is required to file periodic reports to the RBI regarding the exports and the utilization of the foreign exchange in accordance with the guidelines issued by the RBI. No specific instance have been brought on record by the Assessing Officer to prove that the said foreign exchange had not been realized by the appellant within the due date abroad from the

contracting parties. Once the appellant receives the export proceeds in foreign exchange abroad within due dates and the same are utilized by the appellant for the purpose of its own business through its branch office abroad, the said sale proceeds are required to be considered as deemed receipts in India. I am of the view that the decision of Hon'ble Supreme Court in the case of J.B. Boda & Co (supra) and the Board's Circular No. 731 is directly applicable in favour of the appellant. Although the said decision and circular is with reference to Sec 80-O but the ratio and the reasoning is applicable for the purpose of deciding this issue u/s 10B also. In view of the above, the Assessing Officer is directed to include the export proceeds of Rs. 15,14,20,226/- retained by the appellant abroad in accordance with RBI guidelines while computing deduction u/s 10B of the Act. This ground of appeal is allowed."

As such we concur with the Ld. CIT(A) for the reasons recorded by him as above and dismiss the revenue's appeal. We are also of the opinion that the decision of the Hon'ble Supreme Court in the case of J.B. Boda & Co. Pvt Ltd V. CBDT, 223 ITR 271 (S.C) would apply to this case also even though the present case is on Sec 10B of IT Act.

28 In the result, appeal of the assessee is allowed and revenue's appeal is dismissed and the question referred to this Special Bench is answered in favour of the assessee.

Order Pronounced in the Open Court on this 02 day of November, 2010.

Sd/-	Sd/-	Sd/-
(Hari Om Maratha)	**(Pradeep Parikh)**	**(N. Barathvaja Sankar)**
Judicial Member	**Vice President**	**Vice President**

Dated : 02.11.2010

SURESH

Copy to:-The Appellant/The Respondent/The CIT/The CIT(A)/The DR